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CALIFORNIA REPORTER

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158 Cal. 109

In re KEATING'S ESTATE. (L. A. 2,643.)

(Supreme Court of California. July 2, 1910.)

1. APPEAL AND ERROR (§ 621*)—TRANSCRIPT.

Supreme Court rules 2 and 5 (78 Pac. vii, viii) relative to the time for filing a printed transcript of the record have no application, to the filing of a transcript which need not be printed, under Code Civ. Proc. §§ 953a–953c.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 621.*]

2. APPEAL AND ERROR (§ 627*)—TRANSCRIPT.

Code Civ. Proc. § 953a, provides that when an appellant desires to have the record presented other than by a printed record, he shall file with the clerk a certain notice within 10 days after notice of entry of the order. *Held*, that where an appellant within 10 days after the entry of an order filed a notice of appeal therefrom, but did not give the required notice within 10 days thereafter and no transcript was filed, the appeal would be dismissed, though no formal written notice of the entry of the order was served on appellant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 627.*]

3. APPEAL AND ERROR (§ 628*)—FAILURE TO FILE TRANSCRIPT—DISMISSAL.

The Supreme Court, on a motion to dismiss an appeal for failure to file a transcript within the required time, will grant relief to appellant, where the delay was due to the inadvertence and excusable neglect of his attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750–2764; Dec. Dig. § 628.*]

4. APPEAL AND ERROR (§ 628*)—FAILURE TO FILE TRANSCRIPT—DISMISSAL.

Where an appellant who has failed to file his transcript in time seeks relief against a motion to dismiss the appeal, he should show that he has been advised by counsel, and that he has reasonable grounds to expect a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750–2764; Dec. Dig. § 628.*]

5. APPEAL AND ERROR (§ 628*)—DISMISSAL.

On a motion to dismiss an appeal for failure to file a transcript within the required time, appellant offered as an excuse that his attorney elected to have the record prepared under Code Civ. Proc. § 953a, and erroneously conceived that it would not be necessary to give the required notice to the clerk within 10 days after entry of the order appealed from, unless notice of the entry of the order had been served on appellant's attorney. It appeared that there was a stipulation on file, signed by the attorney, dismissing the appeal. Appellant declared that he did not authorize it, and the affidavit of the attorney stated that he made the stipulation without his client's consent, as he believed the appeal had been rendered futile because of delay in filing the transcript. *Held*, that no ground was shown excusing the delay.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.*]

In Banc. Appeal from Superior Court, Los Angeles County; J. C. Rives, Judge.

Judicial proceedings in the estate of Andrew J. W. Keating, deceased. Motion by respondents to dismiss the appeal of William N. Hamaker from an order refusing to confirm a sale of real estate. Appeal dismissed.

Edward A. Meserve, for appellant. J. Wiseman Macdonald, for respondents.

SHAW, J. The respondents move the court to dismiss the appeal upon the ground that no transcript of the record on appeal has been filed, and that the time allowed therefor has expired.

On January 28, 1910, the superior court made an order refusing to confirm the sale of the real property of the estate theretofore made, and reported to the court for confirmation by certain persons claiming to act as trustees. The order was entered by the clerk on the day on which it was made. On February 5, 1910, Hamaker, the purchaser at said sale, filed a notice of appeal from said order. The notice of motion to dismiss the said appeal was served and filed on April 1, 1910. No transcript of the record on appeal has been filed. The time elapsing between the perfecting of the appeal and the filing of the notice of motion to dismiss the same was 55 days. Rule 2 (78 Pac. vii) of this court requires the printed transcript of the record to be filed within 40 days after the appeal is perfected. Rule 5 (78 Pac. viii) provides that the appeal may be dismissed, if the transcript of the record is not filed within the time prescribed, or before a notice is given of a motion to dismiss the same.

These rules were made prior to the enactment of sections 953a, 953b, and 953c of the Code of Civil Procedure, providing that the transcript required on appeal need not be printed when it is prepared in the method therein prescribed. At the time this motion to dismiss was instituted no rule had been made by this court fixing any limit of time within which, after taking an appeal, the appellant shall file the transcript of the record, in case he proposes to prepare it in the new method and not have it printed. The appellant now declares that he intends to follow this new method and he claims that rule 2 does not apply, and that he is not in default for not filing the transcript within the time mentioned.

The motion is not based on the ground that the appeal has not been prosecuted with reasonable diligence, but solely upon the claim that there has been a failure to file the transcript within the 40 days prescribed by said rule. It is obvious that the rule has no application to the filing of a transcript which need not be printed. This answer to the motion would be sufficient if it appeared that there yet remained an opportunity to the appellant to take advantage of sections 953a, 953b, and 953c by filing a typewritten transcript of the record prepared in the manner therein provided. But an examination of the facts disclosed upon the hearing satisfies us that the appellant has lost the right to follow this proceeding.

Section 953a provides that when the appellant desires to have the record presented in the new method he may file with the clerk of the court below "a notice stating that he desires and intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within 10 days after notice of the entry of the judgment, order, or decree. * * * The stenographic reporter shall, within 20 days after said notice has been filed with the clerk, prepare a transcript of the phonographic report of the trial, including therein copies of all writings offered or received in evidence and all other matters required by the notice above referred to to be therein contained, and shall file the same with the clerk. * * * If the judgment, order, or decree appealed from be not included in a judgment roll, the party desiring to appeal shall, on the filing of said notice, specify therein such of the pleadings, papers, records, and files in said cause as he desires to have incorporated in said transcript, in addition to the matters hereinbefore required, and the same shall be included." Section 953b requires the appellant who thus proceeds under section 953a, to file with the notice to the clerk an undertaking, with sureties, to pay to the clerk the costs of preparing such transcript. Section 953c provides that after the transcript is prepared in the manner specified in section 953a, "it shall be the duty of the clerk of the court from which the appeal is taken, within 10 days after the preparation of the record, to transmit to the clerk of the court to which the appeal is taken, the record prepared."

In the present case the order appealed from was not one which required a judgment roll to be made up, and hence a notice to the clerk to have the transcript prepared would be necessary in order to enable him to know what papers were to be included therein. It is admitted that no notice was ever given or filed with the clerk as required by section 953a. Under said section the notice to the clerk must be filed within 10 days "after notice of the entry of the judgment, order, or decree." It appears by the affidavits filed upon the hearing that the appellant was present at the time the order was made and announced in open court, and that a few days thereafter he was in the clerk's office and read the order and stated that he was satisfied with its form. The filing of a notice of appeal therefrom on the 5th of February, 1910, is, of course, conclusive evidence that he knew of said order and of its contents at that time. It is therefore proven by incontrovertible evidence that he had full knowledge of the order at least as early as February 5, 1910. If this fixed the beginning of his time to give the notice to the clerk, then that time had elapsed long before the proceeding to dismiss the appeal was initiated. We think it does fix at least the latest point of time for the beginning of that period, and that by failing to give that notice he has lost his right to proceed with the preparation of the transcript on appeal in that manner. The only course then remaining to him was to have the transcript of the record on appeal printed and filed in the ordinary manner, and within the time prescribed by rule 2, aforesaid. No proceeding to obtain a bill of exceptions has been begun. Hence, the time for filing the transcript has not been extended thereby, as provided by the exception stated in that rule. Relief from the failure to give notice to the clerk, under section 953a, if it can be given at all, must be sought in the lower court. No application for such relief has been made to that court. The failure to file the printed transcript might be excused by this court, if good cause was shown therefor. No sufficient excuse appears. The motion to dismiss the appeal must therefore be granted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is suggested by the appellant that the 10 days within which he should file with the clerk a notice to prepare the transcript does not begin to run until the service upon him of a written notice of the entry of the order, that a conclusive admission of notice appearing of record is not sufficient, and that, there having been no service of formal written notice, his time to proceed under section 953a has not expired, and hence, that he is not in default for not filing the transcript. The proposition that a written notice of the entry of the order is necessary to start running the time for filing the notice to the clerk by the appellant is not sustained, as we understand the authorities. This statute has not been construed, but other decisions upon similar statutes establish the rule to be applied. Section 476, Code Civ. Proc., provides that the time to amend or answer a pleading after a demurrer has been sustained thereto runs from the time of service of notice of the decision or order. In Barron v. Deleval, 58 Cal. 96, it was decided that a written notice was not necessary to set this time running, and that where the party is present in court at the time the ruling is made and requests additional time to that given by the statute, these facts are equivalent to notice or to a waiver thereof, and that his time begins to run immediately. This decision has been followed in Mullally v. Benevolent Society, 69 Cal. 559, 11 Pac. 215; Kelleher v. Creciat, 89 Cal. 41, 26 Pac. 619; Waddingham v. Tubbs, 95 Cal. 251, 30 Pac. 527; Wall v. Heald, 95 Cal. 367, 30 Pac. 557; Forni v. Yoell, 99 Cal. 177, 33 Pac. 887, and Mallory v. See, 129 Cal. 359, 61 Pac. 1123. A somewhat different rule was stated in Biagi v. Howes, 66 Cal. 470, 6 Pac. 100. Section 659 as then existing provided that a notice of intention to move for a new trial must be given within 10 days "after notice of the decision of the court." It was held in the case just cited that the notice of the decision of the court must be in writing and that actual notice was not sufficient to set the time running. This decision seems to have been based chiefly on the provision of section 1010, Code Civ. Proc., that notices must be in writing. This decision was in department and it was overruled in California Imp. Co. v. Baroteau, 116 Cal. 139, 47 Pac. 1018. In that case, after referring to the fact that the decision in Biagi v. Howes, supra, had not been followed in the later cases, the court says: "That case, however, seems to have been based upon authority of cases where there was a statutory provision that there must be a written notice of the decision, and upon that ground it was distinguished from the other cases upon the subject in the opinion of the court in Mullally v. Benevolent Society, supra; and if it cannot be so distinguished, it must be held as overruled by the later decisions above cited." It may be observed further that section 941b, which makes new provisions regarding the method of giving a *notice of appeal*, provides that such notice must be filed "within 60 days after notice of entry of said judgment, order or decree *has been served upon the attorneys* of record appearing in said cause or proceeding," or not later than six months after entry, if no notice thereof is given. From that language it may be a fair inference that the notice there contemplated is necessarily a notice in writing which may be served in the ordinary manner of serving a writing. In section 953a, the provision departs from the language of 941b, and specifies only that the notice to the clerk must be filed "within 10 days after notice of entry of the judgment, order, or decree." It does not refer to or require the service upon the party of any such notice of the entry. The language is therefore precisely the same in effect as that of the various statutory provisions which were under consideration in the cases which we have cited, in which it is held that actual notice, established by satisfactory evidence of record, will start the statute in motion without the service of a formal written notice.

The principal point urged by the appellant in opposition to the motion to dismiss is that his failure to file the transcript within the prescribed period was due to the inadvertence and excusable neglect of his attorney. There can be no doubt that where such default is made under circumstances which would show good cause for relief, under the decisions on that subject, in applications under section 473 of the Code of Civil Procedure, whether that section be applicable to the Supreme Court or not, this court should grant similar relief, allow the transcript to be filed after the time fixed by the rule, and retain the appeal. But the facts do not bring the case within those rules. The only excuse offered is that the attorney, after filing the notice of appeal, elected to have the record prepared in accordance with section 953a, and thereupon conceived the idea that the notice to be given to the clerk for the preparation of the transcript under that section would not have any effect and would not be mandatory upon the clerk, unless there was on file in his office at the time a duly served notice to the appellant's attorney of the entry of the order appealed from, and that, with this idea in mind, he deferred giving any notice to the clerk and awaited the service of notice to himself of the entry of the order from which the appeal was taken, and of which he already had full knowledge. There is nothing whatever in the language of the statute which furnishes any plausible reason for such idea. A mistake so palpable and groundless should not serve as a ground for relief from the delay it caused. It was itself without excuse. Furthermore, there is on file a stipulation signed by the same attorney on the 23d of March, 1910, which was after the time for filing the printed transcript had expired, and before service of the notice of motion to dismiss, in which he states that the appellant does not desire to prosecute the appeal and agrees that it may be dismissed. The appellant declares that he did not authorize the making of the agreement and that he repudiates it. In the affidavit of said attorney to show excusable neglect he says the stipulation to dismiss was made by him in good faith, without his client's consent, and solely because he then believed that by the delay in filing the transcript the appeal was rendered futile. It is clear therefore that when he filed this stipulation he was aware of his mistake. If he had applied to this court for additional time within which to file the transcript stating the facts, it would no doubt have been granted. Eight days elapsed before the notice of motion to dismiss was given. No application for time was made in the meantime and no reason is offered for failing to apply therefor.

Lastly, if rules similar, to those governing applications for relief under section 473, Code Civ. Proc., are to be applied here, the party asking relief from his default must, at least, show that he has consulted counsel and has been advised by them that in their opinion he has reasonable grounds to expect a reversal of the order appealed from if the appeal were considered on the merits. No assertion of this character is made. The appellant stands contending merely for the technical right.

The appeal is dismissed.

We concur: SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.

(158 Cal. 117)

ROBINSON v. ROBINSON. (Sac. 1,817.)

(Supreme Court of California. July 11, 1910.)

1. DIVORCE (§ 183*) — APPEAL — FAILURE TO SERVE AND FILE TRANSCRIPT WITHIN STATUTORY TIME—EXCUSE.

The absolute inability of a wife, appealing from an adverse judgment in her action for divorce, to procure from the husband necessary money to print the transcript, despite her diligence, justifies a refusal to dismiss the appeal for her failure to serve and file the transcript within the time fixed by law, pending her appeal from an order denying her motion to require the husband to furnish additional money to enable her to print the transcript.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 183.*]

2. DIVORCE (§ 280*)— ORDERS APPEALABLE.

An order denying the motion of a wife, appealing from an adverse judgment in her action for divorce, to require the husband to pay her an additional sum deemed necessary to enable her to print the transcript on appeal, is appealable.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 764; Dec. Dig. § 280.*]

3. DIVORCE (§ 184*)—QUESTIONS REVIEWABLE.

The merits of an appeal from an order denying the motion of a wife, appealing from an adverse judgment in her action for divorce, to require the husband to pay an additional sum to enable her to print the transcript on appeal, are not reviewable on a motion to dismiss the appeal from the judgment, on the ground of the failure of the wife to serve and file the transcript within the time fixed by law.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 184.*]

4. APPEAL AND ERROR (§ 628*)—FILING TRANSCRIPT ON APPEAL—EXCUSE FOR NONCOMPLIANCE.

Good cause for failure to comply with the rule of the court as to the filing of the transcript on appeal is a sufficient answer to a motion to dismiss the appeal, on the ground of such failure.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750–2764; Dec. Dig. § 628.*]

In Bank. Appeal from Superior Court, Kings County; J. G. Covert, Judge.

Action by May M. Robinson against J. L. Robinson. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal. Denied.

Robert W. Miller, for appellant. E. T. Cosper, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANGELLOTTI, J. This is a motion to dismiss an appeal taken by the plaintiff from a judgment in favor of defendant, in an action brought by plaintiff to obtain a divorce. The ground of the motion is that appellant has failed to serve and file her printed transcript of the record within the time allowed by rule 2 of this court (78 Pac. vii), or at all. The appeal from the judgment was perfected November 17, 1908, but under the rule, by reason of the pendency of a motion for new trial, notice of which was given prior to perfecting the appeal from the judgment, the time for serving and filing the transcript did not begin to run until the disposition of such motion, which occurred on December 10, 1909. Under the rule appellant had 40 days from the last-named date in which to serve and file the transcript, viz., to and including January 19, 1910. The notice of motion to dismiss the appeal was given on February 5, 1910, at which time no transcript had been served or filed, and none has since been served or filed.

The answer of appellant to this motion is the absolute inability on her part thus far to procure the money necessary for the printing of this transcript, despite her diligent effort to obtain the same from the respondent. The case being one in which the wife being without the necessary means, the husband may be called upon to pay such money as is reasonably necessary to present her appeal to this court, the facts shown on this motion to dismiss are such as to warrant us in holding her answer to the motion good. The case is one in which the trial court has decided that the plaintiff must have money from the respondent in order to print her transcript, having allowed her, long prior to the settlement of the bill of exceptions, the sum of $100 for the printing of transcript and points and authorities. It is quite clearly made to appear that the bill of exceptions as subsequently settled is of such length that the amount so allowed is entirely inadequate for the printing of the transcript alone, and that the doing of such printing cannot be obtained, unless she is afforded further aid by respondent. Appellant makes a satisfactory showing of diligence as to her endeavors to secure the money necessary. In January, 1910, she gave notice of a motion to be made in the superior court on February 7, 1910, for an order requiring respondent to pay her the additional sum deemed necessary. The superior court denied her motion to the extent of refusing to award her effectual relief, making only an order for a sum contended to be inadequate, and deferring the payment thereof until the transcript is printed. This order is appealable, and it is not questioned that appellant is in good faith proceeding with an appeal therefrom. It is impossible to determine the merits of the appeal from this order on this motion. We are of the opinion that the appeal from the judgment should not be dismissed, pending the decision or other disposition of the appeal from the order. The ultimate question involved on the appeal from the order is whether the respondent should be required to pay additional money for the purpose of enabling the appellant to present the record required on her appeal from the judgment, and thus have that appeal determined on its merits. Until that question is finally determined her appeal from the judgment should be retained, so that if it be finally determined that respondent must pay the money necessary to enable appellant to present her appeal to this court, she will still have the opportunity of so presenting it. Good cause for failure to comply with the provisions of our rule in regard to the filing of the transcript on appeal is always a sufficient answer to a motion to dismiss the appeal, based on the ground of such failure, and we are of the opinion that it should be held that good cause is sufficiently shown here.

The motion to dismiss the appeal from the judgment is denied.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

(158 Cal. 95)

HARDY v. MAYHEW et al. (Sac. 1,777.)

(Supreme Court of California. June 28, 1910. Rehearing Denied July 25, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION OF ESTATE—CONSTRUCTION OF DECREE.

A decree of distribution gave testatrix's husband a sum of money for his use during his life, and on his death such sum to certain other persons; and on appeal the decree was modified so as to give him such sum for his use during his life, and on his death the unused portion to the remaindermen. *Held*, that the husband took a life interest with power to use during his life as much of the principal as he deemed proper for his own use, but that he had no power to dispose of any of the corpus by gift.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.*]

2. JUDGMENT (§ 526*)—CONSTRUCTION—OPINIONS.

The Supreme Court, in determining the sense in which a word was used by the Court of Appeal, in a decree may consider the opinion of such court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 969; Dec. Dig. § 526.*]

3. WILLS (§ 634*)—REMAINDER.

Where testatrix's husband took a fund with the right to use it during his life, with remainder of an unused portion to certain persons, they took, under Civ. Code, §§ 693–695, a vested remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.*]

4. EXECUTORS AND ADMINISTRATORS (§ 314*)—DECREE OF DISTRIBUTION.

An interest in property created by a will is to be adjudicated and distributed by the decree of distribution, and the fact that there is a future interest in respect to the time of enjoyment is immaterial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

5. Wills (§ 671*)—Creation of "Trust"—Personal Property—Limitations over.

Where testatrix's husband was given the use of a fund for life, with remainder in any unused portion of the fund to certain persons, there was no "trust" created, within Code Civ. Proc. § 1699, providing for the settlement of accounts of the trustee by the probate court.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 671.*

For other definitions, see Words and Phrases, vol. 8, pp. 7116–7124; vol. 8, p. 7822.]

6. Wills (§ 634*)—Rights of Remaindermen.

On the death of the life tenant it was not necessary that there should be further proceedings in the estate of testatrix to vest in the remaindermen the immediate possession, nor was any proceeding in the estate of the life tenant essential to the rights of the remaindermen to recover the property from those to whom it had been given by the life tenant, without authority and with full notice of his rights.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1488; Dec. Dig. § 634.*]

7. Remainders (§ 17*)—Action by Remaindermen.

In an action by remaindermen to recover the remainder, the legal representative of the estate of the life tenant was not a necessary party.

[Ed. Note.—For other cases, see Remainders, Dec. Dig. § 17.*]

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Florence A. Hardy against Frank Mayhew and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

L. T. Hatfield and W. T. Phipps, for appellants. George & Hinsdale and C. E. McLaughlin, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment given against them in an action brought by plaintiff to obtain a decree that she is the owner of an undivided one-fourth of certain property, real and personal, possessed by them and of which they claim to be the absolute owners, and to obtain an accounting as to said property and a delivery to her of her share or the reasonable value thereof.

The defendants are Frank J. Mayhew and Charles P. Mayhew, sons, and Mary E. Phipps, daughter of Judge Horace Allen Mayhew, who died March 3, 1907, and of Mary Jane Mayhew, who died August 3, 1903, and W. T. Phipps, husband of said Mary E. Phipps. The plaintiff is the sole surviving child of George H. Mayhew, a deceased son of said Judge Mayhew and Mary Jane Mayhew. The property involved in this action is an undivided one-fourth of practically all the property delivered to Judge Mayhew under a decree of partial distribution in the matter of the estate of said Mary Jane Mayhew. Judge Mayhew claimed on his application for partial distribution that under the will of Mary Jane Mayhew he was entitled to have the property, a legacy of $40,000, distributed to him absolutely. His claim in his behalf was resisted by plaintiff. The superior court having jurisdiction of the estate construed the will as giving him only the use of this money with the right to the custody of the principal, for his life, with remainder over to the other parties named in its decree, and distributed to him the sum of $40,000 of the moneys of said estate "for his use, during his natural life, and on his death said sum to Chas. P. Mayhew, Frank J. Mayhew, the sons, to Mary E. Phipps, the daughter, and to Florence A. Hardy, the granddaughter of said deceased, in equal shares, each one-fourth thereof," and directed the executors to pay said $40,000 to him "for his use for the term of his natural life." Appeals were taken by both parties, and the District Court of Appeal, concluding that the will contemplated that the legatee might use the principal sum according to his discretion for his "comfort or pleasure"—even to the extent of using it all, modified the decree by inserting the words "the unused portion of" before the words "said sum to Chas. P. Mayhew," etc., making the decree read, "for his use, during his natural life, and on his death the unused portion of said sum to Chas. P. Mayhew," etc. Estate of Mayhew, 4 Cal. App. 162, 87 Pac. 417.

The basic theory of plaintiff's case is that under this decree Judge Mayhew took only a life interest, with the power to use during his life as much of the principal as he deemed proper for his own use, and that the other distributees took the remainder, viz., the whole property, subject only to such life interest in Judge Mayhew with such power on his part to use the principal, and that upon his death such distributees became entitled absolutely to the possession of all of said property that had not been so used, that Judge Mayhew had no right or power under such decree to dispose of any of the corpus of such property by *gift*, and that those so taking from him by gift took no more than he had the right to give, and must account to the distributees therefor. The case made by the complaint is, substantially, that a few months before his death, with the intent to deprive plaintiff of the share in said property that would otherwise come to her upon his death, Judge Mayhew gave practically all of the same to his three surviving children, the other distributees, and that they received the same with the same intent and hold the same. The trial court so found, finding further that the property so received by Mary E. Phipps was of the value of $17,500, that received by Frank J. Mayhew $11,000, and that received by C. P. Mayhew, $10,700. There were also allegations of conspiracy and undue influence on the part of defendants in this matter, but the evidence demonstrates and the trial court found that there was no basis for any such charge, and that the gifts so made by Judge Mayhew were not solicited in any way by any of the defendants, but were absolutely free and voluntary. On October 26, 1906, each of the three children, at the suggestion of Mr. Phipps, executed a writing reciting that in consideration of gifts made by Judge Mayhew he promised and agreed in future to pay to him the sum of $50 per month, so long as he shall live. It very clearly appears from the evidence that all of the parties regarded the transfers by Judge Mayhew as gifts.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We are satisfied that plaintiff's theory stated above is correct. The decree of partial distribution in Mrs. Mayhew's estate as modified by the District Court of Appeal, is, of course, a conclusive adjudication as to the construction to be given to Mrs. Mayhew's will in this regard, and the rights of the respective parties must be measured solely by that decree. Though entirely immaterial in view of the conclusiveness of this decree, it may be said in passing that we are satisfied that the decree as modified was certainly as favorable to Judge Mayhew as the will warranted. The decree distributed the property to him "for his use, during his natural life, and on his death the *unused* portion of said sum to" the three children and the grandchild in equal shares. Herein was clearly a distribution to Judge Mayhew of a life estate simply, an estate limited by express terms to his natural life, with the power of disposing of the principal, even to the extent of entirely consuming it, in such ways as might be consistent with his "use" thereof, and a distribution of the remainder to plaintiff and the three children in equal shares. This power of disposition and consumption in the life tenant is to be implied solely from the words "unused portion of" inserted in the decree by the District Court of Appeal; for without this addition the word "use" in the decree, applied as it was to the money distributed, would mean a use without impairment of the principal. The added words, however, necessarily give to the word "use" a different meaning, and make it include not only a mere appropriation of the profits or interest, but also an impairment or consumption by the distributee of a part or even all of the principal, to the extent that he might deem proper in his use of the same. But it appears very clear to us, and our conclusion is fully supported by the language of the opinion of the District Court of Appeal, which we have the right to consider in determining the sense in which the word was used by that court, that the "use" authorized was only such personal use as the distributee might desire to make of the money *for himself*, and that it did not include a disposition of practically the whole thereof either by will or by gift during his life, especially a gift made for the very purpose of excluding one of the remaindermen from participating in what otherwise would have been "unused" by him at the time of his death. If the District Court of Appeal had concluded that such was the effect of the provisions of the will in this regard, it would necessarily have modified the decree of the superior court in accord with the contention of the petitioner, making it one whereby the $40,000 was distributed to him absolutely, and not merely for his life.

As determined by the modified decree the interest given to Judge Mayhew was the kind of interest referred to in 2 Underhill on Wills, at section 689, a life interest by its express terms, with the power of disposing of a part or all of the property itself for a particular purpose only, as for the support and maintenance of the life tenant, with a valid gift over to the other distributees which might be disappointed by the exercise of his power by the life tenant and the application of the principal to the purposes indicated. As to such a life tenant Mr. Underhill says substantially, in another section, he may not use the proceeds of a sale of the property for another purpose, he cannot give them away, nor can he devise the land, and also that those who take what remains unused, do not take by descent, as heirs of the first taker, but as purchasers and remaindermen under the will of the testator (section 687). The author is here speaking of real property, but the rule declared is necessarily applicable to such personal property as money. Given a life interest therein, with the power to use the principal for certain purposes, the life tenant may not use it for any other purpose and may not give it away. The distinction between the case of an intended gift of an absolute title to one with an attempted gift over of simply "what remains unexpended" by the donee at the time of his death, where the gift over is void because in derogation of the absolute fee given the first taker, and the case of a gift of a life estate with a power of disposition for a particular purpose only, with an express gift over of what remains unused for such purpose, is recognized by all the authorities.

The cases supporting our conclusion are numerous, and a few of these may properly be referred to. In Downing's Ex'r v. Johnson, 45 Tenn. 229, the gift by will was to the testator's wife of the whole estate "for and during her natural life, to be by her freely possessed and enjoyed," and "the balance * * * that may be on hand at the death of my wife, I dispose of in the following manner," etc. Personal property was involved. It was held that this created a life estate in the wife, with power to consume such as she may deem proper for her support and maintenance, and a remainder in the second takers. It was said that a court might restrain fraudulent and extravagant waste by the life tenant. In Lewis v. Pitman, 101 Mo. 281, 14 S. W. 52, it was held, personal property being involved, that where an express life estate is created, an added power of disposition does not convert the estate into a fee, and that there was no power to dispose of the property by will. In Burleigh v. Clough, 52 N. H. 267, 13 Am. Rep. 23, the gift was of all the estate to the wife to her use and disposal during her natural life, and what is remaining at her decease, undisposed of by her to others named. It was held that the wife took only a life estate, with power to dispose of such of the property, even to the extent of the whole, as her needs, her comfort, or her gratification should demand, and that the provision as to a gift over created a *vested* remainder. The question whether she had power to dispose of the property by will was left undecided; the court concluding that her will did not affirmatively show any attempt to execute the power. In Green v. Hewitt, 97 Ill. 113, 37 Am. Rep. 102, a gift of real and personal property to the wife "as long as she remains my widow. At the expiration of that time the whole, or whatever remains, to descend to my daughters" was held to be one to the wife for widowhood only, with a vested remainder in the daughter. In Eubank v. Smiley, 130 Ind. 393, 29 N. E. 919, a gift to the wife of all the husband's property "to do with and dispose of after my decease as she may think best" and at decease of the wife, the *real estate* to be equally divided among my heirs, was held to give only a life estate in the real estate. Here the wife had conveyed the real estate to a daughter for a nominal consideration, and the deed was held to convey only a life estate. In Gadd v. Stover, 113 Mich. 689, 71 N. W. 1111, the husband's will gave all his property, real and personal, and including a farm, to his wife "to use the same as she may desire and wish for and during her natural life, with full power and authority to grant and convey, in her own name, any part or portion," etc., and gave the property remaining at her death to others. The wife conveyed the farm to a daughter, taking back an agreement for support during her life. It was held that the wife had a life estate only, and that the power of disposition was limited to specific purposes. The court held the conveyance to the daughter ineffectual to defeat the remaindermen, saying, among other things: "It is evident that the intent and purpose of the conveyance made to Mrs. Stover was to subvert the intent of the testator," and that the limitation of good faith will be affixed by the law in determining the effect of the conveyance. In Goudie v. Johnston, 109 Ind. 427, 10 N. E. 296, the gift was to the wife "for her use during her natural lifetime, * * * she to have the control and management of the same, and at her death all of said personal estate remaining * * * shall go to," etc. Personal property only was involved in the case. It was held that the wife took only a life estate, with the power perhaps to consume such as was necessary for her support, but certainly without absolute power of disposition for any other purpose. In Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61, the will gave to the wife all property, real and personal, with full power to dispose of the same as she may think proper, but if, at the time of her decease, any of said property shall remain unconsumed, the same was to be equally divided among his brothers and sisters and their children. According to the allegations of the complaint, the wife during her lifetime had given all of the property to the defendant, and the suit was one by the remaindermen for an accounting, etc. The court held that the intention of the testator was to give his wife a life estate only, with power to consume so much thereof during her lifetime as she might deem necessary for her support and maintenance, and to give the property, subject to this estate and use, to his brothers and sisters and their children—that the wife had no power to dispose of the fee by gift during her life or by will at her death—that the brothers and sisters and their children had a vested remainder in so much of the estate as should remain unconsumed at the wife's death, and that one coming into possession of the property with knowledge of the terms upon which it was held by the wife could be held accountable therefor to the remaindermen. See, also, Giles v. Little, 104 U. S. 291, 26 L. Ed. 745; Brant v. Virginia, etc., Co., 93 U. S. 326, 23 L. Ed. 927; Mansfield v. Shelton, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; Chase v. Ladd, 153 Mass. 126, 26 N. E. 429, 25 Am. St. Rep. 614; Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322; Wager v. Wager, 96 N. Y. 164, 172.

It appears to be settled by the overwhelming weight of authority that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void, where, taking the whole instrument together, it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption. As expressly indicated in some of the decisions referred to above, the interest of the remainderman expressly designated, in this case Chas. P. Mayhew, Frank J. Mayhew, Mary E. Phipps, and plaintiff, was a vested remainder. Neither the person in whom nor the event upon which it was limited to take effect was in any degree uncertain. Civ. Code, §§ 693 to 695.

The decree of distribution operated to remove all the property from the estate of Mary Jane Mayhew and to distribute to the remaindermen the interest which they were thereby determined to have under the will.

The claim of defendants that distribution can be had only as to those persons who are entitled to immediate possession of the property distributed is not well founded and is not supported by the decision cited, Martinovitch v. Mariscano, 137 Cal. 357, 70 Pac. 459. The court in that case was discussing the question of the power of the court in probate on distribution in regard to one having a judgment lien on the property of an heir, devisee, or legatee, and it was in regard to such a person that it said that distribution can be made to only these persons entitled to receive "immediate possession of the property distributed," meaning simply that the rights of third persons against those entitled to take directly from the deceased as heirs, devisees, or legatees were not within the proper scope of distribution proceedings. Necessarily any interest in property created by a will is to be adjudicated and distributed by decree of distribution, and the fact that it is a future interest in respect to the time of enjoyment is immaterial. There was no trust created by the will of Mary Jane Mayhew, within the meaning of section 1699 of the Code of Civil Procedure, providing for the settlement of the accounts of the trustee by the probate court. That section refers exclusively to express trusts created by will. Judge Mayhew was a trustee only in the sense that the duty rested on him, as a life tenant merely, to have due regard for the rights of those in remainder, a duty in the nature of a trust constituting him an implied or quasi trustee *for the remaindermen.* See Perry on Trusts, § 540; Johnson v. Johnson, supra. There is therefore nothing in the claim that further proceedings were essential in the estate of Mary Jane Mayhew upon the death of Judge Mayhew to vest in the remaindermen the right to immediate possession of such of the property as had not been appropriated by him to an authorized use.

Nor was any proceeding in the estate of Judge Mayhew essential to the right of the remaindermen to recover the property to which they were entitled from those to whom it had been given by him without authority, and who had full notice of the limits of his authority in regard thereto. As we have seen, such remaindermen do not take by descent, as heirs of Judge Mayhew, but as remaindermen under the will of Mary Jane Mayhew. The property constituted no part of *his* estate. The remaindermen were not restricted to proceedings against his estate for any improper disposition of their property, but could recover the same in the hands of any person who had taken it by gift, and the legal representative of the estate of Judge Mayhew was not a necessary party to such an action.

In view of what we have said, it is clear to us that the complaint stated a good cause of action within the jurisdiction of the superior court of Sacramento county, and that the demurrer thereto was properly overruled. We have carefully examined the complaint with reference to the claim that the trial court in denying a motion to strike out portions thereof, and are entirely satisfied that if there was any error at all in the ruling, it was entirely without prejudice to defendants.

The findings clearly sustain the judgment. It is claimed that the evidence is insufficient to support some of these findings. No attack is made in the briefs on finding 1, which is that paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, and 18 of the first cause of action set forth in the complaint are true. By these findings are established the death of Mary Jane Mayhew, the proceedings leading to the distribution of the property, the distribution of the same, the delivery of the possession of the property to Judge Mayhew under the modified decree, including in lieu of $6,500 of the legacy of $40,000 principal and $1,863.38 interest thereon, a lot of land in the city of Sacramento, and in lieu of $10,000 thereof, 10 Realty Syndicate investment certificates of the par value of $1,000 each, and $25,363.58 in cash, the death of Judge Mayhew on March 3, 1907, the demand of plaintiff on defendants for an accounting as to such of the property as they had received from Judge Mayhew and the delivery to her of her share and the refusal of defendants, together with the claim on their part that she had no interest therein. Finding 8 is in favor of defendants to the extent that it finds that neither of the defendants "by any act or words, conspired, persuaded, enticed, or induced Horace Allen Mayhew to give * * * to the defendants or either or any of them, any property whatever." But it further finds that for the purpose and with the intent to deprive plaintiff of her share in the money and property elsewhere described in the findings, they received from Judge Mayhew gifts of the same, and hold and claim the same as their own. This property is described in findings 12, 13, 16, and 17, by which it is found that for the purpose of depriving plaintiff of her share, Judge Mayhew gave to Mrs. Phipps, Charles P. Mayhew, and Frank J. Mayhew property received by him under such decree, as follows: To Mary E. Phipps, the $6,500 lot of land in Sacramento, nine of the Realty Syndicate certificates valued at $9,000 and $2,000 in cash; to Charles P. Mayhew certain notes and mortgages and money and property amounting to a total value of $10,700; to Frank J. Mayhew certain notes and mortgages, money and property, aggregating in value $11,000.

It is claimed that these findings are not sustained by the evidence in that there is no evidence to show that the property so received by the respondents was property received by Judge Mayhew under the decree of distribution. It is not claimed by the defendants that the evidence is insufficient to support the conclusion that property of the kind and to the value specified was given by Judge Mayhew to them. In addition to the fact that the evidence is sufficient to support a conclusion that nearly all of the property given to defendants by Judge Mayhew was clearly identified as property received by him under the decree, a careful examination of the pleadings satisfies us that it must be held that it stands admitted thereby that such property as was so given to them was property so received by him under the decree. We are of the opinion, also, that the evidence was sufficient to support the conclusion of the trial court that the intent and purpose of Judge Mayhew and the defendants in the making and acceptance of these gifts was to subvert the intent of the decree of distribution, to the extent of depriving plaintiff of any share in the property distributed thereby. Doubtless all felt that solely by reason of the death of her father, George H. Mayhew, plaintiff was given by the decree of distribution property that Mary Jane Mayhew had never contemplated that she would receive under her will, and it is not surprising that Judge Mayhew, in view of such a belief, and also in view of the opposition made by plaintiff to his petition for distribution, desired to exclude her from participation in the remainder. But the effect of the decree in her behalf could not legally be obviated in the manner attempted.

Most of the alleged errors of law in the matter of the reception of evidence are disposed of by what we have already said in discussing other points. We have considered such as are not so disposed of, and find in the rulings of the court thereon no error warranting reversal.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(157 Cal. 673)

BALLARD v. TITUS et al. (S. F. 5,043.)

(Supreme Court of California. May 9, 1910. Rehearing Denied June 8, 1910.)

1. Easements (§ 1*)—"Right of Way."

A "right of way" is the mere privilege of passing over the land of another in some particular line, with the implied right to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 7, pp. 6230-6234; vol. 8, pp. 7790, 7791.]

2. Easements (§ 44*)—Right of Way—Extent of Right.

The owner of a right of way, the width of which is specified, has the right to use to the limits of such width, though the result is to give him a wider way than necessary.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

3. Easements (§ 44*)—Right of Way—Reservation of Certain Width.

A grant or reservation of a right of way 30 feet in width does not, in the absence of circumstances showing that by the "right of way" a roadway of that width was intended, authorize appropriation of land outside such width, so as to give a roadway 30 feet wide.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

4. Easements (§ 44*)—Right of Way—Reservation of Certain Width.

Where the evident intention of a reservation of a right of way, 30 feet in width, over land granted from the F. road to land still owned by the grantor, was to have the F. road practically continued to such land, it will be treated merely as a reservation of such width for right of way purposes, though within such strip there can be constructed, without trespassing on land outside it, a roadway only 16 feet wide at its narrowest portion; this being as wide as the roadway of the F. road.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

5. Easements (§ 48*)—Right of Way—Location.

Where an unlocated right of way is granted or reserved, the owner of the servient estate has the right in the first instance to designate a reasonable way; and only on his failure to do so may the owners of the dominant estate designate it.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 103-107; Dec. Dig. § 48.*]

6. Easements (§ 48*)—Right of Way—Location—Reasonableness.

Even if the owner of the servient estate has failed to act, so as to entitle the owner of the dominant estate to select the route of an unlocated right of way, he must select one reasonable as to both parties, in view of all the circumstances.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 103-107; Dec. Dig. § 48.*]

7. Easements (§ 61*)—Right of Way—Location—Reasonableness.

Evidence, in a suit for location of a right of way, *held* to warrant the conclusion that the route selected by the owner of the dominant estate was unreasonable, in view of all the circumstances.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 61.*]

8. Easements (§ 61*)—Right of Way—Location—Suit in Equity.

Where the parties cannot agree on a reasonable route for an unlocated right of way, granted or reserved, the location may be determined in equity.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 103; Dec. Dig. § 61.*]

9. Easements (§ 61*)—Right of Way—Location—Suit in Equity—Pleadings.

The allegations of the complaint showing that the action is in fact one in equity to have a right of way over defendants' lands, reserved by plaintiff's deed, but not located therein, located and determined by a judicial decree, the owners of the servient estate refusing to recognize or permit such a location as plaintiff deemed herself entitled to, and the answer admitting the reservation, denying refusal by defendants to locate the route, denying that the route selected by plaintiff was reasonable, and designating another route, and alleging that it would be reasonable and less burdensome to them, and that they had always been willing to allow it, the court is authorized, without a cross-complaint, to designate such way as it may find to be reasonable, under all the circumstances, though the prayer of the complaint is that plaintiff's title to a specifically described strip selected by her be granted; such prayer not making the action one simply to quiet plaintiff's title to such strip.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 61.*]

10. APPEAL AND ERROR (§ 195*)—OBJECTION NOT MADE BELOW.

Plaintiff not having objected to the court's permitting the filing of an amendment to the answer may not complain thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1490; Dec. Dig. § 195;* Pleading, Cent. Dig. §§ 1408–1413.*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Maria V. Ballard against Louis Titus and others. From an adverse judgment, plaintiff appeals. Reversed and remanded with directions.

Hewlett, Bancroft & Ballentine, for appellant. Titus, Wright & Creed, for respondents.

ANGELLOTTI, J. This action is one brought by plaintiff to obtain a decree quieting her title to an alleged right of way over a strip of land 30 feet in width specifically described in the complaint, the same being a portion of a parcel of land in Alameda county, generally described in her complaint, conveyed by her to one Frederick E. Magee, subject to a reservation of a right of way, and conveyed by a successor in interest of said Magee to defendant Claremont Hotel Company, the present owner.

The claim of plaintiff was based upon allegations of her complaint showing that the land so conveyed, being a parcel of about 13 acres, was the "front portion" of a tract of about 40 acres owned by her, that in her deed to Magee she expressly reserved a permanent right of way 30 feet in width beginning at a point on the parcel conveyed where the same touched a public road and leading thence to the "rear portion," that defendants had refused to designate or locate said right of way, and that she had therefore selected and surveyed the same. It was further alleged that the route selected by her is the only accessible and reasonably suitable approach to the "rear portion," and that it imposes no unnecessary burden on defendants, but that defendants refuse to recognize or permit such selection, and exclude her from such right of way. By amendment to her complaint she alleged that under such reservation she was entitled to an actual roadway 30 feet in width, and that to obtain the same she was entitled outside of the 30 feet to make such changes in the surface of defendants' land as are necessary to construct said road to such width, and asked that the decree adjudge her rights in that regard. By another amendment she alleged her right to have such road free of gates or bars, and asked that the decree so adjudge. By their answer defendants admitted that the deed from plaintiff to Magee contained the following reservation, which was, in fact, the only reservation contained therein, viz.: "Save and excepting therefrom a right of way 30 feet in width, beginning at the old Ballard bridge on the Old Fish Ranch road, said bridge being across Harwood creek, and leading thence over said above described tract of land to the remaining land of said Maria Virginia Ballard, to the rear and east of the land hereby conveyed." They denied that they had ever refused to designate or locate a right of way, and denied that the route selected by plaintiff was the only accessible or reasonably suitable approach to plaintiff's land, and denied that it would impose no unnecessary burden on defendants, setting up in detail why it would be most detrimental to them and materially and irreparably injure them. They alleged that another route, generally described, would be more direct and an equally accessible approach and much less burdensome to them, and that they had at all times been willing to allow such route. They denied plaintiff's right to insist on a roadway 30 feet wide, insisting that plaintiff must be confined to building a road within a strip 30 feet in width, and that plaintiff could not go outside of such strip for any purpose, and also denied that she had a right to a road without gates or bars. At the close of the argument, an order was made, on application of the respective parties and without objection or exception, that plaintiff be permitted to file certain amendments, and that defendants be allowed to amend their answer to conform with the proofs by inserting a particular description of the right of way tendered by defendants "being the amendments to answer presented in court." By that amendment defendants set forth a particular description of a proposed route, practically the same as the one known in the case as the Huggins route or survey, alleged to be reasonable and suitable and to correspond to the route generally described in their original answer, and alleged that prior to the commencement of the action, defendants offered a right of way substantially in accord therewith, but that plaintiff refused to accept the same or any other route than the one she had selected, which was the one known as the Prather route or survey. By an amendment they offered the route so described therein. In their original answer they had asked that if the court found plaintiff to be entitled to a right of way, it should decree that she is entitled only to the route referred to therein. The trial court found with the defendants on all their contentions, concluding therefrom that plaintiff is not entitled to the right of way described in her complaint or to any other right of way than the one specifically described in the amendment, that she is the owner of the latter, that she is entitled to construct a roadway thereon, but

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cannot in so doing disturb or change the surface of the land of the Claremont Hotel Company outside of the 30-foot strip described, and that the hotel company may maintain gates, both at the old Ballard bridge and at the point where said way reaches the line of plaintiff's property. Judgment was given accordingly. This is an appeal by plaintiff from such judgment.

The claim of plaintiff that the trial court was not warranted in authorizing the maintenance of any gate or gates on the way established need not be considered, in view of the written waiver filed by defendants consenting that the judgment may be modified by striking therefrom the provision relating thereto, and by inserting therein a provision to the effect that the way awarded is "an open way, unobstructed by gates." Upon all the other points made by plaintiff we are of the opinion that the conclusions of the learned trial judge were right. For a better understanding of the various claims it is necessary to make a brief statement of some of the undisputed facts.

The agreement for the sale of the 13-acre tract to Magee recited a consideration of $37,500, and was made October 12, 1905. The provision therein as to right of way was that "a permanent right of way is to be given to Maria V. Ballard, or successors, to enter her land immediately to the rear and east of above-described land at or about the Ballard bridge on old Fish Ranch road over Harwood creek." It does not appear that there was then any knowledge on the part of plaintiff that it was contemplated using the granted premises for hotel purposes. The conveyance was made to Magee in pursuance of this agreement on November 10, 1905, containing the reservation as to right of way hereinbefore set forth, and on the same day Magee conveyed the property to Titus, acting for the hotel company. The 40-acre tract, of which the 13 acres conveyed were known as the "front portion," was situated in the Berkeley Hills, and was somewhat rectangular in shape. The front portion, which had for a long time been divided by a fence from the rear portion, had been used as a family residence, while the rear portion had practically been unused. Along the westerly and northerly sides of the front portion and the northerly side of the rear portion for about 117 feet ran a public highway known as the Fish Ranch road, but on account of the steepness of the slope of the rear portion bordering on that road, a practical entrance could not be obtained directly from the road to such rear portion. The nearest practical point of entrance from the Fish Ranch road was apparently the old Ballard bridge, thus rendering necessary the reservation of a right of way therefrom if access to the Fish Ranch road was to be had. This road was an ordinary country road constructed over a hilly country, with a roadway, so far as we can make out from the testimony, much narrower than 30 feet. Without anything apparently having been previously said on either side as to the location of the reserved right of way, plaintiff in the latter part of the year 1906 instructed Prather to survey a line from the Ballard bridge to a point on her line near the southeasterly corner of the "front portion," and the result was the Prather location, a winding strip commencing at the bridge on the northerly line of such front portion and running in a general southeasterly direction through the easterly portion almost to the southeasterly corner of the hotel company's land, its length being about 750 feet. Upon being notified of such location defendants refused to consent thereto, and expressed their willingness to allow a road commencing at the bridge and running nearly parallel with Harwood creek through the northern portion of their land to the rear portion, a route substantially complying with the Huggins route subsequently surveyed, and practically adopted by the trial court. This route did not exceed 300 feet in length. By reason of the character of the land included in and adjoining the same, it would cost considerable more to construct and maintain a road over the Huggins route reasonably available to the use of the rear portion than it would over the Prather route, but the trial court was amply warranted in finding that the Huggins route was a practically reasonable one and would constitute an accessible approach to plaintiff's land. On neither route would it be possible to construct a *roadway* 30 feet wide, without trespassing on land without the 30-foot strip, the Huggins route giving a roadway of 16 feet in its narrowest portion. There was nothing in the evidence to indicate that at the time of the conveyance the parties had in mind any particular, contemplated use by plaintiff of the rear portion, such as the subdivision of the same for sale in building lots.

The substance of the evidence in support of the findings to the effect that the Prather location would inflict irreparable injury on the hotel company, and impose an unreasonable burden upon its land was correctly set forth in the opinion of the district court of appeal in this case as follows: "It appears to be shown with reasonable clearness by the evidence that for the purposes of a tourist hotel the property conveyed by the appellant to Magee would be materially and greatly deteriorated in value, if the right of way insisted upon by plaintiff were granted. It is a matter of common knowledge that one of the main and most advantageous and attractive features of such a hotel are the grounds upon which it is situated, and that to disturb the beauty and artistic symmetry of such grounds by running through them a highway, over which the public would have the right to pass and repass, and at the same time practically dividing the grounds into two parts, and, in order to build such highway, necessitating the destruction of large ornamental and umbrageous trees constituting one of the essential attractions of the establishment, would result in materially diminishing the attractions of the hotel and thus greatly depreciating its value for the purposes for which it is intended. The evidence shows that the Prather road, or the route selected and located by the plaintiff, would cut diagonally through a grove of trees at the rear of the hotel. This grove, which consists of eucalyptus, Monterey pine and cypress trees, is of value to the hotel not only because of their great beauty and attractive effect upon the grounds of the hotel, but because they also serve as a windbreak. The plan of the hotel company is to build trails and paths, summerhouses, tea gardens and other like attractive features through and in the grove. Moreover, the evidence discloses that the road as designated by plaintiff would be within 100 feet of the hotel, with which on the east side it would parallel, 'beginning at about the level of the second floor and rising to the level of the fourth floor' for a distance of some two or three hundreed feet. Being so near the windows on that side of the hotel, it is obvious that the privacy of the rooms located on the east side of the building would be thus materially interfered with, and the rental value of such rooms most certainly lessened." At the time of the commencement of this action the construction of such a tourist hotel to cost nearly $1,000,000 had already been commenced. It is clear that the Prather route was an unreasonable location, if such a one as was reasonably adequate and within the contemplation of the parties could be located through the northerly portion more nearly parallel with Harwood creek.

The lower court was fully warranted in concluding that plaintiff was limited under this reservation to a strip 30 feet wide within which to construct her road, even though the effect of such limitation was that her actual roadway would be thereby reduced in width to 16 feet. The words of the reservation were "a right of way 30 feet in width." These words did not necessarily imply a "road" or "roadway" 30 feet in width. In fact the reasonable implication therefrom was the reservation for right of way purposes of a "strip of land" to be thereafter located 30 feet wide. It is doubtless true that plaintiff was entitled to have such strip so located as to enable her to construct thereon a roadway which was, under all the circumstances, of necessary or convenient width, if such a location could possibly be made, but it would appear unreasonable to construe a grant or reservation of a mere right of way 30 feet wide as an authorization for an exclusive and permanent appropriation by the owner of the easement of a strip 44 feet wide, the latter appearing from the evidence to be the width necessary to enable plaintiff to construct and maintain a roadway 30 feet wide, and especially where the evidence was such as to warrant the conclusion that such a roadway as could be constructed within such width of 30 feet, would, under all the circumstances, be one of sufficient width. The very object of the specification of width would appear to be to place without the realm of controversy all questions as to the amount of land the owner of the dominant estate might take and the owner of the servient estate be compelled to give for the purposes of the easement. A "right of way" is defined simply as "the privilege which one person, or particular description of persons, may have of passing over the land of another in some particular line" (Kripp v. Curtis, 71 Cal. 62, 63, 11 Pac. 879), a mere privilege of passage over such land, under the circumstances of this case, with the implied right, of course, under such circumstances, to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner. Where the width of this mere right of way is expressly specified, the owner may have the absolute right to use to the limits of the specified width, even though the result be to give him a wider way than is necessary (see 14 Cyc. 1202; Tudor Ice Co. v. Cunningham, 8 Allen [Mass.] 139; Dewire v. Hanley, 79 Conn. 454, 65 Atl. 573; Herman v. Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800), free of interference by the owner of the servient estate.

But we have found no authority to the effect that such a grant or reservation, in the absence of language from which such an intent may be inferred, authorizes the appropriation of land lying beyond the specified width. In Wheeler v. Wilder, 61 N. H. 2, relied on by plaintiff as being exactly in point, the grant was of the right to cut a canal "said canal to be of sufficient width to carry the water, with the right to dig the same 1¼ rods wide if needed." The right to dig a canal to the full width specified was thus in terms granted, and that grant carried with it whatever was necessary for its reasonable use and enjoyment, including what was found to be the reasonable necessity of throwing the excavated soil upon other land of the grantor and leaving it there. In Thompson v. Uglow, 4 Or. 369, the easement was one to convey a stream of water over land by ditch or water race. The principal question involved was whether one having such an easement may dig up the soil adjacent to the race for the purpose of repairing the banks, in case the same repairs can be made by other but more expensive means. The contract by which the easement was created was not before the court, and the record on appeal was not in such condition as to enable the appellate court to ascertain whether the necessary repairs could be made without digging up the soil. The decision goes no further than to hold that the right to make necessary repairs in the case of such an easement is essential to the enjoyment of the thing granted and necessarily passes by the grant, and that, where the deed leaves the matter of repairs to be implied, the owner of the easement may make such repairs as are essential to enjoyment, even to the extent of taking and using other soil of the owner of the servient estate, each case to be "determined according to its own peculiar circumstances." Neither of these cases constitutes authority for the proposition that a "right of way" of the kind here involved limited by its terms to a certain width authorizes the appropriation to purposes of the way of a greater width. It may be conceded that the circumstances under which such a reservation was made may be such as to show that the term "right of way" of a designated width is intended to denote a roadway of that width, but here the circumstances under which the reservation was made are such as to fully sustain a conclusion that the parties did not contemplate a 30-foot roadway at all, and that the language was intended to mean what it in substance says, viz.: That a strip 30 feet wide was reserved for right of way purposes. We regard it as a very potent fact, in this connection, that it was access to the Fish Ranch road that was sought by the reservation to be preserved. It was the Fish Ranch road practically continued to her property that plaintiff apparently desired, and this road as we have seen, was a narrow, hilly, country road. It is not questioned that the so-called Huggins route will enable plaintiff to have a roadway within the 30-foot limit that will be as wide as the roadway of the Fish Ranch road. Giving full force to the provision of our statute, that "a reservation in any grant * * * is to be interpreted in favor of the grantor" (Civ. Code, § 1069), we are satisfied that the reservation here involved limits plaintiff's use of the servient tenement to a strip 30 feet wide.

It is settled law that where an unlocated right of way is granted or reserved, the owner of the servient estate may in the first instance designate a reasonable way, and if he fails to do so, the owner of the dominant estate may designate it. Jones on Easements, § 337; Kripp v. Curtis. 71 Cal. 62, 65, 11 Pac. 879; Blum v. Weston, 102 Cal. 362, 369, 36 Pac. 778, 41 Am. St. Rep. 188. Findings sufficiently sustained by evidence establish that there was no such failure in this case as to entitle plaintiff to make the selection. But had she been so entitled, she would still have been required to select a route that was reasonable as to both parties, in view of all the circumstances, one "that will not unreasonably interfere with the grantor in the enjoyment of his estate." Jones on Easements, § 337. The trial court was warranted in concluding that the route selected by plaintiff was unreasonable, in view of all the circumstances. The case before us is simply one where the parties have been unable to agree upon a reasonable route in which event the location may be determined in equity. Jones on Easements, § 354; Gardner v. Webster, 64 N. H. 520, 522, 15 Atl. 144.

We are satisfied that the decree does not limit the use of the way decreed to any particular person or persons. By it, as modified under the waiver of defendants as to gates, the way will be an open highway appurtenant to the land of plaintiff, regardless of the manner in which it may hereafter be subdivided, and available for the use of all who may have occasion to go to or from such land.

It is earnestly urged, upon the theory that this is simply an action to quiet plaintiff's title to a strip of land specifically described in the complaint, that, especially in the absence of any cross-complaint, the trial court was not warranted in locating and designating as plaintiff's right of way another strip than that designated in the complaint, and that its judgment could have been, at most, simply one adjudicating plaintiff to be without title as to the strip of land described in her complaint as the right of way desired. We are of the opinion that in making this contention learned counsel for plaintiff are mistaken as to the scope of the cause of action stated in their complaint. That is not conclusively determined by the prayer of her complaint asking that plaintiff's title to the specifically described strip be granted. The allegations of her complaint show that her action was, in fact, one in equity to have a right of way over defendants' land, alleged to be reserved by her deed to Magee, but not located therein, located and determined by a judicial decree; the owner of the servient estate refusing to recognize or permit such a location as she deemed herself entitled to. Such, in fact, was the only kind of action she could maintain under the circumstances alleged in her complaint. She could not be held to have actually acquired title as to any specific route by reason of her mere designation thereof, in no way acquiesced in by the owner of the servient estate, and of which she never acquired possession. If the defendants failed to designate any reasonable route and refused to allow her to exercise any rights under the reservation, which was the case made by the facts alleged in the complaint, her only remedy was to apply to a court of equity to enforce her reservation by locating the way and decreeing her rights therein. In the action thus instituted, the route selected by her, if not an unreasonable route under all the circumstances, should doubtless be awarded her, but any action based upon such facts as were alleged is primarily one for the adjudication of the right to a way and the location of the same by the court. Incidentally the plaintiff, of course, seeks to have the route selected by her designated by the court as the particular way to which she is entitled, but failing in this she was still entitled under the allegations of her complaint to have the court adjudicate her right to a way and locate the same. The admissions of the answer and the evidence showed her to be entitled to such rights in the hotel company's land, and it would have been prejudicial error to have refused to decree those rights, for the effect thereof would probably have been to forever debar her from the assertion of any right under the reservation. The matters adjudicated were all within the issues made by complaint and answer, and no cross-complaint was necessary to authorize the court to designate for plaintiff such way as it might find to be reasonable in view of all the circumstances.

It cannot be held that the trial court erred in permitting to be filed the amendment specifically describing the right of way fixed by the judgment. As we have seen, there was no objection by plaintiff to such action on the part of the court. The filing was with the consent of plaintiff. Nor can it be held that the court erred in refusing to reopen the case on the request of plaintiff. The case had been very thoroughly tried on the issues as to the relative merits of the Prather and Huggins routes, and the trial court was warranted in concluding that there was no good reason for the taking of further evidence. It is claimed that the description in the amendment does not in all its details correspond with the route shown on the map in evidence known as the Huggins route, and as to which the evidence was given on the trial. It is claimed by defendants that it corresponded very closely with such Huggins route as shown on said map, and is substantially the same thing. We need not discuss this matter further, in view of the fact that defendants consent in their brief that plaintiff may have the exact route shown on the map, if she so desires, and that the judgment may be modified accordingly.

There is no other matter requiring notice.

The judgment is reversed and the cause remanded, with directions to the trial court to enter judgment in accord with the old judgment, except in the following respects, viz.: The provision relating to gates shall not be inserted, and in lieu thereof there shall be inserted a provision to the effect that the way awarded is an open and unobstructed way; and further, if plaintiff within 30 days after the filing of the remittitur from this court so demands in writing filed in the superior court, the description of the way awarded shall be changed so that the same shall correspond in all respects to the Huggins route, as shown on the map in evidence in this cause.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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157 Cal. 737

ROYAL CONSOL. MINING CO. v. ROYAL CONSOL. MINES (CALIFORNIA) CO., Limited, et al.

MORRIS et al. v. ROYAL CONSOL. MINING CO. et al. (Sac. 1,744, 1,750, 1,764.)

(Supreme Court of California. May 27, 1910.)

1. VENDOR AND PURCHASER (§ 254*)—"VENDOR'S LIEN"—ORIGIN.

A "vendor's lien" is not the result of any agreement or intention of the parties, but is an equity raised by a court of chancery for the benefit of vendors of realty and is not created by Civ. Code, § 3046, providing that one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 641; Dec. Dig. § 254.*

For other definitions, see Words and Phrases, vol. 8, pp. 7288-7290, 7827.]

2. VENDOR AND PURCHASER (§ 251*)—VENDOR'S LIEN—PRESUMPTION.

Where there is nothing to indicate an intention of the parties as to a vendor's lien, the lien is presumed to exist and is an incident to the transaction of sale.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

3. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—NATURE OF RIGHT—WAIVER.

A right to a vendor's lien is a right personal to the vendor which it may waive without consideration and without writing, and when once waived cannot be resuscitated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 757; Dec. Dig. § 266.*]

4. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—WAIVER.

Where a contract for the sale of mining claims indicated a scheme to convey the claims to a corporation to be formed, free from all incumbrances, and that 90 per cent. of the stock of the corporation should be deposited in a bank to be dealt with in a prescribed manner, such shares to be subject to sale by the vendee or his associates, a stated proportion of the price to go to plaintiff in satisfaction of the purchase price of the stock, etc., it being intended that stock should be issued and sold to the amount of £225,000, while the purchase price of the claims was but $312,000, the nature of the contract indicated a waiver by plaintiff of any right to a vendor's lien to secure an unpaid portion of the price under the rule that any act of the vendor manifesting an intention not to rely on a lien will operate to waive the same.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 713; Dec. Dig. § 266.*]

5. VENDOR AND PURCHASER (§ 251*)—VENDOR'S LIEN—CREATION—PAYMENT OF PRICE—DEFAULT.

Failure of purchaser of realty to pay the price cannot of itself create a vendor's lien, where none had theretofore existed, because of the vendor's election to convey the property free from incumbrance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

6. MINES AND MINERALS (§ 105*)—MINING CORPORATIONS—MORTGAGES—ASSENT OF STOCKHOLDERS.

St. 1880, c. 118, as amended by St. 1897, c. 92, declares that it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned by the corporation, nor to purchase or obtain in any way, except by location, any additional mining ground unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding, which ratification may be either in writing signed and acknowledged by the stockholders or by resolution passed at a regularly called stockholders' meeting. *Held*, that the act goes to the power or authority of directors to act, and not merely to the personal liability of the directors, so that a mortgage of the mining ground of a mining corporation, executed prior to the repeal of the act, in the absence of a ratification by the stockholders, passed no title from the corporation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

7. Mines and Minerals (§ 105*)—Mining Companies—Mortgages—Ratification by Stockholders—Effect.

Where a mining company executes a mortgage on its mining ground without ratification by its stockholders, as required by St. 1880, c. 118, as amended by St. 1897, c. 92, such objection, though unavailable to a stranger who does not connect himself with the title of the corporation, may be raised by the corporation itself or its stockholders to avoid the mortgage.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

8. Mines and Minerals (§ 105*)—Mining Companies—Mortgages—Ratification by Stockholders—Mode.

St. 1880, c. 118, as amended by St. 1897, c. 92, provides that it shall not be lawful for the directors of a mining corporation to mortgage any part of its mining ground unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding, which ratification may be either in writing signed and acknowledged by such stockholders, or by a resolution passed at a regularly called stockholders' meeting. *Held*, that the mode prescribed for such ratification should be regarded as illustrative only and not mandatory and exhaustive, so that, where the holders of two-thirds of the stock of a corporation had in a formal and unequivocal way announced their assent to a proposed mortgage, it was valid though not in the mode prescribed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

9. Mines and Minerals (§ 105*)—Mortgages—Ratification by Stockholders—"Stockholders."

"Stockholders" of record of a mining corporation holding the stock for a lawful purpose, though not the beneficial owners thereof, are stockholders authorized to ratify a mortgage of the corporation's mining ground within St. 1880, c. 118, as amended by St. 1897, c. 92, requiring such mortgage to be ratified by the holders of two-thirds of the stock.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*

For other definitions, see Words and Phrases, vol. 7, pp. 6667–6669; vol. 8, p. 7804.]

10. Corporations (§ 197*)—Stockholder's Right to Vote.

In general the test of a stockholder's right to vote at corporate meetings is the ownership of shares as disclosed by the proper record books of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 747; Dec. Dig. § 197.*]

11. Mines and Minerals (§ 105*)—Mining Corporations—Mortgage of Assets—Ratification—Right to Vote—Statutes.

Civ. Code, § 312, provides that at all elections or votes had for any purpose there must be a majority of the subscribed capital stock or of the members represented, either in person or by proxy in writing, and that each person acting therein in person or by proxy must be a member thereof or a bona fide stockholder having stock in his own name on the books of the corporation at least 10 days prior to the election. *Held*, that the section is sufficiently broad to cover a vote taken at a meeting of the stockholders of a mining corporation called to ratify a mortgage of its mining ground as required by St. 1880, c. 118, as amended by St. 1897, c. 92, at which meeting the right to vote would reside in every bona fide stockholder having stock in his own name on the stock books of the corporation 10 days prior to the meeting or at least at the time of the meeting.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

12. Corporations (§ 197*)—"Bona Fide Stockholder."

A "bona fide stockholder," within Civ. Code, § 312, providing that only bona fide stockholders shall be entitled to vote at corporate meetings, need not necessarily be the owner of the stock; it being sufficient that the stock stands in his name in good faith for a proper purpose and that he is holding the same either for himself or in trust for another.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 747; Dec. Dig. § 197.*

For other definitions, see Words and Phrases, vol. 1, p. 830.]

13. Mines and Minerals (§ 105*)—Mining Corporations—Mortgages—Ratification.

Where a director of a mining corporation was the bona fide holder of two-thirds of the corporation's stock, his act in executing a mortgage on the corporation's mining property as director of the corporation operated as a ratification of the mortgage by two-thirds of the corporation's stock required by St. 1880, c. 118, as amended by St. 1897, c. 92, to give the mortgage validity.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

14. Mines and Minerals (§ 105*)—Mining Corporations—Mortgages—Ratifications by Stockholders.

While the persons holding the legal title to two-thirds of the stock of a mining corporation are persons authorized by St. 1880, c. 118, as amended by St. 1897, c. 92, to ratify a mortgage of the corporation's mining ground, the courts may also look behind the apparent ownership and sustain a ratification made by the beneficial owners of the stock.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

15. Mines and Minerals (§ 105*)—Mining Corporations—Mortgages—Estoppel.

Under St. 1880, c. 118, as amended by St. 1897, c. 92, providing that it shall not be lawful for the directors of a mining corporation to mortgage its mining ground unless the act is ratified by at least two-thirds of the outstanding stock, such a mortgage lacking the requisite ratification cannot be rendered valid by estoppel.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 229, 229½; Dec. Dig. § 105.*]

16. Mines and Minerals (§ 106*)—Mining Corporations — Mortgages — Invalidity —Issues.

Where, in a proceeding to foreclose a mortgage on the realty of a mining corporation, all the pleadings in effect admitted the authorization and making of the mortgage and based objections to its validity solely on the ground that it had not been ratified by the stockholders as required by St. 1880, c. 118, as amended by St. 1897, c. 92, an objection that it was also invalid because executed to H. as one of the trustees, and that H. himself was a director whose vote was necessary to authorize the execution of the mortgage, was unsustainable as not within the issues.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 230; Dec. Dig. § 106.*]

In Bank. Appeals from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by the Royal Consolidated Mining Company against the Royal Consolidated Mines (California) Company, Limited, and others, and by Leon Ephraim Morris and others, cross-complainants, against the Royal Consolidated Mining Company and others. From judgments settling the rights of the parties, the cross-complainants appeal from so much as denied their right to relief prayed, foreclosing a deed of trust and denying their motion for a new trial; plaintiff appeals from parts of the judgment decreeing that it recover nothing, that its action be dismissed, that cross-complainants have judgment against it for a specified sum, that defendants recover from plaintiffs their costs; and the Royal Consolidated Mines (California) Company, Limited, appeals from so much of the judgment as gives to the cross-complainants, trustees, a money judgment and costs against said corporation. Portions of the judgment denying foreclosure of the deed of trust and decreeing the money judgment to the cross-complainants reversed and that portion dismissing plaintiff's complaint affirmed.

Bishop, Hoefler, Cook & Harwood (Alfred J. Harwood, of counsel), for appellants. Nicol & Orr, Campbell, Metson & Campbell, S. D. Woods, Solinsky & Wehe, Jesse W. Lilienthal, and Vogelsang & Brown, for respondents.

SLOSS, J. On the 9th day of February, 1898, the Royal Consolidated Mining Company, a corporation (designated in this opinion as the "vendor" or the "California corporation"), entered into a written contract with J. C. Kemp Van Ee for the sale by it to him of certain mining properties in Calaveras county. The terms of the contract, which will be set out at greater length hereafter, provided for the incorporation by the purchaser of a company under the Joint-Stock Companies Acts of Great Britain, for the purpose of acquiring the properties. Such company, the Royal Consolidated Mines (California) Company, Limited (which will be referred to by us as the "British corporation"), was formed, and title to the properties in question became vested in it. In 1902 this corporation executed, or attempted to execute, to Frederick Rheinwald Bullock, William Bryson Butler, and John Thomas Hodson, as trustees, an instrument purporting to convey said properties to the trustees as security for the payment of £75,000 of debenture stock to be issued by the corporation (and in fact subsequently issued by it) to persons lending money on the faith of such debentures. Pending this action, Bullock, one of the trustees, died, and was succeeded by Leon Ephraim Morris.

This action was brought by the California corporation against the British corporation, J. C. Kemp Van Ee, the trustees above named, and other defendants designated by fictitious names, to foreclose a vendor's lien upon the property conveyed by said plaintiff, its claim being that some $312,000 with interest was due on the purchase price of the mines, and that it was entitled to a lien for such unpaid balance. Each of the named defendants appeared and resisted plaintiff's claim. Albert Raymond, appearing as a defendant sued by a fictitious name, also denied the existence of plaintiff's asserted lien. Raymond himself claimed a lien on the property by virtue of an attachment for the sum of $64,421 and interest, levied in an action brought against the British corporation. The trustees, Morris, Butler, and Hodson, filed in addition to their answer a cross-complaint, seeking foreclosure of the instrument executed to them to secure payment of the £75,000 of debentures. The trial resulted in findings upon which the court entered its judgment: (1) That plaintiff recover nothing and that its action be dismissed against defendants and cross-complainants; (2) that cross-complainants take nothing as against plaintiffs and defendants, except that cross-complainants have and recover from the British corporation the sum of $242,500 with interest; (3) that defendants recover costs from plaintiff; (4) that Van Ee and Raymond recover costs from cross-complainants; (5) that cross-complainants recover costs from the British corporation. In other words, the court determined in the original action that the plaintiff had not established its right to a vendor's lien, and, in the cross-action, that the instrument under which the trustees claimed was not a valid mortgage and could not be foreclosed, but that such trustees were entitled to a money judgment against the British corporation for the sums actually advanced to it by the debenture holders.

From this judgment three appeals have

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

been taken. No. 1,744 is the appeal of the cross-complainants (trustees) from those parts of the judgment denying them the relief of foreclosure, giving them a money judgment, and awarding costs against them. They appeal also from an order denying their motion for a new trial. No. 1,750 is the appeal of plaintiff from the parts of the judgment decreeing that it recover nothing, that the action be dismissed, that cross-complainants have judgment for $242,500, and that defendants recover from plaintiff their costs. No. 1,764 is an appeal taken by the British corporation and J. C. Kemp Van Ee from the part of the judgment whereby cross-complainants (trustees) recover a money judgment and costs against said corporation.

The bills of exceptions presented by the respective parties are, except for the assignments of error, identical, and for this reason, among others, the various appeals can most conveniently be considered in a single opinion. It will be well to take up first the questions arising on plaintiff's appeal (No. 1,750) from the judgment declaring that it is not entitled to a vendor's lien. Some of the facts to be stated in this connection will be important in considering the other appeals.

The complaint sets forth at length the terms of the agreement of February, 1898, between the plaintiff, the then owner of the properties in question, and Van Ee. This agreement, after reciting that the plaintiff is the owner of the mining properties in question, and that Van Ee is desirous of acquiring such property, provides that the vendor (plaintiff) agrees to sell, and Van Ee agrees to purchase, the aforesaid properties for the sum of $400,000, payable as provided in the agreement. The purchaser, it is agreed, shall, on the signing of the agreement, pay the sum of $60,000 to the credit of the vendor with the Anglo-Californian Bank, Limited, at its San Francisco office, on account of the purchase consideration. The third paragraph reads as follows: "The purchaser shall proceed forthwith to incorporate a company in London under the Joint-Stock Companies Acts of Great Britain, for the purpose of acquiring the aforesaid properties, and said company shall have a nominal capital of 250,000 shares of one pound each, of which 25,000 shares, at the par value, shall be reserved for the purpose of providing working capital for the said properties, and the balance of shares, namely, 225,000 shares, shall be issued fully paid up and be deposited in London with the Anglo-Californian Bank, Limited, as security for the payment of the balance of the purchase consideration of $400,000 for the said properties, and upon the allotment and deposit of said 225,000 shares, the property shall be duly and legally conveyed by the purchaser to the company to be formed as aforesaid to acquire the same, free from all incumbrances." The agreement further provides that the balance of the púrchase price, namely, $340,000, "shall be paid in the manner following, that is to say, an amount equal to eighty per cent. of the net proceeds arising from the working of said mines shall be paid to the vendor monthly on or before thirty days after the time of each and every clean-up, and shall be credited as aforesaid on account of the purchase consideration; provided, however, that as sales are made of said 225,000 shares, or any part thereof, as herein provided, the purchaser shall pay only such proportion of said amount equal to said eighty per cent. of said net proceeds as the number of shares remaining in said bank bears to the total of 225,000 shares." The following paragraph provides that "the purchaser, however, shall have the right from time to time to otherwise discharge so much of the purchase consideration as he may think fit by the sale of as many of the said 225,000 shares as he may think necessary or advisable, always provided that none of the said shares shall be sold for less than their par value, and that in any event, as the same may be sold, they may be withdrawn by the purchaser or released, as he shall direct, against a payment to said bank for account of said vendors of ninety per cent. of the par value of said shares, to apply upon said purchase consideration." After the payment, however made, of the balance of the purchase price, all the shares remaining in the hands of the bank are to be delivered to the purchaser. The vendors agree in paragraph 8 that upon the payment of the $60,000 they will deposit with the Anglo-Californian Bank, Limited, in San Francisco, a good and sufficient deed conveying to the purchaser, his nominee or nominees, satisfactory title to all of said properties free and clear of all incumbrances whatsoever, together with a letter of instructions authorizing and directing said bank to deliver such deed upon receiving from the Anglo-Californian Bank, Limited, in London, a cablegram to the effect that the said 225,000 shares have been deposited with the said bank in London to be dealt with in accordance with the terms of the contract. It is provided that until the payment of the balance of $340,000 the vendors may have a representative upon the properties, but that upon the payment of the $60,000 possession of the properties is to be turned over to the purchaser. By the terms of paragraph 11 it is agreed that if the whole purchase consideration shall not have been paid at the expiration of four years "then the balance of shares remaining in said bank shall, at such time thereafter as may be determined by said vendors, be divided between vendors and purchaser so that the purchaser receive such proportion of said shares as the whole amount of money paid by him hereunder bears to the entire amount of said purchase consideration; and the vendors shall receive the balance of shares in satisfaction of the purchaser's covenant to purchase." The agreement further provides that it is to be binding upon and inure in favor of the heirs, representatives, successors, and assigns of the respective parties.

Upon the execution of said agreement of February 9, 1898, Van Ee paid to the plaintiff the sum of $60,000, and plaintiff delivered up the possession of the said properties in accordance with the terms of the contract, which possession was held by Van Ee until the organization of the British corporation. At the same time plaintiff executed its deed of the properties to Van Ee, and deposited such deed in escrow with the Anglo-Californian Bank, Limited. In May, 1898, Van Ee and John Thomas Hodson, who was interested with him in the transaction, caused to be incorporated a company in London under the Joint-Stock Companies Acts of Great Britain for the purpose of acquiring the property described in the contract. (The contract of February, 1898, had theretofore been assigned by Van Ee to Hodson.) This corporation, known as the Royal Consolidated Mines (California) Company, Limited, is the one herein referred to as the "British corporation." It was organized with a nominal capital of 250,000 shares of £1 each. Upon its organization it entered into a contract with Hodson, whereby Hodson agreed to sell, and the British corporation to purchase, free from incumbrances, the properties here in controversy, for the sum of £225,000, to be paid and satisfied by the allotment to the vendor, or his nominee, of 225,000 fully paid shares in the company of £1 each. It was provided that the sale should be completed on the 20th day of July, 1898, and that the company should before that time issue certificates for the said 225,000 shares as required by Hodson, and lodge the same with the Anglo-Californian Bank, Limited, at its London office. The 225,000 shares of capital stock of said British corporation were issued fully paid to Hodson, and were by him deposited with the Anglo-Californian Bank in London pursuant to the terms of the contract between plaintiff and Van Ee. Thereupon the deed from plaintiff to Van Ee, which had been deposited in escrow with the Anglo-Californian Bank, Limited, in San Francisco, was, in accordance with the provisions of the contract of February 9, 1898, delivered to Van Ee. Van Ee executed his deed conveying the properties to the British corporation, and the latter took possession of the properties. It immediately commenced to work and improve the said property and expended large sums in the operation of the mines and the placing of improvements thereon. Out of the proceeds there was paid to plaintiff, pursuant to the terms of its contract, the sum of $29,479.96. With the exception of this sum, no part of the balance of $340,000 of the purchase price has been paid. The four years allowed for payment of the consideration of Van Ee's purchase expired on the 9th of February, 1902. At that time and thereafter the plaintiff entered into several agreements with Van Ee, modifying the terms of the original agreement and extending the purchaser's time for performance. It is alleged in the complaint that all of these extensions were made without any consideration moving to the plaintiff, and that all the agreements made by it were executed and received on the part of Van Ee and of the British corporation without any intention upon the part of either of them of performing or fulfilling them. The court finds these allegations to be untrue, and, without prolonging the discussion by an examination of the evidence, we shall simply state that we think these findings, so far as they are material on this appeal, are fully sustained. The issue of the £75,000 of debenture stock and other transactions connected therewith are set out in the complaint and charged to have been part of a fraudulent scheme concocted by Van Ee and the British corporation for the purpose of complicating and clouding the title to said property, and to prevent said plaintiff from being able to collect the balance of its purchase price. The findings are contrary to these averments, too, and there is, in fact, no substantial evidence tending to show any such fraudulent intent. It is found that the plaintiff has never at any time determined the time as provided in the contract of February 9, 1898, when the balance of shares remaining in said bank should be divided between it (said plaintiff) and Van Ee, nor made demand therefor, but at all times since the expiration of the time provided for in the contract and the extensions thereof (except when the shares were, with the consent of the plaintiff, in the hands of third parties) the British corporation has been ready to make such division and deliver to plaintiff the shares belonging to it under the contract.

With reference to plaintiff's claim of a vendor's lien the court finds that it was plaintiff's intention at the time of the execution of the contract of February 9, 1898, to sell and convey to Van Ee and to the British corporation the properties in question absolutely for the purpose of conveying the same absolutely to the corporation to be organized, and plaintiff did not intend to nor did it have or retain in said property a vendor's lien or any lien for the unpaid balance of the said purchase price, and it was the intention of the said plaintiff to waive any lien as vendor or otherwise that it might have or claim on said property for said balance and it did waive said lien.

On the question whether or not there was a lien the parties, on both sides, base their respective claims mainly on the terms of the contract of February 9, 1898. We think that contract, fairly construed, manifests, on the part of the vendor, an intent plainly inconsistent with the reservation of a lien on the properties to be conveyed.

Section 3046 of the Civil Code provides that "one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." But the lien does not find its origin in this statutory enactment. It has been generally recognized by courts of chancery. It is "not the result of any agreement or any intention of the vendor or vendee, but is a simple equity raised by courts for the benefit of vendors of real estate." Avery v. Clark, 87 Cal. 623, 25 Pac. 919, 22 Am. St. Rep. 272. Accordingly, where there is nothing to indicate an intention one way or the other, "the lien is presumed to exist, and is an incident of the transaction of sale." Finnell v. Finnell, 105 Pac. 740. In the case last cited, the lien was upheld, although the vendor was unaware, at the time of the sale, of the fact that he was, under the law, entitled to a vendor's lien. On the other hand, the "right thus afforded of enforcing payment of the consideration against the property conveyed is a personal one, and it may be waived and relinquished without consideration and without a writing (see Claiborne v. Castle, 98 Cal. 30, 33 [32 Pac. 807]), and, when once waived, is gone forever. It is thoroughly settled that, if the vendor do any act manifesting an intention on his part not to rely on the lien thus given by law for the payment of the purchase money, such as taking security therefor, without an express agreement that he may still have his vendor's lien, the lien will not exist." Finnell v. Finnell, supra, citing cases.

The respondents point to various elements of the transaction to support the contention that the plaintiff waived any lien. Without considering separately such arguments as that the plaintiff took security or that the contract did not make the vendee liable for any liquidated purchase price measurable in terms of money, we have no hesitation in declaring our conviction that the contract, viewed as a whole, evidences a scheme or plan of dealing which is inconsistent with the retention by the vendor of any lien on the properties. That scheme briefly stated, was this: The mines, owned by plaintiff, were to be conveyed, free and clear of incumbrance, to Van Ee. Van Ee was to form a corporation, and to transfer the properties, likewise unincumbered, to it. Ninety per cent. of the shares of stock of such corporation were to be deposited in a bank, to be dealt with in a given manner. These shares were to be subject to sale by the vendee or his associates, but a stated proportion of the sum realized on any sales was to go to the plaintiff in satisfaction of the consideration stated in the agreement. Similar provision was made with reference to a percentage of the proceeds arising from the operation of the mines by the vendee or his assigns. The number of shares to be deposited was 225,000, of the par value of £1 each. Sales of these shares were to be made at not less than their par value. In other words, the agreement contemplated that a title, apparently free and unincumbered, should be conveyed to a corporation which should, upon the basis of such title, issue and sell its shares to an amount exceeding a million dollars. The plan called for a nominal capitalization of about three times the price which plaintiff was willing to take for its properties, and provided that the shares should be sold to the public at a rate which would bring in an amount equal to or exceeding their face value. What may fairly be supposed to have been in the contemplation of the parties to this agreement? Did the plaintiff and Van Ee intend to sell to prospective shareholders, at this price, an interest in a property which was subject to a paramount, but unrecorded, lien for $340,000, or did they propose to offer at par shares in a corporation owning a clear title to the property? A reading of the agreement leaves no doubt that this question must be answered by saying that no secret lien in favor of the original vendor intended to be retained. In re Brentwood Brick & Coal Co., L. R. 4 Ch. Div. 562, was a case in which property was conveyed to a corporation for a consideration of £6,000, to be paid, by the payment to the vendor of 50 per cent. of all money received by the company on the sale of shares, and a like 50 per cent. of all money by way of capital to be at any time borrowed by the company, until the £6,000 should be paid. The transaction was held to be such as to exclude the idea of the retention of a vendor's lien. Referring to the provision for payment out of proceeds of shares sold or money borrowed, James, L. J., said: "To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property." The reasoning applies with equal force to the provision here for the sale of 225,000 shares at not less than their par value. Neither the plaintiff nor Van Ee could have considered it feasible to market at par any part of an issue of 225,000 one-pound shares of a corporation owning no assets beyond an equity of redemption (worth, perhaps, $60,000) in a property subject to a lien of $340,000. Again, the covenant that the plaintiff's conveyance to Van Ee, and his subsequent transfer to the British corporation should be free and clear of incumbrances, excludes the idea that a title subject to a lien in favor of the plaintiff was to be retained. It is true that in Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802, it was held that a somewhat similar covenant was to be construed as referring "to prior charges and incumbrances" and not to "any which arise out of the conveyance itself." But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free of incumbrances the restricted meaning applied in the Slide & Spur Case, the vendor's lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of incumbrance.

But apart from this somewhat technical consideration, we prefer to rest our conclusion on the broader ground that the whole scope of this agreement, differing materially from that in the Slide & Spur Case, is such as to make the existence of a vendor's lien inconsistent with the proper execution of the plan agreed upon.

We have not, in the foregoing discussion, given any attention to the attack made by appellant upon the finding to the effect that the purchaser had not defaulted in the matter of dividing the shares of stock of the British corporation with the plaintiff. If the court below was right, as we are satisfied it was, in holding that the plaintiff, at the time of executing the contract of February 9, 1898, intended to and did waive any lien on the properties, the alleged default had no bearing on its right to such lien. Failure to pay the purchase price cannot, of itself, create a lien, where none had theretofore existed. Fisk v. Potter, 41* N. Y. 76. But if it be claimed that the breach by Van Ee gave plaintiff the right to some kind of a personal judgment against him, we think the point is sufficiently answered by saying that the finding that he had not committed the breach alleged has adequate support in the evidence.

In accordance with these views, it must be held that the court below rightly determined that the plaintiff did not hold a vendor's lien and was not entitled to any relief. If this be so, the plaintiff is not concerned with the correctness of the findings with respect to the claims or liens of other parties, and it will not, on this appeal, be necessary or proper to consider any points made by plaintiff with regard to such matters.

The appeal of the cross-complainants Morris, Butler, and Hodson, trustees, No. 1,744, is, as we have said, from the portions of the judgment which deny foreclosure of the deed of trust and give a money judgment for the sums advanced. The refusal of the relief sought was based upon the proposition that the indenture of trust or mortgage was void for want of compliance with the terms of the act of 1880, as amended in 1897, for "the further protection of stockholders in mining companies." St. 1880, p. 131; St. 1897, p. 96. This act (now repealed) was the one which required ratification by the holders of two-thirds of the stock in mining corporations of a sale or mortgage of any part of the mining ground owned or held by the corporation.

The findings are to the effect that on the 2d day of October, 1902, the board of directors of the British corporation determined to raise and borrow a sum of £50,000 and for that purpose to issue the debenture stock of the corporation to the amount of £75,000. In order to secure the redemption and payment of this stock, a certain indenture by way of mortgage of all the property described in the complaint was, on the 2d day of October, 1902, at London, and as authorized by the directors of said corporation, made, executed, and delivered by and between said directors and the original cross-complainants Morris, Butler, and Hodson as trustees for the creditors of the corporation and the holders of said debenture stock. The instrument was acknowledged, and, on February 5, 1903, recorded in the office of the county recorder of Calaveras county. Thereafter the British corporation issued debenture stock to the amount of £75,000 and in consideration of a loan of £50,000 made to it by the British Transvaal & General Financial Company, Ltd., delivered said stock to said British Transvaal & General Financial Company, Ltd. The sum of £50,000 was actually received by the British corporation from said lender, and was the full and agreed consideration for said debenture stock. The same has always been, and now is, retained by the British corporation, and no part of it has ever been repaid. That out of said sum of £50,000 the British corporation expended in permanent improvements on the mining property the sum of $206,791.50. That all of said improvements are now on and form a part of the property and are of the reasonable value of said last-named sum.

It is further found and these are the findings which are attacked by the appellant trustees, that at the time of the borrowing of said money and the making, delivery, certification, and recording of said trust deed, all of the capital stock of said British corporation was owned in equal shares by the defendants Van Ee and Hodson subject to the conditional ownership therein of the said plaintiff under and by virtue of the contract of February 9, 1898, and at no time during said period was said Hodson or any other person than Van Ee and plaintiff, the owner or holder of more than one-half of the capital stock of said corporation; that the indenture of October 2, 1902, was never ratified or authorized by the holders of two-thirds of the capital stock of the defendant corporation as required by the act of 1880.

The act in question provided that: "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way (except by location) any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at any regularly called stockholders' meeting."

That there was no ratification, either by a writing signed and acknowledged by the stockholders as such or by resolution passed at a stockholders' meeting, is conceded. The position of appellants is, however, that Hodson was in fact the holder of more than two-thirds of the stock of the corporation, that he authorized, executed, and acknowledged the instrument on behalf of the corporation as one of its directors, and that such authorization, execution, and acknowledgment was a sufficient ratification to comply with the requirements of the act. It appears that the 225,000 shares, which were the consideration for the conveyance to the British corporation, were by it issued fully paid to Hodson and were by him deposited with the Anglo-Californian Bank in London as required by the terms of the agreement of February 9th. Thereafter Van Ee executed to the corporation a deed of said properties. The 225,000 shares so issued in the name of Hodson remained in the Anglo-Californian Bank until after the signing of the deed of trust in question, with the exception of a period during which they were, with plaintiff's consent, made subject to an option which was never exercised. So far as appeared from the books and records of the corporation, Hodson was, at the date of the execution of the mortgage, the sole owner of this stock. The record does not disclose that he had ever transferred any part of it to any other person. The interest which the court found to be held by Van Ee was such interest as may have been vested in him by reason of the fact that he and Hodson were to share equally in the profits of the transaction. The interest of the plaintiff was the right which it had to receive a certain proportion of the shares remaining unsold at the expiration of the four-year period designated in its agreement of February 9, 1898, with Van Ee.

The stock being in this condition, the deed of trust was signed under the seal of the British corporation by John T. Hodson and H. Percy Hood, directors, and J. K. Gray, secretary of the corporation, and by the trustees named in the deed. Attached to the instrument is the certificate of acknowledgment of the Consul General of the United States at London certifying that the instrument was acknowledged by John Thomas Hodson and Henry Percy Hood, directors, and J. K. Gray, secretary of the corporation, "who acknowledged to him that they were the officers of the said company who for and in the name of the said company have executed the foregoing instrument, they then and there severally acknowledged the same to be their respective free act and deed and as and for the act and deed of the said company for the uses and purposes therein set forth."

The act of 1880 has been under consideration by this court several times. The earlier cases showed a disposition to give a very rigid and strict interpretation to the provisions of the law, but this strictness has been somewhat relaxed in the more recent decisions. The first case involving the act was McShane v. Carter, 80 Cal. 310, 22 Pac. 178. That was a suit to enjoin an execution sale of mining property. The plaintiff claimed title through a conveyance from a mining corporation which had owned the property. The deed had not been ratified by the stockholders. The execution was issued on a judgment obtained against the corporation after the date of the deed. It was held that in the absence of ratification by the stockholders no title passed from the corporation. The court's view of the effect of the statute was stated in these words: "We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them; and to so construe would be to practically nullify the act. In our opinion the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two-thirds of the stock, given as prescribed by the act. And it follows without such consent that title does not pass. And if this be so, the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof." Pekin, etc., Mining Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679, followed soon after McShane v. Carter, and approved the holding of that case to the effect that a deed by a mining corporation of any part of its mining ground not shown to have been ratified by two-thirds of the stockholders did not pass the title. These cases declared the rule—and the declaration was necessary to the decision in each instance—that the assent of two-thirds of the stockholders was essential to the validity of the acts described in the statute. McShane v. Carter and Pekin, etc., Mining Co. v. Kennedy were cited with approval in Granite Gold Mining Co. v. Maginness, 118 Cal. 137, 50 Pac. 269, although the particular transaction there involved was not shown to be within the purview of the statute. Again, in Johnson v. California Lustral Co., 127 Cal. 283, 59 Pac. 595, the decision was that a mortgage of mining ground of a mining corporation not ratified by the stockholders could not be foreclosed; the court saying: "The statute declares unlawful a mortgage or other disposition by the directors of the whole or any part of the mining ground of a mining corporation, except upon the ratification of the holders of two-thirds of the stock, and it must be enforced according to its intent. Several instances of its application have occurred"—citing McShane v. Carter and Pekin, etc., Mining Co. v. Kennedy.

With these decisions before it, the Supreme Court of the United States, in Williams v. Gaylord, 186 U. S. 157, 22 Sup. Ct. 798, 46 L. Ed. 1102, was called upon to consider the effect of the statute. The suit was brought in the United States Circuit Court by Williams to foreclose a mortgage made to him as the trustee of bondholders by the Gold Hill Mining Company, a West Virginia corporation, upon mining ground in California. The corporation defaulted, but foreclosure was resisted by purchasers at execution sales under judgments rendered against the corporation. The defense set up was the want of ratification of the mortgage by the stockholders. The defendants prevailed in the Circuit Court (96 Fed. 454) and in the Circuit Court of Appeals (102 Fed. 372, 42 C. C. A. 401). The case came to the Supreme Court on certiorari. That court, after deciding that the construction and effect of the statute were matters in which the federal courts would follow the decision of the state courts, proceeded to examine the cases above cited, and from them deduced the conclusion that this court had held (a) that without the consent of holders of two-thirds of the stock title to property attempted to be conveyed does not pass; and (b) that that consent must be evidenced in the manner prescribed by the act, i. e., "either in writing signed and acknowledged by such stockholders or by resolution duly passed at a stockholders' meeting called for that purpose." With respect to the second proposition, the court said: "This manner of ratification was held to be necessary as we have seen in McShane v. Carter, supra, and that case has not been limited or varied by any subsequent case, and we have no doubt of the power of the state to so prescribe. * * * Nor can we contest that power, though we might, if we were permitted to exercise an independent judgment, construe the statute as only illustrative and not as exhaustive of the manner of ratification." In Williams v. Gaylord, the Supreme Court of the United States was not declaring its own view of the statute. It was merely ascertaining and applying the construction given to a state statute by the highest court of the state. There is, therefore, nothing in the decision to prevent us from inquiring whether this court has not, by its decisions subsequent to Williams v. Gaylord, modified the strict interpretation given to the act by our earlier cases.

On the first point, i. e., that title does not pass in the absence of ratification by the stockholders, we think there is nothing in any later case which modifies the rule as declared in McShane v. Carter. The appellants place great reliance upon Galbraith v. Shasta Iron Company, 143 Cal. 94, 76 Pac. 901, in which it was held that one asserting a title in hostility to the corporation and to those claiming under it was not in a position to object that the corporation's deed had not been ratified as required. But this goes no further than the declaration of the court in McShane v. Carter. In the opinion in that case, after stating that title does not pass, the court goes on to say that "the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof." It was not there suggested that strangers to the title might raise the question, and we do not think the statement that the title did not pass was intended to convey the idea that the transaction could be treated as void by persons having no relation to the title of the corporation. Here, however, the objection is made by the corporation itself and by stockholders, and the question whether the mortgage was, in the absence of ratification, absolutely void as to all parties, has no significance in connection with the point now under discussion. The parties here objecting are certainly in a position to insist that the instrument, if unratified, passed no title and created no lien.

On the proposition that the ratification of the stockholders must be in the manner and form prescribed by the statute, the statement in the McShane Case that the directors had no power or authority to convey without the consent of holders of two-thirds of the stock "given as prescribed by the act" has been materially modified by this court. In the first place, it should be noted that this declaration was not in strictness necessary to the decision in McShane v. Carter, since in that case, as in the other decisions of this court above cited, there was no contention that there had been a ratification by stockholders in any manner. But whether or not the statement be viewed as dictum, it can no longer, in view of the decision in Lacy v. Gunn, 144 Cal. 511, 78 Pac. 30, be regarded as a correct statement of the law. This was an action to quiet title. Both parties claimed through the Amalie Mining Company, the plaintiff under an execution sale and deed of the corporate property, and the defendant under a deed from one Ferris, to whom the company had made an assignment for the benefit of its creditors. The assignment antedated the judgment under which plaintiff was claiming. The property in question was mining property, and the deed from the corporation had not been ratified by the stockholders in the manner prescribed in the act. There was, however, evidence tending to show that the directors who authorized the making of the assignment were the actual owners of more than two-thirds of the stock. The court held that: "A previous consent or direction by two-thirds of the stockholders, although purported to have been made in the capacity of directors, is, as against creditors, equivalent to a subsequent ratification." It is true that this rule was, in its application to the particular case, limited to the effect of a conveyance as against creditors, and that it was not in terms extended so as to affect stockholders. But we see no reason for any distinction in this regard. Under the rule of McShane v. Carter, and the cases following it, any person connecting himself with the title of the corporation, as, for example, an execution creditor, was entitled to rely upon the provisions of the act, and no good ground suggests itself for saying that a conveyance, good as against a judgment creditor, would not be equally good as against a stockholder. Applying the doctrine, then, to stockholders, as well as to creditors, we think the rule declared in Lacy v. Gunn to be sound and reasonable. The act was designed for the protection of stockholders and to guard them against the improvident action of directors. Where the persons holding the required two-thirds of the stock have in a formal and unequivocal way announced their assent to the proposed transaction, their rights are as fully safeguarded as if they had ratified the transfer, purchase, or mortgage by subsequent writing or at a meeting. In other words, we think the proper rule is that suggested by the Supreme Court of the United States in Williams v. Gaylord, namely, that the statute should be construed "as only illustrative and not as exhaustive of the manner of ratification." If, then, Hodson was the holder of two-thirds of the stock of the British corporation at the time of the authorization and execution of the mortgage, his act in authorizing, executing, and acknowledging the mortgage as a director of the corporation answered every requirement of the act.

There remains the question whether Hodson was the holder of two-thirds of the stock, and, as such, empowered to ratify the mortgage. The court below seems to have proceeded on the theory that it must go behind the legal title, as disclosed by the corporate books, and find the holders of stock to be the persons who had the ultimate beneficial interest in the shares, and this, notwithstanding the fact that the record holder was himself beneficially interested, and that the shares had been put in his name, for proper and legitimate purposes, with the approval of the other parties in interest. We cannot give our assent to this view. The statute of 1880 provides that the ratification may be made either in writing, "signed and acknowledged by such stockholders or by resolution duly passed at any regularly called stockholders' meeting." It will, of course, not be questioned that, whichever of these methods be followed, the individuals authorized to ratify will be the same. If given persons form two-thirds of the stockholders authorized to vote at a stockholders' meeting, they may act as stockholders in signing and acknowledging a written ratification. The general rule is that the test of the right to vote as a stockholder at corporate meetings is the ownership of shares, as disclosed by the proper record books of the corporation. 3 Clark & Marshall on Priv. Cor. § 653; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; State v. Ferris, 42 Conn. 560; In re Argus Printing Co., 1 N. D. 435, 48 N. W. 347, 12 L. R. A. 781, 26 Am. St. Rep. 639. In some jurisdictions the books furnish prima facie evidence of such right; in others, the showing of the corporate records is conclusive. In this state, so far, at least, as domestic corporations are concerned, the question seems to be definitely settled by statute. At the time of the enactment of the statute of 1880, and of the execution of the mortgage under consideration, section 312 of the Civil Code provided that: "At all elections or votes had for any purpose there must be a majority of the subscribed capital stock, or of the members, represented, either in person or by proxy in writing. Every person acting therein, in person or by proxy or representative, must be a member thereof or a bona fide stockholder, having stock in his own name on the stockbooks of the corporation at least ten days prior to the election. * * *" Since the section covers not only elections, but all votes, we take it (although this precise point is not here involved, and is, consequently, not decided) that the words "ten days prior to the election" are to be read, in the case of a vote for a purpose other than an election, as referring to a period prior to the meeting at which the vote is had. The section is sufficiently broad to cover a vote taken at a meeting of stockholders called under the act of 1880. At such meeting, the right to vote would reside in every "bona fide stockholder, having stock in his own name on the stockbooks of the corporation at least ten days prior to the" meeting, or, at least, at the time of the meeting. That Hodson was such stockholder is not to be doubted.

In Smith v. S. F. & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. Rep. 119, this court held that the requirement of section 312 that the person voting be a "bona fide" stockholder authorized an inquiry into the character of the holding. In that case the ruling was that where the real owners of stock had, for the sole purpose of avoiding statutory liabilities, caused the stock to be registered in the names of persons having no interest in it, the nominal holders were not entitled to vote at an election for directors. But the court observed that the right to vote is, by the Code section, conferred upon "stockholders," not upon "owners" of stock, and recognizes that one may be a "bona fide" stockholder without having the sole, or, indeed, any beneficial, interest in the shares. "One may," says the court, "be a bona fide stockholder without being the owner of the stock. He may have caused himself to be registered as a stockholder in the utmost good faith, both toward the corporation and also toward his fellow stockholders, and yet he may not be the owner of the stock. * * * It may be placed in the name of one as trustee to hold under an express trust, without any interest in the stock, but for the sole purpose of applying the income or disposing of the proceeds of its sale according to the terms of the trust. It may be the property of an estate, and transferred into the name of the executor. In all such cases the transfer would be in good faith, and the person in whose name it was registered would be a 'bona fide' stockholder." The relations between the plaintiff, Van Ee, and Hodson were such as to make it entirely natural and proper that the stock should stand in Hodson's name. The plaintiff's interest in the shares was contingent and indefinite. Under the terms of the contract of February, 1898, the plaintiff might receive full payment in money, and, in that event, would not be entitled to any stock. Van Ee's agreement with Hodson was that the two should be equally interested in any shares remaining after the payment of $400,000 to plaintiff. At the time of the execution of the mortgage, neither Van Ee nor the plaintiff corporation had anything more than an uncertain, future, and contingent interest in an unascertainable number of shares of the stock. The existence of these equities, indefinite in extent, did not so affect the bona fides of Hodson's holding of the stock, as to deprive him of the rights vested by law in a stockholder. See Market St. Ry. Co. v. Hellman, 109 Cal. 571, 589, 42 Pac. 225. The case is in no way analogous to that of a mere nominal holder, or "dummy." At the date of the mortgage it would not have been possible for the plaintiff or Van Ee to show, as against Hodson, the right to a transfer of a single share.

We need not here consider whether section 312 of the Civil Code is applicable to the proceedings of foreign corporations. Even if the section be intended to prescribe a rule for the management of California corporations merely, it may well be looked to for aid in ascertaining the legislative intent in the enactment of the statute of 1880, which, as has been held, governed foreign as well as domestic mining corporations in their dealings with mining property situate in California. Pekin M., etc., Co. v. Kennedy, supra; Williams v. Gaylord, supra. The word "stockholder" is used in both the Code section and the act of 1880, and the interpretation given to the word in the one enactment is presumably applicable to the other. If we were to hold that section 312 has no application here, the question would be, simply, whether Hodson was a stockholder. We have already stated our reasons for concluding that he was a "bona fide stockholder." A fortiori, he was, if the requirement of bona fides be omitted, a "holder" of two-thirds of the stock.

The contention that, under the act of 1880, a ratification must be made by the persons owning the ultimate beneficial ownership in two-thirds of the stock, seems to be founded on a statement in Lacy v. Gunn, supra. The opinion in that case contains this declaration: "It is the actual owners of the stock, and not those who appear to be so, who are under the protection of the statute, and whose ratification or consent is required." This expression, like all declarations made by a court in disposing of a controversy, is to be read in the light of the facts considered. The court was examining the validity of a transfer by a mining corporation of mining property, assented to by the actual owners of two-thirds of the stock. The transfer was upheld on the theory that, as the act was for the benefit of stockholders, the purpose of the law was satisfied if the transfer had the approval of the requisite proportion of those really having the beneficial interest in the stock. This was a liberal and broad construction, adopted with a view to the establishment of rights acquired and claimed in good faith. But there was no intention of declaring that the stockholders and the corporation would not be equally bound by the ratification of those whom they had invested with the actual legal title to the stock. The latter are the persons authorized, under the statute, to act in the matter, although, in favor of parties claiming under the corporate conveyance, the courts may look behind the apparent ownership and sustain a ratification made by the beneficial owners.

It follows, from these views, that the findings against the validity of the mortgage or deed of trust are not sustained by the evidence. These findings furnish support for the conclusions that the cross-complainants are not entitled to a foreclosure, and that they are entitled to a money judgment for the amount actually advanced. If the mortgage be valid, the judgment must direct a sale for the amount of the debentures and the charges secured.

The decree must, therefore, so far as it embodies these conclusions, be reversed, as must the order denying the cross-complainants' motion for a new trial. It is urged that, instead of awarding a new trial, this court should direct the court below to enter a decree of foreclosure on the findings made. This claim is put upon the ground that, regardless of the alleged want of ratification of the mortgage, and its consequent invalidity, the corporation is estopped, under the facts found, to deny the binding effect of its attempted act, under which it received and has retained large sums. If the mortgage in fact lacked the assent of the requisite number of stockholders, we think the doctrine of estoppel cannot be applied so as to give the instrument validity. The statute of 1880 makes the stockholders "a component part of the power to make a mortgage effective." Curtin v. Salmon River, etc., Co., 130 Cal. 345, 351, 62 Pac. 552, 555, 80 Am. St. Rep. 132. If the directors could, without the assent of the stockholders, so act as to bind the corporation in matters in which such assent is made necessary, the purpose of the statute, i. e., the protection of stockholders, would be nullified. We do not say that there may not be circumstances under which the stockholders could be held estopped to rely on the want of ratification, but merely that such estoppel cannot be predicated upon the acts of the corporation or the directors alone. The finding upon which appellants rely relates solely to the conduct of the corporation.

A further ground is urged by cross-complainants for directing a judgment in their favor, to wit, that the pleadings admit that Hodson was the record holder of more than two-thirds of the stock and that he did acts amounting to a ratification of the mortgage. It would consume too much space to go into an elaborate analysis of the pleadings. Suffice it to say that we think the answers to the cross-complaint were clearly intended to raise issues on these points and that an unduly strict construction would be required to justify an order of judgment based upon the theory that there were no such issues. Nor do we think the findings on this point such as to justify a judgment of foreclosure.

The respondents suggest, as a ground for upholding the judgment in as far as it denies foreclosure, the point that the mortgage should be held invalid for the reason that it was executed to Hodson as one of the trustees and that Hodson himself was a director whose vote was necessary to authorize the execution of the mortgage. A sufficient answer to the point is that this defense was not within the issues. All of the pleadings in effect admitted the authorization and making of the deed of trust and based their objections to its validity solely on the ground that it did not have the ratification of the stockholders as required by the statute of 1880.

The third appeal (No. 1,764) may be briefly disposed of. That is the appeal of the British corporation and of Van Ee from that part of the judgment whereby the cross-complainants recover from the British corporation the amount of the advances made upon the faith of the debentures. It will be unnecessary to refer specifically to the grounds upon which this appeal is based. As we have shown in discussing the appeal of the cross-complainants (No. 1,744), this part of the judgment must fall with the granting of a new trial upon the issues affecting the foreclosure of the mortgage.

Accordingly, the following orders will be entered upon the respective appeals:

In No. 1,744: The portions of the judgment appealed from and the order denying a new trial are reversed.

In No. 1,750: The portions of the judgment appealed from are affirmed.

In No. 1,764: The portions of the judgment appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

13 Cal. App. 498

TUOLUMNE WATER POWER CO. v. FREDERICK. (Civ. 712.)

(Court of Appeal, First District, California. May 30, 1910. Rehearing Denied July 28, 1910.)

1. Eminent Domain (§ 191*)—Acquisition of Right of Way for Electric Power Line—Complaint—Sufficiency.

Under Code Civ. Proc. §§ 1238, 1241, 1244, authorizing the exercise of the right of eminent domain for electric power, heat, and light lines, and providing that the complaint must contain a statement of the right of plaintiff, a complaint in an action to condemn a right of way for an electric power line, which avers that plaintiff is a corporation organized to furnish electric power, light, and heat to municipalities and the inhabitants thereof, that it seeks to condemn a right of way for the construction and operation of an electric power line to transmit electric power for public sale, and that plaintiff is in charge of the public use and the right to construct and maintain an electric power line, shows that plaintiff seeks a right of way for an electric power line for the transmission of electricity for sale to municipalities and the inhabitants thereof, and that the right of way is sought for a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509–518; Dec. Dig. § 191.*]

2. Eminent Domain (§ 66*)—Public Uses—Judicial Question.

The question of what is a public use for which land may be taken, is a judicial question, though in doubtful cases the legislative declaration on the subject is of great persuasive force.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165–167; Dec. Dig. § 66.*]

3. Eminent Domain (§ 169*)—Acquisition of Right of Way for Electric Power Line.

A corporation organized to furnish electric power, heat, and light to municipalities and the inhabitants thereof, and to acquire a right of way for the transmission of electric power, may institute proceedings to condemn land for a right of way, without first making contracts to furnish electric power, or obtaining a franchise from a municipality, or making a contract therewith.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 461; Dec. Dig. § 169.*]

4. Eminent Domain (§ 196*)—Evidence—Admissibility.

Where, in a proceeding to condemn a right of way for an electric power line, a civil engineer described the course of the line, the general nature of the towers desired to be erected, and that after the line entered a county it ran on a private line, with the exception of crossing over county roads, the question as to how many county roads the line crossed over was immaterial, on the right to condemn the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529–534; Dec. Dig. § 196.*]

5. Appeal and Error (§ 971*)—Review—Discretion of Court—Examination of Witnesses.

The extent to which a cross-examination may be carried rests largely in the discretion of the trial court, and to predicate error on the refusal to allow a question on cross-examination, it must appear that the materiality of the evidence sought is so evident, that injury will be presumed from its exclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3854; Dec. Dig. § 971.*]

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6. ELECTRICITY (§ 9*)—ACQUISITION OF RIGHT OF WAY FOR ELECTRIC POWER LINE.

A corporation seeking to establish and maintain an electric power line to furnish electric power, heat, and light to municipalities and inhabitants thereof, has the right to construct its line in the manner and place it deems best, provided it uses the most available route, and provided the location is made in a manner most compatible with the greatest public good and least private injury; and the fact that it has not so located its line can only be established by clear and convincing proof.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 4; Dec. Dig. § 9.*]

7. EMINENT DOMAIN (§ 200*)—COMPENSATION—BURDEN OF PROOF.

In proceedings to condemn a right of way for an electric power line, the burden is on the owner of the land to prove the damages he will sustain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540; Dec. Dig. § 200.*]

8. EMINENT DOMAIN (§ 222*)—COMPENSATION—INSTRUCTIONS.

An instruction in proceedings to condemn a right of way for an electric power line, that the burden of proof as to the value of the lands sought to be taken is on the owner, and unless he shows that he will be damaged by the erection of the towers and transmission line as contemplated, he may recover only nominal damages, is not erroneous, as suggesting that he is entitled to nominal damages only.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Tuolumne Water Power Company against W. A. Frederick. From a judgment for plaintiff, defendant appeals. Affirmed.

F. J. Castelhun, for appellant. Chickering & Gregory, for respondent.

COOPER, P. J. This action was brought to condemn a right of way over defendant's lands for an electric power line. The case was tried with the aid of a jury, and a verdict rendered fixing the amount of defendant's damages at $450. Judgment was accordingly entered in favor of plaintiff as prayed and fixing the damages for the right of way at the sum so found by the jury. Defendant prosecutes this appeal from the judgment and order.

The first contention made by defendant is that the court erred in overruling his demurrer to the complaint. His argument is that the complaint does not show that the use for which it is sought to condemn the property is a public use. The Code of Civil Procedure provides (section 1238) as follows: "Subject to the provision of this title the right of eminent domain may be exercised in behalf of the following public uses. * * *

"12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating, or power purposes to individuals or corporations, together with lands, buildings, and all other improvements in or upon which to erect, install, place, use, or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

"13. Electric-power lines, electric-heat lines; and electric light, heat and power lines."

Section 1241 of said Code provides that before the property can be taken it must appear, first, that the use to which it is to be applied is a use authorized by law; second, that the taking is necessary to such use.

In condemnation proceedings the essentials required in the complaint are set forth in Code of Civil Procedure, section 1244, and after requiring that the name of the corporation or person in charge of the public use must be stated, it is provided that the complaint must contain "a statement of the right of plaintiff." This phrase evidently means a statement of the facts sufficient to show that the plaintiff is authorized to maintain the condemnation suit.

The complaint in this case contains the name of the corporation in charge of the alleged public use, and states that the corporation was organized and its purpose among other things was "to furnish electric power, light, and heat to counties, cities, villages and towns, and the inhabitants thereof, and to acquire by right of eminent domain rights of way over lands for the transmission of electric energy and power." The complaint further avers that the plaintiff seeks to condemn the right of way for a public use, to wit, "the construction, maintenance, and operation of an electric power line for the transmission of electric energy or power for public sale, which said electric power line is to be of the character described in this complaint." This is followed by a statement that the plaintiff is in charge of said public use and the right to construct, operate, and maintain an electric power line for such purpose, and to acquire and maintain a right of way for the same. While the complaint is certainly not a model as to the statement of facts showing that the use is a public use, yet it is sufficient when attacked by a general demurrer. It is evident the pleader intended to allege that its purpose was to engage in the operation of an electric power line for the transmission of electric energy and power for sale to the public generally; and although the words "for public sale" are used, we must look to all the allegations of the complaint in order to arrive at the solution of the question as to whether or not it states facts sufficient to constitute a cause of action. Particularly is this so in the face of the fact that the defendant demurred to the complaint upon five special grounds, but did not intimate in either of the grounds that it could not be ascertained from the complaint that the use for which the right of way was sought was a public use.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The term "public use" is a term of indefinite signification. The statute authorizes the right of eminent domain in behalf of certain public uses, among which are included "electric power lines." While what is a public use is a judicial question, yet in a doubtful case the legislative declaration is of great persuasive force. Lindsay I. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802; Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725. It fairly appears from the complaint in this case that the plaintiff sought the right of way for an electric power line for the transmission of electricity, to be sold to the public to furnish power, light, and heat to counties, cities, villages, and towns, and the inhabitants thereof. Clearly such are public uses, and are expressly so declared to be in the statute.

The main argument as to the special demurrer is that it does not appear and cannot be ascertained from the complaint that the plaintiff is under any contractual obligation to furnish electricity to any person for any purpose, or that it has a franchise to furnish electricity to any counties, cities, or villages through which the proposed line is to run. It is not necessary that the plaintiff should have made a contract to furnish electric power before it had installed its plant and procured the right of way for its line. To prevent the plaintiff from exercising the right of eminent domain until it shall have obtained a franchise from some city or village or made a contract to furnish its product to some city or village, would be to deprive it of the means by which it would be enabled to construct its works and put in a position to make a contract. Minn. Canal Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105. The Legislature, representing the people, has provided that the right of eminent domain may be exercised for electric power lines for public use. At the present day the use of electric power, not only for lighting streets and private houses, but also for the purpose of moving railroad cars, street cars, machinery for manufacturing purposes, and for use in mines and smelters, has become so general that it is almost a necessity of our modern civilization. The courts would not be aiding the great enterprises of the West by adopting a narrow and restricted view of the meaning of the words "public use," as used by the Legislature and in our Constitution. The evidence is sufficient to show that the plaintiff desires to construct its line for public and not for private use. The jury were fully and fairly instructed as to the various matters to be considered in arriving at the amount of damage to defendant, and their verdict upon the evidence is conclusive.

Appellant in his brief enumerates many alleged errors in the rulings of the court upon the admission or rejection of evidence which he characterizes as "glaring errors." The first one of these alleged errors—and presumably the most important in his estimation—is as to a question asked of the witness Zoffmann. Zoffmann testified in direct examination that he was a surveyor and civil engineer; that he had been engaged in running the electric line for plaintiff. He then described the point where the line commences and its general course, and stated that in its course it crosses the counties of Calaveras, Stanislaus, San Joaquin, and the lower portion of Alameda county, and runs to the Mission San José. He then described the general nature of the towers desired to be erected for the purpose of the power line, and particularly the towers desired to be erected on the defendant's land, and the distance of the proposed cable to the ground as it would pass over defendant's land. He then testified in cross-examination, in answer to questions asked by defendant's counsel, that after the line enters Alameda county it runs entirely on a private line, with the exception of crossing over county roads. The defendant's counsel then asked the witness the question: "How many county roads does it cross over?" The question was objected to upon the ground that it was incompetent, irrelevant, and immaterial, and the judge of the trial court sustained the objection, at the same time stating that he did not see the materiality of it. Like the trial judge, we fail to see how it was material to the defendant as to the number of county roads the plaintiff's line crossed. It could not aid in the solution of the question before the court as to the plaintiff's right to condemn the right of way over defendant's land, and at the places where its proposed line was to cross the defendant's land, by showing that it crossed many public roads at other places than on defendant's land. Counsel has not even given us a reason why the evidence sought was material. He contents himself with saying, "Defendant submits that the question was proper cross-examination." It is elementary that the cross-examination of a witness, and the extent to which such cross-examination may be carried, rest largely in the discretion of the trial court, and that in order to predicate error upon the refusal to allow a question to be asked on such cross-examination, it must appear that the evidence sought was relevant and material; and not only this, but that its materiality is so evident that injury will be presumed from its exclusion. The other objections and alleged errors, while several in number, are of similar import. It is sufficient to say that we have examined them, and find none of them of sufficient importance to justify discussion.

Complaint is made that the court instructed the jury to the effect that the plaintiff under the law has the right to construct its line in the manner and place it deems best, provided it uses the most available route, and provided that the location is made in a manner most compatible with the greatest public good and the least private injury; and that in case it is claimed that the plaintiff has not so located its line, the proof must be clear and convincing. In our opinion the rule is correctly stated in the instruction. It is in almost the identical language used by the Chief Justice in City of Pasadena v. Stimson, 91 Cal. 255, 27 Pac. 604, where it is said: "The state, or its agents in charge of a public use, must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. Code Civ. Proc. § 1242. Exercising as they do a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of discretion, the propriety of his selection ought not to be questioned; for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them. And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing; for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because whatever location was proposed it could be defeated by showing another just as good." See, further, San Francisco & S. J. V. Ry. Co. v. Leviston, 134 Cal. 413, 66 Pac. 473; Kansas Ry. Co. v. Northwestern Coal Co., 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717.

Complaint is made of the eleventh instruction given by the court to the jury at the plaintiff's request. The instruction is as follows: "I charge you that the burden of proof as to the value of the lands of defendant was upon the defendant. Unless he has shown you by sufficient proof that he will be damaged by the erection of said towers and transmission line as in said complaint contained, then that he is entitled only to a nominal damage at your hands." The rule was correctly stated to the effect that the burden of proof was upon the defendant to prove the damages he would sustain. The court did not, as suggested by counsel, tell the jury that the plaintiff was entitled to only nominal damages. The instructions elsewhere fully covered the subject, and stated to the jury the matters and things to be considered by them in determining the amount of damages to which the defendant would be entitled. And not only this, but by their verdict it is shown that they gave the defendant substantial and not nominal damages.

Other instructions are criticised, but we find no substantial error in the giving or refusing any instruction to which our attention is called. The court seems to have given to the jury a full and fair statement of the law applicable to the issues and the questions which were before the court.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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13 Cal. App. 514

STATE BOARD OF HEALTH v. BOARD OF TRUSTEES OF WATSONVILLE SCHOOL DIST. OF SANTA CRUZ COUNTY et al. (Civ. 813.)

(Court of Appeal, First District, California. May 30, 1910. Rehearing Denied July 25, 1910.)

1. MANDAMUS (§ 163*) — PLEADING — DEMURRER.

The petition for writ of mandate must, on demurrer thereto, be taken as true.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 343; Dec. Dig. § 163.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 158*)—PUPILS — VACCINATION — STATUTES — CONSTITUTIONALITY.

Act Feb. 20, 1889 (St. 1889, c. 24), providing for the exclusion from common schools of unvaccinated children, is within the police power of the Legislature, and is constitutional.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 329; Dec. Dig. § 158.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 158*)—PUPILS — VACCINATION — STATUTES — CONSTRUCTION.

Act Feb. 20, 1889 (St. 1889, c. 24), providing that the trustees of the several common school districts, etc., are directed to exclude from the benefits of the common schools therein any child or person who has not been vaccinated, etc., is mandatory and not directory.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 329; Dec. Dig. § 158.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 158*)—PUPILS—VACCINATION—STATUTES—REPEAL.

Act Feb. 20, 1889 (St. 1889, c. 24), providing for vaccination of school children was not repealed by the compulsory education act (St. 1905, c. 333).

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 158.*]

5. STATUTES (§ 158*)—REPEAL BY IMPLICATION.

Repeals of statutes by implication are not favored.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Petition by the State Board of Health of the State of California for writ of mandate against the Board of Trustees of Watsonville School District of Santa Cruz County and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

J. E. Gardner, for appellant. James A. Hall, for respondents.

COOPER, P. J. This case comes here on appeal from a judgment of the superior court of Santa Cruz county, sustaining the demurrer of the defendants to plaintiff's petition for a writ of mandate, and directing the entry of judgment for the defendants, and that the plaintiff's petition herein be dismissed. The plaintiff is the state board of health, and the defendants are the trustees of Watsonville school district. The petition must be taken as true for the purposes of this decision. It appears therefrom that the petitioner has demanded, and that the defendants as such trustees have at all times refused, and now refuse, to exclude from the benefit of the common schools of said district all unvaccinated children residing therein. It is claimed to be the duty of defendants, as trustees, by virtue of their office, to exclude from said school all school children who have not been vaccinated, under an act of the Legislature entitled "An act to encourage and provide for general vaccination in the state of California," approved February 20, 1889 (St. 1889, p. 32). It is contended by the said school trustees that the said act is unconstitutional and void for the reason that it is an abuse of the police power of the state.

We have no doubt as to the constitutionality of the act. The Legislature must necessarily be the judge as to legislation under the police power for the public health and for the purpose of preventing the spread of contagious diseases, the means used to prevent such spread, and the diseases regarded as contagious. It is invested with a large discretion within the scope of its powers, which discretion cannot be controlled by the courts except in cases where such discretion has been plainly abused. Its acts are the acts of the people; and as the Legislature is selected by the people for the purpose of enacting legislation, if an act is oppressive and unjust, the remedy is with the people through the Legislature. It is not for the courts to interfere, or in any way to set up their judgment against that of the Legislature, as to the general police powers of the state. It is sufficient for the purposes of this decision that the act has been held constitutional in Abeel v. Clark, 84 Cal. 227, 24 Pac. 383, and in French v. Davidson, 143 Cal. 659, 77 Pac. 663.

The statute is not directory, but mandatory. It provides: "The trustees of the several common school districts in this state and boards of common school government in the several cities and towns are directed to exclude from the benefits of the common schools therein any child or any person who has not been vaccinated, until such time when such child or person shall be successfully vaccinated. * * *" It is the plain duty of the trustees, and they are directed by the express terms of the statute, to exclude from the public schools any child or person who has not been vaccinated. Until the child has been vaccinated he must be excluded from the schools. If the trustees could use their discretion, and of their own will at times exclude and at other times admit to the schools children who have not been vaccinated, or if the trustees could exclude some children and admit others, the law would be uncertain and of little value. It was never the intention under the terms of the act that the board of trustees should possess such discretion. By its terms all are to be excluded, and the exclusion is to continue as to all until they have complied with the law. The duty devolves upon defendants by virtue of their office to exclude such children. They must obey and not question the law. They are not compelled to hold their respective offices as such trustees; but while in office it is their duty, and the duty of each and every one of them, to see that the law is enforced, and this whether the law is popular or unpopular, or whether they believe in the vaccination of children or otherwise. The law having been passed by the people, it is the duty of the trustees and of all persons to obey it until it is repealed.

The act was not repealed by the subsequent compulsory education act (St. 1905, p. 388). The latter act is not inconsistent with the former. Repeals by implication are not favored. The parents of children are compelled to send them to school under the latter act, but they must comply with the law as to having them vaccinated in case they desire to avail themselves of the privilege of sending them to the common school. There is nothing in the latter act to show that it was intended to supersede or do away with or in any way modify the previous act.

The judgment is reversed, and the court below directed to overrule the demurrer.

We concur: HALL, J.; KERRIGAN, J.

13 Cal. App. 564

Ex parte MILLER. (Cr. 119.)

(Court of Appeal, Third District, California. June 6, 1910.)

1. Licenses (§ 40*)—Failure to Obtain—Criminal Prosecutions—"Law."

Though an ordinance of a county requiring one engaged in the business of raising cattle to pay a license fee does not denounce failure to obtain the license as a crime, one so failing is subject to prosecution by virtue of Pen. Code, § 435, declaring guilty of a misdemeanor every person who commences or carries on any business without procuring a license required by "any law of this state" for the carrying on of the same; an ordinance being a law within such code provision.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 40.*

For other definitions, see Words and Phrases, vol. 5, pp. 4014–4023; vol. 8, p. 7701.]

2. Licenses (§ 7*)—Regulation of Business—Fees.

The license fee, imposed by a county ordinance on the business of raising cattle, of seven cents for each head of cattle, the entire tax in the county for any year not amounting to over $700, cannot be held unreasonable, as against the presumption to the contrary, in view of the probable expense to the county that may be caused by the business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

3. Habeas Corpus (§ 11*)—Voluntary Restraint.

Where, even if at the very moment petitioner applied for the writ, he was in the custody of the officer, it was only momentary and voluntary, and invited for the purpose of obtaining a decision as to the validity of an ordinance, habeas corpus will not lie.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 12; Dec. Dig. § 11.*]

Application of Dave Miller for writ of habeas corpus. Writ discharged and proceeding dismissed.

Edward F. Treadwell, for appellant. Pat. R. Parker, for respondent.

BURNETT, J. The petitioner was charged in the justice court of Bridgeport township, county of Mono, with misdemeanor in having commenced and carried on within said county "the business of raising, grazing, herding, and pasturing cattle without having taken out or procured a license therefor, as required by an ordinance of the board of supervisors of said county."

The said ordinance requires on the part of every one engaged in such business the payment to the tax collector of the sum of seven cents for each cow, heifer, bull, or bullock, owned by, in the possession or under the control of, such person and used in such business in Mono county.

It is claimed that petitioner is entitled to his discharge for two reasons: First, the ordinance does not provide that the act complained of shall be a crime; and secondly, the ordinance is "unreasonable, unconstitutional, and void, and was not passed for the purpose of regulating the business therein referred to, but was passed solely for the purpose of raising revenue."

The ordinance does indeed omit to denounce as a crime the failure to secure said license, but petitioner was amenable to prosecution by virtue of section 435 of the Penal Code, providing that "every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." It has been held by the Supreme Court that "any law of this state" includes ordinances of counties and municipalities. Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Bagshaw, 152 Cal. 701, 93 Pac. 864.

The second ground of attack is equally untenable. It is well settled that the "police power, the power to make laws to secure the comfort, convenience, peace, and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested." Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. "The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere, unless it clearly appears that the Legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation." County of Plumas v. Wheeler, 149 Cal. 762, 87 Pac. 911. "It is always a judicial question whether a particular regulation of the right to pursue a useful business is a valid exercise of the police power, though the authority of the courts to declare any regulation invalid will be exercised with the utmost caution. An ordinance must be clearly shown by the attacking party to be obnoxious and unreasonable to authorize the interference of the court." In re McCoy, 10 Cal. App. 116, 101 Pac. 419.

And, as stated in County of Plumas v. Wheeler, supra: "It is to be remembered that the presumption is in favor of the reasonableness of the charge, and that the county is not limited to the exact amount of the expense, as it may subsequently develop. 'The municipality is at liberty to make the charge large enough to cover any reasonable, anticipated expense.' Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160 [23 Sup. Ct. 817, 47 L. Ed. 995]. What expense the county will be put to in the enforcement of the ordinance cannot be determined from an inspection of the ordinance itself. * * * To arrive at the amount of such expense it would be necessary to consider the topographical conditions of the county, the extent of the industry as practiced there, the effect of the industry on the roads, trails and other public property of the county, the probable cost of prosecutions for violations of the ordinance and any other matters having a reasonable tendency to indicate the cost to which the county would be subjected by the business sought to be regulated." It was there held that a tax of 10 cents per head upon sheep and lambs, in the absence of evidence as to cost of regulation, could not be adjudged unreasonable.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Some evidence was taken in the matter before us, but it cannot be said that it clearly appears therefrom that the tax in question is unreasonable and oppressive. The amount realized from the license is comparatively small, and the showing made by petitioner falls far short of that considered by this court in the McCoy Case, supra. The amount of the tax upon all the owners of the cattle does not exceed—so it is admitted—the sum of $700 a year, and some years it is much less. This certainly appears quite reasonable in view of the probable expense to the county that may be caused by the business, and while the evidence as to this is unsatisfactory and indefinite, it cannot be said that the presumption is overcome that said expense may approximate the amount of the tax, or that the board of supervisors was not entirely justified in concluding that the tax was proper to meet "a reasonable, anticipated expense."

But there is another reason why the application should be denied, and that is found in the return of the sheriff "that on November 1, 1909, the said Dave Miller did come to me as said sheriff, and state that he desired to surrender himself to my custody and release his bail, and whatever custody or control I now have is solely under this surrender. Upon the said Dave Miller thus surrendering himself I did not assume actual custody or control of the person of the said petitioner, and he was permitted his own recognizance, and has never by me been in restraint or jeopardy." It thus appears that, if at the very moment the petitioner applied for the writ he was in the custody of the officer, it was only momentary and voluntary, and invited for the purpose of obtaining a decision as to the validity of said ordinance. This practice is said to be not within the spirit of the habeas corpus act, and not to be countenanced by the courts. In the case of In re Gow, 139 Cal. 243, 73 Pac. 145, the practice is condemned in the following language: "Our conclusion is that such a practice ought not to be countenanced, and hereafter the court will make strict inquiry in this class of cases whether the alleged imprisonment is actual and involuntary, and if it is found to be, as in this case, a merely nominal restraint, voluntarily submitted to for the purpose of making a case, the proceeding will be dismissed."

For the foregoing reasons, the writ is discharged and the proceeding dismissed.

We concur: CHIPMAN, P. J.; HART, J.

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13 Cal. App. 435

SIRCH ELECTRICAL & TESTING LABORATORIES v. GARBUTT. (Civ. 756.)

(Court of Appeal, Second District, California. May 17, 1910.)

1. CONTRACTS (§ 322*)—BREACH—KNOWLEDGE OF OTHER PARTY.

Evidence *held* to support a finding that one who had contracted to have an electrical plant installed in a boat was fully informed that the plant had been improperly installed, acquiesced in all delays in the installment thereof, and with knowledge of such facts made a payment to the contractor.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.*]

2. CONTRACTS (§ 305*)—BREACH—WAIVER BY ACCEPTANCE OF WORK.

Where one, hiring work done and material furnished under contract, accepts them as in accordance with the contract and pays therefor, with full knowledge that the work and materials do not comply with the contract, he waives the right to seek damages therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1467–1475; Dec. Dig. § 305.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Sirch Electrical & Testing Laboratories against F. A. Garbutt. Judgment for defendant on the complaint, and for plaintiff on the counterclaim, and defendant appeals. Affirmed.

J. L. Murphey and Murphey & Poplin, for appellant. C. S. Tappan, for respondent.

TAGGART, J. Action to recover balance due on contract for constructing and installing an electric lighting and heating plant, with counterclaim for damages for failure to comply with contract. Judgment was for defendant for his costs on the complaint, and for plaintiff on the counterclaim. Defendant appeals from that part of the judgment which denies him relief on his counterclaim, and the record is presented under the alternative method.

The plaintiff agreed to construct, on a boat belonging to defendant, an electrical plant, to be comprised of engine, generator, switchboard, storage batteries, electric cooking range, searchlight, and the necessary wiring and equipment to operate the same, and to perform the labor necessary to install the plant, and do the engineering required for and the superintending of the installation of said plant, for which defendant was to pay the actual cost of material and apparatus purchased and manufactured, 75 cents per hour for labor in installing the plant, transportation of workmen from Los Angeles to San Pedro, and their board and lodging at the latter place if they remained there while engaged in the work, and for engineering and superintending 15 per cent. of the actual cost of the plant, such cost in any event to be not less than $2,500 for this purpose. The complaint alleges that plaintiff expended $3,700.81; that there was additional apparatus purchased by it in the sum of $320.39 for use in the plant, which was billed to defendant, upon which it is entitled to a commission; that there have been paid on said items, respectively, $3,437.64 on account of materials, and $200 on account of commissions, leaving an unpaid balance of $666.72 due from defendant to plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The answer denies that the materials were of any greater value than the sum paid by defendant to plaintiff, and denies any indebtedness on account of commissions, for the reason that the contract was not complied with by plaintiff and no commissions earned. The counterclaim of defendant of $5,754.03 is made up of the $3,437.64 paid to plaintiff for materials, which it is contended are lost to defendant, because the plant is valueless and useless to him, except that portion thereof which may be used as a lighting plant which is of the value of $1,000, and certain fixtures, air compressor, and searchlight, of the value of $320.39, and the further alleged items of $1,000 damages for loss of use of the boat for two months, owing to delay of plaintiff with the work done; $500 damages for loss of use of the plant for six months, and $500 for completion of installation of parts of the plant left unfinished by plaintiff.

The trial court found: The contract to have been made as alleged; that plaintiff pursuant thereto purchased material and apparatus and performed labor to the value of $3,610.98, but did not complete said plant in accordance with the contract; that "defendant had paid to plaintiff" said sum ($3,610.98) "with full knowledge that said contract had not been carried out in accordance with the agreement entered into between plaintiff and defendant"; * * * "that by reason of said failure to complete said contract" plaintiff "is not entitled to recover any further or additional remuneration for said services rendered, other than said sum of $3,610.98, paid by defendant to plaintiff under the terms of said contract"; that defendant was not damaged in any sum whatever by reason of the delays in installing the plant; and that defendant is not indebted to plaintiff in any sum under the contract. The two findings, however, as to which appellant principally urges error, are as follows: "(6) That defendant was fully informed of the fact that said plant had been improperly installed by plaintiff, and defendant acquiesced in any and all delays in the installation of said plant, and, with full knowledge of said facts, the defendant paid said sum of $3,610.98 to plaintiff." "(9) The court further finds that, in respect to the counterclaim of defendant against plaintiff, any damage suffered by reason of the nonperformance of said contract by plaintiff has been waived by reason of defendant, with full knowledge of said facts, having paid for and accepted said work."

We are of opinion that there is evidence in the record to sustain these findings. While defendant testified that he was not an electrical expert, he further testified that, after he became suspicious of the electrical ability of plaintiff's supervising manager, Mr. Sirch, he consulted experts and took their advice in the matter; that he was "on the job" generally six or seven times a week, always once a week, for two or three hours; and that, at the second visit of Sirch to the boat, he (Sirch) was guilty of such manifest absurdities in his attempts to take measurements of the boat for the purpose of installing the plant as caused the defendant and his construction foreman to look at each other and smile. This was before any work was done on the contract. The witness Sirch also testified that defendant personally directed the designing, the placing of the conduits, and their quality, and passed upon every step as the work progressed, including the wiring of the circuits, and how they would have to be, and the location of each piece of machinery. "He instructed what he wanted there, and I did what he said." The bill of particulars rendered by plaintiff shows services performed and material furnished between April and December, 1907, principally prior to September; and the 14 checks of defendant introduced as evidence of payments made by him to plaintiff for the work done under the contract bore dates running from April 29, 1907, to December 21, 1907. This would seem to support finding 6 without further examination of the record. That the later correspondence between the parties contained charges of misrepresentation and bad faith made by each to the other is not evidence that defendant did not accept the work as done by plaintiff. It was not necessary that the entire work be completed before there could be an acceptance of any of the work by the defendant. There was evidence to sustain the finding of the court to this effect.

The contention of appellant that the decision is against law is equally untenable. The defendant, with full knowledge of all the defects in the work, accepted and paid for it, and he thereby waived his claim for damages. This is not a case in which judgment has been given on a quantum valebant or quantum meruit count, but one in which the court has found that goods and labor to a certain value have been furnished under the contract and so accepted by defendant, notwithstanding they were not up to the standard fixed by the contract. In other words, there has been an extinction of the obligation of plaintiff to make good the breach of contract of which it was guilty by an acceptance of the work by defendant, which is in the nature of an accord and satisfaction. The court did not recognize the plaintiff's right to retain the amount received by it from defendant on the ground that the goods furnished and services rendered were reasonably worth that amount, but because defendant accepted them in compliance with the contract and paid that amount for them. There is no common count in the complaint.

The residue of the damage claim of defendant, which covered all but the matters which the court found were accepted, consisted of damages for delay, repairs, etc., and all these were negatived by the court's findings.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. App. 561

CROUSE-PROUTY et al. v. ROGERS et al.

(Civ. 825.)

(Court of Appeal, Second District, California. June 6, 1910. Rehearing Denied Aug. 4, 1910.)

1. Appeal and Error (§ 977*)—Discretion of Trial Court—Motion for New Trial.

Where a new trial is asked for insufficiency of evidence, newly discovered evidence embodied in affidavits used on the hearing of the motion, and errors of law occurring at the trial, and the order granting the motion is general, the ruling will not be disturbed on appeal, in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

2. New Trial (§ 68*)—Grounds—Discretion of Court.

Where the evidence, including newly discovered evidence, tended to establish facts contrary to those found by the court, the granting of a new trial was not an abuse of discretion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135–140; Dec. Dig. § 68.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Carol Crouse-Prouty and another against Julia A. N. Rogers and another. There was judgment for defendants, and from an order granting a new trial they appeal. Affirmed.

Haas, Garrett & Dunnigan, for appellants. O. B. Carter and Schweitzer & Hutton, for respondents.

SHAW, J. Action to quiet title. Judgment went for defendants; plaintiffs moved for a new trial, which motion was granted, and defendants prosecute this appeal from the order granting the same.

The judgment was based upon certain findings of the court to the effect that the purchase price of the lot in controversy was not paid to Glassell pursuant to the contract; that the deed to plaintiff Carol Crouse-Prouty did not describe the land set out in the complaint; that at the time defendant Julia Nolan Rogers received the deed to the lot she had no notice, either actual or constructive, of the deed from the corporation to plaintiff, and that plaintiff had no claim of right, title, or interest in and to the lot in question, as to all of which findings the evidence was conflicting.

The grounds of the motion for a new trial were insufficiency of the evidence to justify the decision, newly discovered evidence embodied in affidavits used upon the hearing of the motion, and errors of law occurring at the trial. In such cases, where the order, as here, is general, this court will not disturb the ruling of the trial court, unless the making of the order constitutes an abuse of discretion. Brooks v. San Francisco, etc., Ry. Co., 110 Cal. 178, 42 Pac. 570; Cole v. Wilcox, 99 Cal. 552, 34 Pac. 114; Von Schroeder v. Spreckels, 147 Cal. 186, 81 Pac. 515.

On December 26, 1885, Andrew Glassell, who was the common source of title, entered into a contract with Ralph and W. E. Rogers, whereby he agreed to sell and convey to them a large tract of land, which included the lot in controversy. On March 24, 1886, Ralph and W. E. Rogers transferred this agreement for purchase to a corporation known as the Garvanza Land Company, which, under the terms of the agreement, caused a portion of the land to be subdivided into lots and blocks and designated it as "Garvanza Addition No. 1," map of which was duly recorded. On June 19, 1886, the corporation, for a valuable consideration, executed a deed, which was duly recorded, to plaintiff Carol Crouse-Prouty, whereby it conveyed to her the lot in question. After the execution of this deed by the corporation, and on December 15, 1886, the corporation transferred the Glassell contract to W. F. McClure, who, on the day following, assigned it to Ralph Rogers. On July 12, 1888, Glassell executed a grant deed to Ralph Rogers of the lands described in the said contract, excepting therefrom certain tracts, which excepted lands did not, however, include the lot involved in this action. W. E. Rogers joined Glassell in the execution of this conveyance. This deed recited payment of the consideration mentioned in the contract, and that "this deed is delivered and accepted in satisfaction of the existing obligations of the party of the first part (Glassell) by reason of said contract of December 26, 1885." On January 2, 1892, Ralph Rogers conveyed the lot in question, together with other lands, to one Conway, from whom, by mesne conveyance, defendants acquired whatever title they have to the lot. It thus appears that plaintiffs' claim of title to the lot is by virtue of the deed from the Garvanza Land Company, whose only interest in the lot was by virtue of the Glassell contract, while defendants claim under a subsequent deed made by Ralph Rogers after he had acquired title to the property by a deed executed pursuant to the Glassell contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The record contains evidence which tends to prove that Ralph Rogers organized the Garvanza Land Company as an agency by means whereof to more conveniently conduct the real estate business in which he was then engaged, and make sales of lands and interest owned by him; that he owned practically all of the stock and was president of the corporation; that the other directors and officers, except W. E. Rogers, who for a short period held a comparatively small amount of stock which Ralph subsequently acquired, were mere dummies; that all the persons, including the corporation, in whom the title to the property was at any time vested, held the same without consideration and as trustee for Ralph Rogers; that defendant Julia Nolan Rogers, at the time she claims to have acquired the lot by purchase for a valuable consideration, had actual notice of the conveyance of the lot to plaintiff Carol Crouse-Prouty, and of the fact that she claimed ownership under the deed from the corporation. Moreover, under the facts presented, the court might be justified in holding the record of plaintiff's deed sufficient to impart constructive notice. Rogers v. McCartney, 3 Cal. App. 34, 84 Pac. 215.

This and other evidence on the part of plaintiff, including a number of affidavits of newly discovered evidence presented at the hearing, tended to establish facts contrary to those found by the court, and, by reason of the granting of the motion, it must be presumed that the court arrived at the conclusion upon the hearing thereof that the evidence upon which it based the findings was insufficient, either with or without the newly discovered evidence shown by affidavits, to support them. The record fails to disclose any abuse of discretion on the part of the court in granting the motion.

The order appealed from is therefore affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 440

KOSHLAND et al. v. CHERRY et al.

(Civ. 806.)

(Court of Appeal, Second District, California. May 18, 1910.)

1. Adverse Possession (§ 8*)—Use of Public Alley—Presumptions.

Any user by adjoining owners of a public alley for the purposes of an alley cannot be presumed adverse to the public's right.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 14–57; Dec. Dig. § 8.*]

2. Municipal Corporations (§ 648*) — Streets—Title.

Where land was known as Rose Alley and used as an alley as early as 1862 and so continued until the issuance of a patent by the United States thereto in 1868 to the chairman of the town board of trustees, in trust for the occupants, the trust for which the town trustees took the title was to maintain it as an alley.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.*]

3. Dedication (§ 37*)—Acceptance of Highway by User.

In ascertaining whether or not a highway, park, or public place has been accepted by user, the purpose which the way, park, or place is fitted or intended to serve, must be the standard by which to determine the extent and character of use necessary to constitute an acceptance.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

4. Adverse Possession (§ 8*)—Highways.

An accepted public highway cannot, as a general rule, be destroyed or acquired by adjacent private proprietors by adverse holding.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 14–57; Dec. Dig. § 8.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Marcus S. Koshland and others against F. C. Cherry and others. From a judgment of nonsuit and an order denying a new trial, plaintiffs appeal. Affirmed.

R. V. Bouldin and C. P. Kaetzel, for appellants. Thomas A. Norton and W. H. Spencer, for respondents.

TAGGART, J. Action to restrain city from removing gate erected across alley by plaintiffs. Plaintiffs appeal from judgment of nonsuit and an order denying their motion for a new trial.

Rose alley is a cul de sac about 12 feet wide, extending from Monterey street into block No. 13, of the city of San Luis Obispo, and terminating at the center of a creek in the middle of the block called San Luis Obispo creek. Plaintiffs' property extends along one side of the alley its full length. The wall of a building thereon, commonly known as the Sinsheimer store, follows the line for about one hundred feet of the way and a fence and warehouse, belonging to plaintiffs, the rest of the distance. When the Sinsheimer building was erected, some 23 years before the trial of this action, a gate was built by plaintiffs' predecessors in interest across the alley at the southeast corner of the building, and ever since that time the occupants of the Sinsheimer store have controlled and occupied the rear end of the alley as a part and parcel of the back yard of that building and used the other portion of the alley as a way to and from the rear of their premises. The defendants as the trustees and superintendent of streets of the city threaten to tear down the gate and open up the alley to the use of the public its entire length; hence this action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint alleges ownership and possession, continuous inclosure, use, and occupancy of the premises by plaintiffs and their predecessors in interest "as a back yard and for storage purposes," and the ownership of the gate in question. It further alleges that there never has been a street, alley, road, public or private, across said parcel of land or any part thereof; that no proceedings were ever taken to acquire it for road purposes, no such use made of it, no money expended in its maintenance, and no acceptance of it as a street.

The title papers stipulated as introduced were a deed from one Brizzolara to Sinsheimer, a deed from Sinsheimer and wife to S. Koshland, and a decree of distribution in the estate of S. Koshland, deceased, to plaintiffs, in all of which instruments Rose alley is called for as a boundary line from the center of the creek to Monterey street. It appears by the oral testimony of the chairman of the board of trustees of the town of San Luis Obispo, at the time, that he received the patent from the United States government for the city "in trust for the occupants," about 1868. (The patent was not introduced and no plat or survey of the town or city or the field notes are in the record.) This witness further testified that at the date of the patent he knew the place that is called Rose alley, and "I can't at that time say whether I saw any particular travel over said alley." He was in San Luis Obispo off and on in 1852 and 1853 and made it his permanent residence after 1857. The city clerk, who was the only other witness, testifying to the early user of the land, said he had been familiar with Rose alley since 1862, and that from that time down there had been travel through it. "It was simply used for taking horses in there to water and also delivering goods to the Brizzolara store." That formerly the gate was in the side line of the alley running down from the building on the premises to the center of the creek, instead of across the alley.

It is not quite clear whether appellants rely upon an adverse title to or an easement or way acquired over the premises in question. It is stipulated that no taxes have ever been paid on the premises by plaintiffs or their predecessors in interest, but to this, in support of their theory of an adverse title acquired, they reply that there is no evidence that any taxes have ever been assessed against the property. If this were a public alley, as defendants contend, there would be no assessment of it, and the case may be considered upon this basis. So, also, it must be admitted that any user by plaintiffs and their predecessors of a public alley for the purposes of an alley could not be presumed to be adverse to the public's right. There is no evidence in the case to which application can be made of the authorities cited by appellants, that the title of a city to lots held for sale for building or other private purposes may be lost by adverse possession. Ames v. San Diego, 101 Cal. 390, 35 Pac. 1005; San Francisco v. Straut, 84 Cal. 124, etc., 24 Pac. 814. There is nothing in the record from which it can be determined that Rose alley is a lot or parcel of land "remaining unproved" under section 9 of the act of March 23, 1868 (St. 1867-68, p. 247). Neither can it be said that this alley was one laid out by the Harris and Ward map, or any other map or survey made after the title thereto had vested in the town authorities of San Luis Obispo in trust for the owner, as was the case with the tract considered in Cerf v. Pfleging, 94 Cal. 131, 29 Pac. 417. The meager testimony in the record shows without contradiction that Rose alley was known as such and used for the purposes of an alley as early as 1862, and so continued down to the issuance of the patent by the United States. The trust for which the town trustees took the title to it therefore was to maintain it as an alley.

In ascertaining whether or not a highway, park, or public place has been accepted by user, the purpose which the way, park, or place is fitted or intended to serve must be the standard by which to determine the extent and character of use which constitutes an acceptance. Rose alley was not a thoroughfare, and the uses to which it could be put by the public were, of course, somewhat limited. The taking of horses to water in the creek during the early days was a common use such as the public might have made of it. So also the gaining of access by the people at large to the surrounding property by delivery wagons, as well as to the stream of water. The testimony does not show that this use was limited exclusively to the delivery wagons of the occupants of the premises now owned by plaintiffs. An accepted public highway cannot, as a general rule, be destroyed or acquired by adjacent private proprietors by adverse holding, and there is no element of estoppel here which would bring the case within any exception suggested.

Judgment and order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 395

SALMONSON v. STREIFFER. (Civ. 809.)

(Court of Appeal, Second District, California. May 13, 1910.)

1. APPEARANCE (§ 8*)—WHAT CONSTITUTES—OBJECTION TO SURETIES.

Under Code Civ. Proc. § 1014, providing that a defendant appears when he answers, demurs, or gives plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him, a notice served by defendant's attorneys on plaintiff's attorney that defendant excepted to the sufficiency of plaintiff's sureties on an undertaking given by plaintiff to secure an attachment, and demanding that the sureties justify, did not constitute an appearance obviating the necessity of service in order to confer jurisdiction to render judgment by default, though an appearance by defendant's attorneys in court to move for affirmative relief would constitute such appearance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 40; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 1, pp. 449–451.]

2. APPEARANCE (§ 6*)—FORM—NOTICE.

Under Code Civ. Proc. § 1014, providing that a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance or when an attorney gives notice of appearance for him, written notice is required only when the defendant appears in pro. per.; appearance by attorney not being necessarily required to be in writing.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 20–22; Dec. Dig. § 6.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Isidor Salmonson against L. Streiffer. From an order granting defendant's motion to set aside his default and vacate a judgment against him, plaintiff appeals. Affirmed.

Isidore B. Dockweiler, for appellant. Goldberg & Meily, for respondent.

SHAW, J. Plaintiff appeals from an order of court granting defendant's motion to set aside his default and vacate the judgment rendered thereon against him. Respondent assigns several grounds upon which he insists the record herein is not entitled to be considered upon this appeal for any purpose. We deem it unnecessary to pass upon this contention for the reason that, accepting the record at appellant's valuation thereof, it discloses no error in the ruling of the court.

As appears from the transcript the complaint was filed November 9, 1908. No summons was ever served upon defendant. On November 13, 1908, defendant caused to be served upon plaintiff's attorney a notice as follows: "You and each of you will please take notice that the defendant herein hereby excepts to the sufficiency of the sureties upon the undertaking heretofore given by said plaintiff in said action to secure an attachment therein, and demands that said sureties justify as required by law. Goldberg & Meily, Attorneys for Defendant." On December 14th, in the absence of service or filing of any other documents on behalf of defendant, the clerk entered defendant's default, the ground assigned therefor being that defendant had been regularly served with process and had failed to appear and answer plaintiff's complaint. Judgment followed upon the same date. Thereafter, pursuant to notice duly given, defendant made his motion to set aside the default and vacate the judgment upon the ground that the court never obtained jurisdiction of the person of the defendant. This motion was granted.

Appellant contends that excepting to the sufficiency of the sureties upon the undertaking, notice of which was served upon plaintiff, constituted a voluntary appearance in the action on the part of defendant. We cannot assent to this proposition.

Section 1014, Code Civ. Proc., provides: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." In Vrooman v. Li Po Tai, 113 Cal. 305, 45 Pac. 471, the court, through Mr. Justice Temple, in discussing the effect to be given under this provision to stipulations extending defendant's time to answer, says: "But it is contended by respondent that by taking and filing the stipulation extending the time to answer, and by accepting and acting upon the agreement to grant successive extensions in consideration of certain payments made, defendant appeared in the action. Section 1014 of the Code of Civil Procedure defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of an appearance for him, and he can appear in no other way. This statute was intended to settle all disputes upon the subject. There can be no chance for argument about equivocal acts. * * * There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be dispute." There is no ambiguity or uncertainty in the statement made by the learned judge to the effect that the purpose of the rule was to dispose of questions upon which there might be dispute. While the statute requires the notice of appearance by defendant in pro. per. to be a written notice, such requirement is not exacted when the notice is given for him by an attorney. In such case, it need not necessarily be in writing. It may be given by the act of appearing in open court upon an application for affirmative relief which could only be granted upon the hypothesis that defendant had submitted himself to the jurisdiction of the court. Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296. The mere giving of a notice of a motion to be made at a certain time and place for the dissolution of an attachment issued in the cause would not constitute such an appearance. In Glidden v. Packard, 28 Cal. 649, it was expressly held that the notice of a motion to dissolve an attachment did not constitute an appearance authorizing the entry of defendant's default. If, however, pursuant to such notice, the attorney appears in court and makes the motion, such act on the part of the attorney would be sufficient to constitute notice of appearance. In excepting to the sufficiency of sureties defendant is not required to appear in court. Such notice does not even contemplate his appearance therein for any purpose; neither does it contemplate an application to the court for any relief whatsoever. The giving of it imposes upon the plaintiff the duty of having the sureties, or others in their place, justify, not before the court, but before the judge or clerk thereof, and in case of failure so to do, the judge or clerk must issue an order vacating the writ of attachment. In Steinbach v. Leese, 27 Cal. 295, the court, in discussing this section of the Code, says: "The words 'answer' and 'demurs' are obviously words of enumeration, and we cannot, on received principles, interpolate into the text notices of motion for new trials, notices of appeal, nor any other paper served incidentally in the conduct of judicial proceedings, the direct and principal purpose of which is, not to give notice of appearance, but to give notice of a step taken or about to be taken in the cause."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In our judgment, excepting to the sufficiency of sureties upon an undertaking is in no sense an appearance in the action wherein the attachment is issued. To so hold would not only violate the express provisions of section 539, Code Civ. Proc., but impose a penalty upon the defendant, whether resident or nonresident, by requiring him to subject himself to the jurisdiction of the court as a condition of exercising the right conferred by statute.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 271

DUDLEY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

(Civ. 796.)

(Court of Appeal, Second District, California. April 5, 1910. On Rehearing, April 18, 1910. Second Rehearing Denied May 18, 1910.)

1. Elections (§ 275*)—Contests—Jurisdiction—Constitutional Provision.

The jurisdiction of the superior court over election contests is included within the jurisdiction conferred by Const. art. 6, § 5, providing that the superior court shall have jurisdiction of all such special cases and proceedings as are not otherwise provided for.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250–256; Dec. Dig. § 275.*]

2. Elections (§ 276*)—Contests—Notice to Court.

Code Civ. Proc. § 1118a, requiring the county clerk to notify the superior court of the filing of statements of contests of elections, being a means for calling the pendency of the contest to the attention of the court, and there being nothing in the statute requiring the notification to be in writing, where the court had actual notice it was not necessary for the clerk to give a formal notification.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*]

3. Elections (§ 276*)—Contests—Order for Special Session—Statutory Provisions—"Thereupon."

Under Code Civ. Proc. § 1118a, providing that within five days after the end of the time allowed for filing statements of contested elections the county clerk must notify the superior court of all statements filed, and the court shall thereupon order a special session to be held not less than 10 nor more than 20 days from the date of the order, the word "thereupon" does not necessarily mean immediately, and a delay of six days in making the order for the special session was not unreasonable.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*

For other definitions, see Words and Phrases, vol. 8, pp. 6953–6955.]

4. Elections (§ 276*)—Contests—Jurisdiction.

Under Code Civ. Proc. § 1115, providing for the filing with the county clerk of a written statement of the grounds of contest of an election within 30 days after the declaration of the result, section 1118a, requiring the county clerk within five days after the time allowed for filing such statements to notify the superior court of all statements, and requiring the court to order a special session not less than 10 nor more than 20 days from the date of the order, when the ballots shall be opened and a recount taken, where the court, having actual knowledge of the pendency of a contest within 30 days after the declaration of the result of the election, six days later ordered a special session of the court to hear the contest at a date more than 10 days and less than 20 days from the expiration of the 30-day period, when the court was first authorized to act, it had jurisdiction of the subject-matter of the contest, so far as it was within the general law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.*]

5. Elections (§ 281*)—Contest—General Appearance—Demurrer—Effect.

Under Code Civ. Proc. § 1014, making a general demurrer an appearance, where the defendant in an election contest filed a general demurrer to a statement of grounds of contest, the neglect of the county clerk to issue citation in proper form, or the service thereof, is of no materiality in determining the question of personal jurisdiction.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 265; Dec. Dig. § 281.*]

6. Municipal Corporations (§ 78*)—Officers — Elections — Contests — Application of General Law.

Under Const. art. 11, § 6, providing that cities and towns, and all charters thereof, except in municipal affairs, shall be subject to and controlled by general laws, even if an election contest is a municipal affair, in order that the charter shall supersede the general law in relation thereto, the charter must contain appropriate provision relating thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 182; Dec. Dig. § 78.*]

7. Municipal Corporations (§ 78*)—Officers — Elections — Contests — Application of General Law.

Where a city charter contains no reference to an election contest, but merely provides after an enumeration of powers that the council shall have full power to pass ordinances upon any other subject of municipal control, or to carry into effect any other powers of the municipality, and there is no ordinance of the city establishing a mode of proceedings in election contests, the general law prevails as to the contest of election of a city officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 182; Dec. Dig. § 78.*]

8. ELECTIONS (§ 275*)—STATUTES.

Municipal Corporations Act (Gen. Laws 1910, p. 826) § 762, providing that boards of trustees shall determine all election contests in cities of the fifth class, is applicable only to cities actually of that class, and does not apply to a city of that class which has adopted a freeholder's charter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250–256; Dec. Dig. § 275.*]

Application by T. H. Dudley for writ of prohibition to the Superior Court in and for Los Angeles County. Writ denied without opinion. On rehearing, writ denied, and second rehearing denied.

Stephens & Stephens and Tanner, Taft & Odell, for petitioner. Ben S. Hunter and C. C. Towner, for respondent.

On Rehearing.

PER CURIAM. It is made to appear from the petition filed herein that Santa Monica is a city organized and existing under a freeholders' charter; that on the 7th day of December, 1909, an election was held in said city at which petitioner and one Roy Jones were rival candidates for the office of mayor; that on the 13th day of December, 1909, the city council, pursuant to law, canvassed the returns of said election and declared petitioner elected to the office of mayor of said city for the full term of two years; that thereafter said Dudley qualified as such mayor and is now acting as such; that thereafter, on the 8th day of January, 1910, Roy Jones filed his complaint or statement against petitioner in the superior court in which he alleged, among other things, that the board of election of said city wrongfully, inadvertently, and unlawfully counted, tallied, and returned votes for said Dudley for the office of mayor which were not cast for him, and which should not have been counted for him, and that some thereof so tallied and returned for Dudley were cast for said Jones; that certain illegal votes were cast at said election and counted for said Dudley; that if all of said illegal votes so given to said Dudley were taken from him the same would reduce his vote below the number of legal votes given to said Jones; and he prayed the court for a recount and that he be declared elected mayor of said city of Santa Monica. That upon the filing of said statement or complaint the same was presented to C. D. Wilbur, one of the judges of the superior court of Los Angeles county, who upon reading the same ordered a citation to be issued by the clerk directed to said Dudley, ordering him to appear before said judge on the 19th day of January, 1910, to show cause, if any, why the relief prayed for in the said complaint should not be granted. Thereupon, on the same date, the clerk issued a citation as by said judge directed. That on the 19th day of January, 1910, being the time fixed in said citation for the appearance of Dudley, he appeared in said proceeding specially and for the sole purpose of objecting to the jurisdiction of the court, and moved to quash and set aside the citation, upon the ground that the same was issued prematurely and not in accordance with the provisions of section 1118 of the Code of Civil Procedure, upon the hearing of which motion the same was denied. Upon the same day of the denial of said motion Dudley filed his demurrer to the complaint and statement filed by said Jones, both general and challenging the jurisdiction of the court over the subject-matter of the action, which demurrer was, upon the 19th day of January, overruled. Dudley by counsel thereupon objected to the court making any order for a special session for the trial of said cause, for the reasons that the clerk had not given the notice as required by section 1118a of the Code of Civil Procedure to the court, or at all, that the time for giving such notice had expired, and because the time within which the court could make an order had expired, which objections the court overruled, and on said 19th day of January made its order calling a special session of the court to be held on February 1, 1910, for a recounting of the ballots cast at the election held in Santa Monica for the office of mayor, and defendant was ordered to appear on that date, and which said last-mentioned order was ordered to be entered as one superseding the prior minute order made directing citation. It is alleged that the clerk did not, within five days after the end of the time allowed for filing statements of contest, notify the superior court of the filing of any statement, and that by reason thereof the court lost jurisdiction over the subject-matter; that the trial of said cause will entail great expense upon said Dudley, and he therefore prays for a writ prohibiting the court from further proceeding in the matter in connection with a recount of said ballots.

The jurisdiction of the superior court to hear and determine election contests is included within the jurisdiction conferred upon such superior court by section 5, article 6, of the Constitution; said proceeding being special and the jurisdiction in relation to which is not otherwise provided for by statute. The clerk of the county is ex officio clerk of the superior court, and a paper filed with such clerk having reference to a special court proceeding is filed with him as ex officio clerk of such court.

The general law of the state regarding the contests of elections provides, by section 1115 of the Code of Civil Procedure, that when an elector contests the right of any person declared elected to such office he must file with the county clerk a written statement setting forth specifically the facts constituting the grounds of contest which are enumerated in the section, which statement must be verified and filed within 30 days after the declaration of the result of the election by the body canvassing the returns thereof. By section 1118a of the Code of Civil Procedure it is provided: "Within five days after the end of the time allowed for filing such statements the county clerk must notify the superior court of the county or city and county of all statements filed. The court shall thereupon order a special session to be held, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, at which session the ballots shall be opened and a recount taken, in the presence of all the parties," etc. By section 1119 of the Code of Civil Procedure it is provided: "The clerk shall thereupon issue a citation for the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified."

It is petitioner's contention that, by reason of the failure of the clerk to notify the court as provided by section 1118a of the filing of the statement, and by reason of the court making its order for a citation before the lapse of time for filing statements, the order of January 19th entered by the court calling a special session was without jurisdiction; the time having elapsed within which, it is claimed, under the statute such order could be made. It may be conceded that the order of the court entered on January 8th directing the citation in the manner and form set forth in such order, except in so far as it is record evidence of a knowledge of the pendency of the proceeding, may be disregarded, as no such order is contemplated by the statute, and the citation issued by the clerk did not purport to convey to the contestee either the substance or effect of any order which by law the court was authorized to make and enter. The provision of the statute requiring the clerk to notify the court of the filing of the contest is a means provided by the statute for calling the pendency of the contest to the attention of the court, in order that the court may make a timely order calling a special session for the hearing of such action. There is nothing in the statute indicating that the notification to the court of the filing of such proceeding must of necessity be in writing. It affirmatively appearing that the court had actual notice on January 8th of the filing of the contest, it was not necessary for the clerk to give a formal notification in order that the court might be apprised of the pendency of the proceeding. The court having knowledge of the pendency of the proceeding before the date at which it could act, and the record disclosing that such knowledge was still within the breast of the court on the 19th of January, it is fair to assume that such knowledge remained with the court during the interim, which includes the 31st day after the filing of the statement of contest. Upon this date the court, having knowledge of the filing of the contest, is required by the statute to make its order calling a special session for the hearing of the same. This order, calling the special session for February 1st, the court made on the 19th day of January, six days after the expiration of the 30 days from the filing of the statement. It will be observed that the date named for the commencement of the special session was within 20 days from the date when, as we have said, the court, having notice of the contest was authorized to act, and the time so fixed was more than 10 days thereafter. The statute directs the court upon receipt of the notification to thereupon make its order. This word "thereupon" does not of necessity mean immediately. Cal. Academy of Sciences v. Fletcher, 99 Cal. 210, 33 Pac. 855. As said by the Supreme Court of this state in Porphyry Pav. Co. v. Ancker, 104 Cal. 342, 37 Pac. 1052, where the court was considering a section of the street law in which it is provided that the superintendent of streets shall thereupon cause certain posting to be done, the word refers to the order of time in which the act shall be done and is not a mandatory regulation requiring immediate performance; "that it should follow within a reasonable time is the most that should be claimed." It cannot be said that a delay of six days in making the order was an unreasonable time, when we consider that in so far as the public is concerned the time fixed for the special session was within the limit of 20 days from the time when the court was first authorized to act and exceeded the 10 days, the minimum of time designated. We are of opinion, then, that the superior court had jurisdiction of the subject-matter pertaining to the election contest, if the same is subject to general law.

It further appears by the petition that upon the same date when the order was made calling the special session the petitioner, defendant in said contest, filed a general demurrer to the statement of Jones, the contestant. Under section 1014 of the Code of Civil Procedure the effect of such demurrer was the entering of an appearance to the proceeding. The parties then being in court, and petitioner herein having entered an appearance to the proceeding, the neglect of the clerk to issue the citation in proper form, or the service thereof, is of no materiality in determining the question of personal jurisdiction.

It is further insisted by petitioner that the matter of the contest of an election held in a municipality acting under a freeholders' charter is a municipal affair, and that under the Constitution (art. 11, § 6), which provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws," the general law is subordinate to the regulations of the city in respect of such matters. The only provision of the charter of the city of Santa Monica claimed by petitioner to have reference to an election contest is found in section 30: "The council shall also have full power to pass ordinances upon any other subject of municipal control, or to carry into effect any other powers of the municipality." It may be conceded that the election and classification of the officers of a charter city, as well as contests arising from such election, are municipal affairs, but that the charter shall supersede the general law in relation thereto it is necessary that the charter itself should contain appropriate provision relative to such affairs. Mr. Justice Harrison, in Fragley v. Phelan, 126 Cal. 395, 58 Pac. 928, says: "If, however, the charter of a city, whether given to it by the Legislature prior to the Constitution of 1879, or framed by a board of freeholders, contains no provision in reference to subjects which might have been included therein, that city or its inhabitants is not thereby freed from legislative control. * * * A city cannot claim to be exempt from general laws relating to municipal affairs, if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the Legislature." This last proposition is cited and followed in Dinan v. Superior Court, 6 Cal. App. 223, 91 Pac. 808.

We find nothing in the charter of Santa Monica which undertakes to deal with the subject of the contest of municipal elections, nor any ordinance of the city based upon the authority of the charter under which any mode or proceeding relative to such contest is sought to be established. There is therefore nothing in such charter in conflict with general law. The averment in the petition that the election was held according to law cannot be construed into a statement involving the matter of a subsequent contest growing out of such election. The right of a legislative body to determine the election and qualification of its own members is not here presented, but the election and qualification of the chief executive officer alone is involved. It follows that the contest of such an election is therefore to be conducted under the provisions of the general law of the state.

It is further claimed by petitioner that Santa Monica having been a city of the fifth class before it adopted its charter, therefore the provisions of section 762 of the Municipal Corporations Act (Gen. Laws 1910, p. 826), which provides that boards of trustees shall determine all election contests in cities of such class, is applicable to the contest under consideration. This law with relation to cities of the fifth class applies only to cities actually of that class, and when Santa Monica adopted its freeholders' charter and the same was approved by the Legislature, the effect thereof was to remove that city from the classification of cities, at least to the extent of legislation applying especially to such class, and it became amenable to the general law of the state relative to election contests of the character here instituted. In addition to this, it may be observed that the corporations act referred to makes no provision for a mayor in cities of the fifth class, and, of course, no contest involving such office could possibly exist in a city under such a classification.

In what we have heretofore said we have disregarded the point made by respondent as to the adequacy of appeal, on account whereof prohibition will not lie. This we have done because upon this rehearing we are not agreed upon the question as to an appeal in such a contest affording a speedy and adequate remedy, and rest the decision upon the merits of the petition as presented.

The writ is denied.

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13 Cal. App. 547

SHAW v. CITY AND COUNTY OF SAN FRANCISCO. (Civ. 693.)

(Court of Appeal, First District, California. June 1, 1910. Rehearing Denied July 28, 1910.)

MUNICIPAL CORPORATIONS (§ 220*)—SERVICES RENDERED—LIABILITY.

A municipal corporation is not liable for the reasonable value of services rendered by employés in a department appointed in violation of the civil service provisions of the charter of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 599; Dec. Dig. § 220.*]

Appeal from Superior Court, City and County of San Francisco; C. B. Hebbard, Judge.

Action by H. M. Shaw against the City and County of San Francisco. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

Percy V. Long, John T. Nourse, and John F. English, for appellant. Costello & Costello, for respondent.

HALL, J. Plaintiff, in his own right, and as the assignee of 46 other persons, brought an action to recover the total sum of $5,600, as the reasonable value for services rendered by plaintiff and his several assignors, as deputy registrars of voters of the city and county of San Francisco, under appointments made by resolution adopted by the board of election commissioners of said city and county in regular session assembled. (In this opinion plaintiff and his assignors will hereafter be referred to as the plaintiffs.) Plaintiffs recovered judgment as prayed for, and this is an appeal from such judgment, taken upon the judgment roll.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It appears from the findings that the positions to which plaintiffs were appointed had been duly included by the civil service commissioners of the city and county within the civil service commission system, and that in accordance therewith appointments to such positions should and could only be made from the list of civil service eligibles for the class or grade to which the positions belonged. It further appears that the plaintiffs were appointed in entire disregard of the civil service provisions of the charter. None of them even took the competitive examination required by the charter, and the name of no one of said plaintiffs was upon the register or list of civil service eligibles. In fact no attempt was made by plaintiffs or the board of election commissioners to comply with the requirements of the civil service provisions of the charter. The civil service provisions of the charter are contained in article 13 thereof, and section 11 of said article provides that "all officers, courts, boards and heads of departments, vested in this charter with the power to appoint deputies, clerks, stenographers or employés in any of the offices or departments of the city and county mentioned in this section, shall make such appointments in conformity with the rules and provisions prescribed by this article, and any appointment not so made shall be void." The section further expressly provides that the provisions of article 13 shall apply to the board of election commissioners.

In the face of these provisions of the charter, it is not claimed by respondent that the appointments of plaintiffs were valid. On the contrary, it seems to be conceded that such appointments were void. Plaintiffs sought to recover, and did recover, upon the theory that, though their appointments were void as having been made in violation of the clear and express provisions of the law, yet as they performed the services, and appellant received the benefit thereof, plaintiffs are entitled to recover the reasonable value of such services from the municipality.

To this doctrine we cannot subscribe. It is contrary to the rule laid down in this state in well-considered cases, the leading one of which is Zottman v. San Francisco, 20 Cal. 97, 81 Am. Dec. 96. To the same effect are Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; City Improvement Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 Pac. 465; Fountain v. City of Sacramento, 1 Cal. App. 462, 82 Pac. 637.

To permit a liability to be imposed upon the municipality to pay for services rendered under appointments made, as in this case, contrary to the explicit provisions of the law, and by the law declared to be void, would be to fritter away the entire scheme for civil service appointments contained in the charter. This we may not do. In Zottman v. San Francisco, the plaintiff sought to recover for work done on the public streets of the municipality under a contract let to plaintiff in disregard of the requirements of the law regarding such contracts. The claim that plaintiff could recover upon a quantum meruit, because the work had been performed and accepted, was pressed upon the court. It was held that the contractor could neither recover upon his express contract nor upon quantum meruit. The court said: "It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him, but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard." So, too, in the case at bar, the plaintiffs as well as the board of election commissioners, when the appointments were made, knew or ought to have known that they were made in contravention of the provisions of the charter, and were under the law void. Plaintiffs were bound to see that their appointments were made according to the requirements of the charter. If they neglected this, or chose to take the hazard of accepting a void appointment, they were mere volunteers, and suffer only what they should have anticipated.

Respondent contends that the doctrine laid down in Zottman v. San Francisco, supra, has been repudiated in the later case of Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189. This latter case is peculiar in its facts, and it may be conceded that in the opinion of Justice McFarland the soundness of the rule enunciated in the Zottman Case is questioned. But this opinion was concurred in by but one other justice, while Justice Angellotti and two other justices concurred in the judgment upon grounds not affecting the rule of the Zottman Case. On the other hand, Chief Justice Beatty also concurred in the judgment, but took pains to affirm his adherence to the rule of the Zottman Case, and to further show that the doctrine of estoppel against a municipality, enunciated in the opinion of Justice Cope in Argenti v. City of San Francisco, 16 Cal. 256, cited by respondent herein, never was concurred in by his associates, and was subsequently expressly repudiated by him in the Zottman Case. It thus cannot be said that the court in Contra Costa Water Co. v. Breed overruled the Zottman Case.

Respondent suggests in a supplemental brief that, "should this court determine this case favorably to respondent, the civil service scheme cannot be in any wise injuriously affected, for the reason that it cannot be presumed that city officials will in future perform their duties in an irregular or illegal manner."

This suggestion does not appeal to this court with much force. It occurs to us that such action would encourage disregard of the civil service provisions of the charter. The most certain way to enforce compliance with such provisions is to deny compensation out of the public funds to persons receiving such void and illegal appointments.

The judgment is reversed, with directions to the trial court to enter judgment in favor of appellant for its costs.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 487

PEOPLE v. EMMONS. (Cr. 228.)

(Court of Appeal, First District, California. May 30, 1910. Rehearing Denied July 28, 1910.)

1. Indictment and Information (§ 109*)—Construction—Determination of Sufficiency.

The only correct way to determine the sufficiency of an indictment is to take its language in its ordinary and accepted meaning, and its statements as to defendant's acts, and compare them with the statute which it is claimed has been violated, in order to determine whether or not defendant is charged in plain language with having done a particular act or thing which is made a crime by statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 286–288; Dec. Dig. § 109.*]

2. False Pretenses (§ 26*)—Indictment—Requisites and Sufficiency.

Pen. Code, § 532, provides that every person who, knowingly, by any false or fraudulent representation or pretenses, defrauds another person of money, is punishable as for larceny. An indictment stated that defendant on a day named therein did knowingly, falsely, and fraudulently pretend and represent to H. that he was then the sole owner of a certain-named mine, located in a county and state named, and that there was then being erected at said mine a ten-stamp mill, that the property had been in litigation for over 30 years, but that it was now settled; and that in fact defendant was not the sole owner of said mine, and there was not then or at any time any mill being erected at said mine; that it had not at any time been in litigation for over 30 years, but that in truth and in fact the mine was then in litigation; that H., believing the said false representations to be true, and solely by reason of them was induced to and did deliver to defendant the sum of $500, and that defendant falsely and fraudulently received, took, and carried away the sum. *Held*, that the indictment was sufficient.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 31; Dec. Dig. § 26.*]

3. Indictment and Information (§ 109*)—Sufficiency of "Indictment."

An indictment is sufficient when it fully and fairly informs defendant of the acts of which he is accused, so that he may defend as to such acts, and so that it may be determined as a matter of law whether such facts as are alleged constitute a crime under the statute, and show a violation of a statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 286–288; Dec. Dig. § 109.*

For other definitions, see Words and Phrases, vol. 4, pp. 3551–3555.]

4. Criminal Law (§ 787*)—Instructions—Failure of Defendant to Testify.

After defendant in a prosecution had rested, the district attorney claimed to be surprised by the fact that defendant had not called and examined certain witnesses, and that for this reason he had not put in a material declaration by defendant on a former trial of the same charge, as he had expected to elicit such evidence on cross-examination. The court, under objection of defendant, reopened the case, and the district attorney was permitted to read a portion of defendant's evidence given on a former trial. Defendant, who had not testified, then asked the court, after the evidence was concluded, to instruct the jury that defendant had a legal right to take the stand as a witness, or not to do so, and that the mere fact that he does not testify raises no presumption against him, and the jury cannot draw any unfavorable inference from that fact. The court refused the instruction, but in lieu thereof read to the jury Pen. Code, § 1323, which provides that a defendant in a criminal action cannot be compelled to be a witness against himself, "but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief," and that his neglect or refusal to be a witness cannot prejudice him on the trial. *Held*, that the action of the court was error, and injurious to defendant, as the instruction requested contained a correct statement of the law pertinent to the issue, and there was no question before the jury as to what could be done if defendant had taken the stand, nor as to whether he could be compelled to testify against himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.*]

5. Criminal Law (§ 317*)—Presumptions—Failure of Accused to Testify.

Since one accused of crime has the right to stand mute, no presumption is raised against him if he chooses to remain silent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 732; Dec. Dig. § 317.*]

6. Criminal Law (§ 834*)—Instructions—Requests by Defendant.

Where an instruction is asked by accused which contains a correct statement of the law and is pertinent to the issue and to the evidence, the court should not weaken it by coupling with it a sentence or statement not pertinent, although in the abstract containing a correct statement of the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. False Pretenses (§ 9*)—Issues, Proof, and Variance.

In a prosecution for false pretenses, the state must prove that the representations and pretenses alleged induced the prosecutor to part with his money, or that such representations and pretenses were the main inducement.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 3, pp. 2662-2668; vol. 8, p. 7661.]

8. Criminal Law (§ 1130*)—Appeal and Error—Briefs.

Where counsel rely upon error in the giving or refusing of an instruction, the brief should call attention to the facts and the law in a manner sufficient to show in what way the giving or refusing of the instruction injured defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2965; Dec. Dig. § 1130.*]

9. Criminal Law (§ 371*)—Admissibility of Evidence—Similar Offenses.

In a prosecution for obtaining money under false pretenses, evidence of similar offenses involving the making of other false representations by defendant is admissible to show that he is aware of the falsity of the statements made by him in the particular case on trial, but the evidence must tend to show a guilty intent in connection with the crime for which he is being prosecuted, and must not be received to show other and distinct crimes which have no bearing upon the question of guilty intent as to the crime for which he is being tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

E. W. Emmons was convicted of obtaining money by false pretenses, and appeals. Reversed and remanded.

Jos. A. Browne, Thos. V. Cator, Robert Ferral, and George Appel, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendant was convicted of the crime of obtaining money by false pretenses, and sentenced to a term of six years in the state prison at San Quentin. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

It is contended that the court erred in overruling the defendant's demurrer to the indictment and also in denying his motion in arrest of judgment. As each of said contentions depends upon the question as to whether or not the indictment states facts sufficient to constitute a public offense, we will consider them together.

The way, and the only correct way, to determine the sufficiency of an indictment is to take its language in its ordinary accepted meaning, and its statements as to the matters and things that defendant did, and then compare them with the statute which it is claimed has been violated, for the purpose of determining the question as to whether or not the defendant is charged in plain language with having done a particular act or thing which is made a crime by the statute. People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419. The Penal Code, § 532, provides that every person who knowingly, by any false or fraudulent representation or pretense, defrauds another person of money, is punishable in the same manner and to the same extent as for larceny of the money so obtained. The indictment states that the defendant did, on the day named therein, knowingly, feloniously, and fraudulently pretend and represent to Mrs. M. E. Hurst that "he, the said defendant, was then, at said time, the sole owner of a certain mine or mining claim and real property called 'Drummer Boy Mine,' located at Siskiyou county in the state of California, and that there was then at said time being erected and constructed at said mine upon said property a ten-stamp mill, and that the said mine and property had been in litigation for over 30 years, but that the said litigation had then been and was then all settled; whereas, in truth and in fact, said defendant was not then or at any time the sole owner of said mine, mining claim, and real property, and there was not then or at any time a ten-stamp mill or any mill being erected or constructed at said mine or upon said property; and the said mine and property had not then or at any time been in litigation for over 30 years, but in truth and in fact the said mine and property was then at said time in litigation, and said litigation had not then at said time been all settled or settled at all." It further states that Mrs. Hurst, believing the said false representations to be true, and solely by reason of them, was induced to and did deliver to defendant the said sum of $500, and that defendant fraudulently and feloniously received, took, and carried away the same. This is sufficient under the statute. It is not necessary, and indeed would have been bad pleading, for the indictment to state what the defendant did or intended to do with the money, or that the money was never returned to Mrs. Hurst, or any other evidentiary fact. If the defendant did not obtain the money in the manner charged in the indictment, or if it was paid to him with the full understanding of all the facts and circumstances, or if it was a loan, or given to him for the purpose of depositing in a bank, such fact or facts could have been shown by him in defense. The indictment has answered its purpose when it fully and fairly informs the defendant of the acts he is accused of, so that he may prepare for his defense and defend himself as to such acts, and so that it may be determined as a matter of law whether or not such facts as are alleged in the indictment constitute a crime under the statute. If the acts as stated show a violation of the statute, the indictment is sufficient. We therefore conclude that the demurrer was properly overruled, and the motion in arrest of judgment properly denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We have examined the evidence, and we find it sufficient to support the verdict, and it is not necessary to further discuss it.

After the case was closed on behalf of both prosecution and defense, and the defendant had rested, the district attorney claimed that he had been surprised by the defendant not calling and examining certain witnesses (evidently referring to the fact that the defendant had not taken the stand as a witness in his own behalf), and that for this reason he had not put in a material declaration or admission made by defendant on a former trial of the same charge, as he expected to elicit such evidence on cross-examination. The court, under the objection of defendant, reopened the case, and the district attorney was permitted to and did read a portion of defendant's evidence given on a former trial. Defendant then asked the court, after the evidence was concluded, to instruct the jury as follows: "The defendant has a legal right to take the stand as a witness, or not to do so, just as he pleases or as his counsel may advise. The mere fact that he does not testify raises no presumption or prejudice against him, and the jury cannot draw any unfavorable inference against a defendant who does not offer himself as a witness." The court refused the instruction, but in lieu thereof read section 1323 of the Penal Code as an instruction to the jury, which section and instruction is as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him or be used against him on the trial or proceeding."

This was error, and clearly injurious to the defendant. The instruction as requested contained a correct statement of the law pertinent to the issue, and under the circumstances it was very material to the defendant that it should have been given. The court, in effect, instead of telling the jury that a failure of the defendant to testify should not create a prejudice or unfavorable inference in the minds of the jury, told them that a defendant could not be compelled to be a witness against himself, "but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." It was not a question before the jury as to what could be done if the defendant had taken the stand as a witness for himself, nor as to whether he could be compelled to testify against himself. It seems therefore plainly apparent that the effect of reading section 1323 of the Penal Code was to inform the jury that the fact that defendant, if he had taken the stand, could have been cross-examined was probably the reason why he did not take the stand as a witness. If this were not so, why did the court read the law to the jury as to the effect of something that had not occurred, instead of giving the instruction as requested?

The defendant was entitled to a fair trial. He was entitled to a simple statement of the law pertinent to the issue, without having it coupled with another statement, not pertinent to the issue, which robbed it of all its force as to defendant's rights. He had the right to stand mute. No presumption is raised against him by the law if he choose to remain silent. People v. Streuber, 121 Cal. 432, 53 Pac. 918. In People v. Cuff, 122 Cal. 589, 55 Pac. 407, the defendant did not take the stand as a witness, and the court instructed the jury: "The court instructs you that the evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and that therefore if weaker or less satisfactory evidence is offered, and it appears that stronger or more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

The instruction given in that case was correct as an abstract proposition of law, and evidently was founded on section 2061, subdivisions 6 and 7, of the Code of Civil Procedure; but the court held its effect was to emphasize the fact that the defendant had not taken the stand in his own behalf, and that the giving of it was prejudicial error. The court in discussing the matter said: "Let us consider one objection to it. Here there is no suggestion whatever in the record that any important witness could have been produced by the defendant before the jury and was not produced. Under such circumstances certainly the occasion was not a proper one upon which to give the instruction. But, upon the other hand, the defendant did not take the stand, and the practical application of the instruction necessarily points to that fact as a strong circumstance to be taken against him. To the ordinary mind there seems to have been no other reason or purpose in the giving of the instruction. Yet a defendant has the constitutional right to stand mute and demand that the prosecution prove the case against him beyond a reasonable doubt."

The reasoning there applies with much force to this case. The defendant had not offered himself as a witness, so why should the court, of its own volition, have stated to the jury that if he had taken the stand he could have been cross-examined? It was most prejudicial and damaging to the defendant. It ordinarily tends to the due and proper administration of justice for the trial court to leave the jury entirely free to pass upon each and every fact and phase of the case without any prejudicial instructions, or any intimation by the court as to matters of fact, or as to the weight of evidence. When any instruction is asked by a defendant which contains a correct statement of the law and is pertinent to the issue and to the evidence, it should be given. The court should not weaken or emasculate an instruction by coupling with it a sentence or statement not pertinent to the issue or the evidence, although in the abstract containing a correct statement of the law. We cannot conceive of any occasion arising during the trial of a criminal case for giving the jury an instruction as to the fact that the defendant could be cross-examined, if he should be a witness. If he was not a witness and had not offered himself as such certainly the instruction should not have been given. If he had offered himself as a witness the court, and not the jury, would determine the question of his cross-examination and the extent thereof. It was wholly unnecessary for the court to voluntarily state to the jury a proposition of substantive law which is for the court, and not for the jury under any circumstances.

The court also erred in refusing defendant's requested instruction numbered 16, which is as follows: "If you should have a reasonable doubt in your minds as to whether the prosecuting witness parted with her money because of the representations set forth in the indictment, or any of them, or whether on the other hand she so acted by reason of and induced by other or different representations, then you should give the defendant the benefit of that doubt, and your verdict should be not guilty."

If the jury entertained a reasonable doubt as to whether Mrs. Hurst parted with the money by reason of the representations set forth in the indictment, they should have acquitted defendant. The indictment charges that Mrs. Hurst was induced by said false representations and pretenses. That is the gist of the charge; and certainly if that is not true, and the money was obtained by other or different means or representations, the defendant should not have been convicted. It is true that the false representations and pretenses charged may not have been the sole inducement, or, in other words, other causes or pretenses or promises may have in such cases acted in connection with and in aid of the alleged false representations; but at the same time the false pretenses and representations charged in the indictment must have been the main cause that operated on the mind of the complaining witness when she parted with the money. The jury should have been satisfied beyond a reasonable doubt that the representations and pretenses charged in the indictment caused Mrs. Hurst to part with her money. If this were not so the jury might have convicted, although not satisfied beyond a reasonable doubt that the prosecution had proven the material allegations of the indictment.

The refusal of the court to give other instructions requested by defendant is pointed out as error by calling attention to the number of such instructions separately, and stating that the court erred in refusing them. As we have said many times before, when counsel rely upon error in the giving or refusing of an instruction, it is due to this court that the brief should at least call attention to the facts and the law sufficient to show in what way the giving or refusing of the instruction injured the defendant. However, we have examined the requested instructions, and the court no doubt properly refused the greater number of them, or gave instructions which substantially covered the subject-matter thereof. Others might properly have been given, but we are not prepared to say, in view of the whole record, that the refusal of the court to give any one of them was error sufficient to justify a reversal of the case.

The claim is made that the court erred in receiving the evidence of the witness Cook as to representations made by defendant to Mrs. Hurst about a gold nugget chain which he said was made from nuggets picked up at the mine; the stock of which he was trying to sell to Mrs. Hurst. The record shows that the witness testified without objection to the fact that defendant showed Mrs. Hurst the chain, and told her that the nuggets of which it was made came out of the mine. Some of the nuggets were small and some of them large and rough shaped. The objection to the testimony was made later, when the witness was asked to describe the size and shape of the nuggets. If any error was committed it had been committed before the defendant objected to the testimony; but without regard to the form or time of the objection, we are not prepared to say that the evidence was inadmissible. In this class of cases evidence of similar offenses, involving the making of other false representations, is admissible against the defendant to show that he is aware of the falsity of the statements made by him in the particular case on trial. The law is liberal in allowing other false statements to be proven for the purpose, and only for the purpose, of showing such guilty intent or purpose, or guilty knowledge of the falsity of the statements that the party is making. Underhill on Criminal Evidence, vol. 2, star pp. 672, 673; People v. Whalen, 154 Cal. 472, 98 Pac. 194. Of course the evidence must tend to show a guilty intent in connection with the crime under investigation, and must not be received to show other and distinct crimes which have no bearing upon the question of guilty intent or knowledge as to the crime for which the defendant is being tried. What has been said applies to several other alleged errors as to testimony of similar transactions.

It is urged with much earnestness that the court erred in reopening the case at the request of the district attorney for the purpose of allowing him to prove certain statements made by the defendant on a former trial. The district attorney should have put in all his evidence in chief, and not have relied upon the uncertain event of the defendant taking the witness stand in his own behalf, so that he could make out a part of his case by cross-examination. Such practice is not to be tolerated. Of course, in cases where the district attorney has inadvertently or through ignorance omitted to put in certain material evidence, but has acted in good faith, and the court is satisfied that he has so acted, it should be liberal in allowing the case to be reopened so that it may be fully tried upon all the facts; but in case the district attorney deliberately keeps back a part of his testimony so as to surprise the defendant by bringing it out in cross-examination, at the same time speculating upon the contingency as to whether or not the defendant will take the stand, a more serious question arises. It may certainly be said that in such case the district attorney does not stand in a very favorable position to ask or invoke the discretion of the court to reopen his case. However, it is not necessary for us to pass upon the question as to whether or not the court abused its discretion, for the reason that upon a retrial of the case the district attorney will certainly not again speculate on the chances of the defendant taking the stand as a witness in his own behalf. We do not deem it necessary to discuss any other point.

For the error in refusing the instructions asked by defendant as herein pointed out the judgment and order are reversed, and the case remanded for a new trial.

We concur: KERRIGAN, J.; HALL, J.

13 Cal. App. 426

PEOPLE v. BORDET. (Cr. 241.)

(Court of Appeal, First District, California. May 16, 1910.)

1. Criminal Law (§ 1178*)—Appeal—Review—Waiver.

Where defendant's counsel in his brief on appeal stated that defendant was convicted on the uncorroborated testimony of his wife, which was contradicted in every material particular, and that it then became a question of veracity for the jury to determine, and then averred that "the evidence presented by the people was insufficient to justify the verdict," without any other argument showing wherein the evidence was insufficient or as to what the evidence was, the assignment will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec. Dig. § 1178.*]

2. Criminal Law (§ 1170½*)—Trial—Curing Error.

Where an objection to a question calling for a conversation was sustained, any error in the ruling was cured by the subsequent statement of the witness that she had no such conversation.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170½.*]

3. Criminal Law (§ 670*) — Trial — Exclusion of Evidence—Purpose of Evidence.

Where a question calling for a statement made by accused to third persons regarding his wife was objected to, it was the duty of accused to disclose the character of the statement and the object of the proposed proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593–1596; Dec. Dig. § 670.*]

4. Criminal Law (§ 413*)—Evidence—Self-Serving Declaration.

A self-serving declaration made by accused to third persons is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928–935; Dec. Dig. § 413.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Alphonse Bordet was convicted of placing and leaving his wife in a house of prostitution, and he appeals. Affirmed.

William Tomsky, for appellant. Attorney General Webb and James F. Brennan, for the People.

COOPER, P. J. The defendant was charged in the information with the crime of felony in willfully and feloniously placing and leaving his wife in a certain house of prostitution known and designated as No. 50 Bartlett alley, situated in the city and county of San Francisco, and with permitting his wife to remain in said house. To the information he entered a plea of not guilty, and after the evidence was in the jury returned a verdict finding him guilty as charged in the information. Judgment was accordingly entered upon said verdict, and this appeal is prosecuted from the judgment and from the order denying defendant's motion for a new trial. The case comes here upon the judgment roll and a bill of exceptions.

The defendant's counsel in his brief states that the defendant was convicted upon the uncorroborated testimony of his wife, and that the said testimony was contradicted in every material particular, and "it then became a question of veracity for the jury to determine." The brief then states: "The evidence presented by the people was insufficient to justify the verdict." No other or different argument is made in regard to the insufficiency of the evidence, nor is it pointed out in any way nor at all as to what the evidence was, or the respects wherein it was insufficient. In such case we do not deem it our duty to consider the sufficiency of the evidence, but will regard it as sufficient.

The wife of the defendant testified that her husband went with her after telling her the place where she could find employment, and that she first went with her husband to 46 Bartlett alley, and that she found that it was not the right house, and the woman at 46 Bartlett alley accompanied her to No. 50, where she talked to the woman at No. 50. She was then asked by defendant the following question: "Now what conversation, if anything, did you have with the lady living at No. 46?" This question was objected to by the district attorney, and the objection was sustained. It is claimed that the court erred in sustaining the objection to this question. It appears by an examination of the record that in answer to the question immediately following the witness answered that she had no conversation with any person at No. 46 prior to the time she went to No. 50. Therefore if the question was material it was afterwards answered by the witness that she had no such conversation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is also urged that the court erred in sustaining an objection made to the following question asked of the defendant by his counsel when he was upon the stand: "Did you make a statement to them there regarding your wife?" The question had reference to the fact that defendant had taken his children to or permitted them to be placed in care of the Society for the Prevention of Cruelty to Children, and that he went there and had some conversation with regard to his children and his wife. Nothing was said in reference to the character of the statement that was made by defendant, or what was the object of it, and we are not told in the brief. By an examination of the record we cannot determine that the question related to a material matter. Any self-serving declaration made by defendant at that time to third parties would not be admissible.

There is no other error complained of, and hence it follows that the judgment and order must be affirmed, and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

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13 Cal. App. 481

CAMPBELL v. GRENNAN et al. (Civ. 686.)

(Court of Appeal, Third District, California. May 26, 1910.)

1. Vendor and Purchaser (§ 232*)—Rights of Third Persons—Notice—Possession.

Where the vendor is in apparent possession, the purchaser finding the title of record in the vendor is put on no further inquiry, and if at the same time another person is also in possession, there is no presumption of title in him inconsistent with that of the purchaser, unless there is some fact or circumstance apparent to his observation calculated to excite suspicion of a prudent man dealing with the property that a prior conveyance has been made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–562; Dec. Dig. § 232.*]

2. Vendor and Purchaser (§ 232*)—Possession—Notice to Vendee.

Decedent being the owner of an entire city lot sold the easterly half to defendants, they orally agreeing on a division line 18 inches west of a north and south line dividing the lot into equal parts, whereupon defendants erected a residence occupying such 18-inch strip. To enable them to do so, decedent moved her residence located on the west part of the lot to the rear and so located it that it rested partly on defendants' property. Defendants occupied their residence for five years and after decedent's death her administrator conveyed the "west half" of the lot to plaintiff, who had been familiar with the premises for nearly 40 years, but who had no knowledge of the agreement between defendants and decedent with reference to the division line. *Held*, that the peculiar location of decedent's building in the rear of the west half of the lot in connection with defendants' occupation of their dwelling over the line equally dividing the lot was such as to challenge investigation of a prudent person contemplating purchase of the property and charged plaintiff with notice of the division line agreement so as to preclude him from recovering such 18-inch strip, the effect of which would greatly injure defendants' house.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–562; Dec. Dig. § 232.*]

3. Vendor and Purchaser (§ 242*)—Bona Fide Purchasers—Boundaries—Buildings—Presumptions.

Where land is occupied by buildings up to an agreed line, the grantee is presumed to have purchased the property with a view to the boundaries so visibly marked and to have relied thereon and fixed the price according to the value of the property so defined and used.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 242.*]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Edward J. Campbell against Charles Grennan and another. Judgment for defendants and plaintiff appeals. Affirmed.

Theo. A. Bell, for appellant. F. R. Devlin, for respondents.

BURNETT, J. The evidence shows, as stated by appellant, that defendants' house projects a little more than 18 inches over and upon the west half of lot No. 33, in block 245, in the city of Vallejo. The defendants obtained title to the east half of this lot from one Mrs. Barr, who was the owner of the entire lot. In March, 1906, the plaintiff purchased the west half of said lot from the administrator of Mrs. Barr's estate. The lot has a frontage on York street of 50 feet between two board fences which have stood in their present location for 30 years. The defendants do not claim title to the small strip in dispute through the deed from Mrs. Barr, but predicate their claim upon an oral agreement with her by which she and the defendant, Charles Grennan, agreed upon the division line. This agreement was never reduced to writing, but it is admitted by appellant that "if this were an action between Mrs. Barr and the defendants, there is no doubt that she would be estopped from disturbing the defendants in their possession of the disputed ground, simply because she knowingly permitted defendants to hold over the line." But it is contended that the vital question in the case is: Was the plaintiff an innocent purchaser without notice? And in this connection it is urged "that from the time defendants built upon the disputed premises until the plaintiff purchased from Mrs. Barr's administrator, Mrs. Barr in her lifetime and her administrator thereafter occupied and was in possession of the full 25 feet constituting the western half of lot 33." It is conceded that defendants were also in possession of the disputed strip, but the rule is invoked that requires open, notorious, and exclusive possession to impute to the purchaser of the record title notice of undisclosed equities in favor of another person. The authorities seem to be uniform as to this legal proposition. It is stated in Smith v. Yule, 31 Cal. 185, 89 Am. Dec. 167, as follows: "Where the vendor is in the apparent possession, the subsequent purchaser finding the title of record in the vendor, is put upon no further inquiry, because the possession appears to be according to the title; and if at the same time another person is also in possession, there is no presumption of title in him inconsistent with that found in the vendor. * * * The subsequent purchaser is not justly chargeable with fraud in failing to make inquiry for a prior unrecorded conveyance, unless there is some fact or circumstance apparent to his observation, calculated to excite the suspicion of a prudent man dealing with the property, that a prior conveyance has been made. The existence of such a conveyance would not be suggested by the possession of a third person, while the vendor held the title appearing of record and was in the apparent possession." Other cases are cited to the same effect. It is urged by respondents, however, that the rule finds no application to the facts of this case. Attention is called to the evidence showing that "appellant was familiar with the premises for a period of nearly 40 years. He knew that Grennan had purchased one-half of the lot. He knew that Grennan, during the time of construction, was erecting a building upon the half of the lot claimed by him, and he knew that Grennan was living alone with his own family in the house he had erected, and that there was no division of possession between himself and Mrs. Barr."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the assumption that the foregoing quotation from respondents' brief is a full statement of the facts, it could not be gainsaid that respondents' position is entirely sound. The problem, though, is somewhat affected by the circumstance that a short time before respondents' house was erected, Mrs. Barr moved her residence from the center of the lot to the rear of the same and located it so that it projected over the agreed division line and easterly of the center of said lot.

The case, then, in brief, is this: B. owns the entire lot and sells the easterly half to G. They agree upon the division line and G. erects a residence abutting thereon. To enable him to do this B. moves her residence to the rear and leaves it partly upon G.'s property. This she occupies until the time of her death. G. and his family are the sole occupants of his residence for five years when C. with a knowledge of all the facts, except the said agreement between B. and G., purchases the legal title to the westerly half of said lot, which includes, as we have seen, a strip about 18 inches in width east of the said agreed line. If appellant is awarded possession of said strip respondents will be greatly damaged, or, as testified by one of the latter: "If I am compelled to move that part of my building which the plaintiff claims is on his part of the lot, I will have to cut off about 18 inches of my house—it would practically ruin the house. It would take off the roof and part of the room that projects eighteen inches over the line claimed by plaintiff; it would certainly injure the building if that part of it were removed."

Under such circumstances what does equity require? We think there can be reasonably but one answer to the question. The moral and legal duty was cast upon appellant to make inquiry concerning these patent and obtrusive circumstances. The knowledge that respondents were building and occupying exclusively a dwelling upon the disputed tract, and thus exercising acts of ownership, would arrest the attention and challenge the investigation of any prudent person contemplating the purchase of the property. The peculiar location of the other building in the rear of the lot also would naturally excite comment and lead to inquiry. These two facts and circumstances were apparent to appellant's observation and were both calculated to excite the suspicion of any prudent man that some agreement not disclosed by the record was made by the parties owning the lot. At any rate, it is undisputably true that respondents were in the open, notorious, and exclusive possession of the portion of the lot covered by their dwelling, and the presumption follows that their ownership was coextensive with the claim thereby asserted, and of this appellant was clearly put upon notice. It would be manifestly unjust, therefore, to eject respondents from the portion of the lot actually occupied by them. But the question in relation to the whole strip has been treated as one and indivisible and involving the same situation, and therefore the judgment in favor of respondents should not be disturbed. With the knowledge possessed by plaintiff it must be presumed that he purchased the west half of the lot in view of respondents' possession.

Where land is occupied by buildings up to the agreed line the grantee is presumed to have bought the property with a view to the boundaries thus visibly marked, and to have relied thereon and fixed the price according to the value of the property as thus defined and used. Young v. Blakeman, 153 Cal. 483, 95 Pac. 888.

The cases cited by appellant clearly involve a different situation from what we have here. In the Smith Case, supra, the vital fact is disclosed in the statement given in the syllabus: "If the owner of a lot in a city occupies part of a house on the same, and another person occupies the remainder of the house, and while this occupation of both continues the owner conveys to this other person whose deed is not recorded, and then conveys to a third person whose deed is first recorded, the possession of the one having the unrecorded deed is not sufficient to give notice to the subsequent purchaser"—and this, for the reason that the possession appears to be according to the title.

In Taylor v. C. P. R. R. Co., 67 Cal. 615, 8 Pac. 436, it was held upon conflicting evidence that the claimant had not settled upon nor improved the land in controversy, and it appeared that the subsequent applicant had no knowledge that any portion of the land had been inclosed by plaintiffs or that they had made any application for the purchase thereof, the contest involving the question as to whether plaintiffs or the defendant Davis should be preferred as the purchaser of certain land belonging to said company.

In Schumacher v. Truman, 134 Cal. 431, 66 Pac. 591, it was held that "the possession of a tenant of the divorced husband after the decree of divorce must be presumed to be the possession of the divorced wife, as a tenant in common with him, and is consistent with and not adverse to the record title of the divorced wife, and did not put the purchaser from her upon inquiry as to any equitable rights of the divorced husband under the unrecorded agreement." This, of course, must follow from the principle that either of the co-tenants was entitled to the possession of the whole of the land as against every one except his co-tenant, and that the possession of one co-tenant is presumed to be for his benefit and also for that of his co-tenant. His possession or that of his tenant would therefore be no notice of any hostility to the title of his co-tenant.

In Harris v. McIntyre et al., 118 Ill. 275, 8 N. E. 182, it appears that the owner of the legal title was permitted "to exercise, so far as the public could see, exclusive control and management of the farm and its products," without objection by the claimant of the equitable title, or the assertion of any right on her behalf, "while she to all appearances was simply the housekeeper for her brother, and as far as shown by the proof, apparently, to the world, occupied the premises in no other capacity."

In the case of Lindley v. Martindale, 78 Iowa, 379, 43 N. W. 233, the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion, but the lands had for a long time been cared for by both the husband and the son. It was justly held that one who, upon being told that the title was all right in the son, took a mortgage from the son to secure a loan which was used for the most part to pay off prior incumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land. Since the son exercised acts of ownership jointly with his father, it negatived any inference that might arise from the existence of separate residences. Besides, it was decided that the plaintiff was estopped by her conduct from setting up the claim of any equitable interest in the premises.

In Atwood v. Bearss, 47 Mich. 72, 10 N. W. 112, it was held that the fact that the husband lived on the premises with his wife did not constitute notice of an unrecorded deed from her to him.

Wells v. Am. Mort. Co., 109 Ala. 430, 20 South. 136, is to the same effect, where it is declared that "The possession of land by the grantee, holding under an unrecorded deed together with her grantor, is not constructive notice of the unrecorded deed to a subsequent purchaser."

In Pope v. Allen, 90 N. Y. 298, it also appeared that both defendant and P. lived upon the land at the time of the conveyance to plaintiff and apparently occupied it jointly. Plaintiff had no actual notice of defendant's rights. "Held that, as P. had the record title, the proper inference was that defendant's possession was under him and in subordination to his title."

McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418, and Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012, likewise present the situation of a joint occupancy.

Here, under the circumstances shown by the evidence, it would be opposed to the principles of equity and fair dealing recognized by the authorities, to give effect to the bare legal title to the extent of depriving respondents of a right honestly acquired and continuously exercised within the observation of appellant.

The order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 464

BROADDUS et al. v. MONROE et al.

(Civ. 698.)

(Court of Appeal, Third District, California. May 23, 1910.)

1. DEEDS (§§ 15, 72*)—RIGHT TO CONVEY.

Since, in the absence of fraud, one may dispose of property as he sees fit, if decedent understood the nature of her deed to her daughter and it was voluntary, consideration and whether she acted on independent advice are unessential to validity of the deed, though subject to consideration on an issue of undue influence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 23, 190–199; Dec. Dig. §§ 15, 72.*]

2. DEEDS (§ 211*)—VALIDITY—UNDUE INFLUENCE.

Evidence *held* to show that decedent understood the nature of her deed to her daughter, and that it was voluntary.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–649; Dec. Dig. § 211.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. DEEDS (§ 68*)—VALIDITY—GRANTOR'S MENTAL CAPACITY.

That grantor was nearly a centenarian does not conclusively show her mental incapacity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149–155; Dec. Dig. § 68.*]

4. DEEDS (§ 72*)—VALIDITY—UNDUE INFLUENCE.

The mere relation of parent and child does not invalidate a deed from the former to the latter, though a circumstance to be considered in determining whether undue influence was used; fraud, importunity, or imposition, etc., being a necessary additional element.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190–199; Dec. Dig. § 72.*]

5. DEEDS (§ 210*)—CONSIDERATION—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain a finding that decedent received a good consideration for a conveyance to her daughter.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635, 636; Dec. Dig. § 210.*]

6. DEEDS (§ 195*)—CONSIDERATION—SERVICES.

If services rendered decedent by her daughter were rendered without expectation of reward or agreement therefor, they must be treated as gratuitous, as affecting the sufficiency of consideration for a deed by decedent, and in the absence of proof are presumed to have been gratuitous.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 195.*]

7. EVIDENCE (§ 236*)—GRANTOR'S DECLARATION.

The declarations of a grantor as to why she executed the deed would be admissible against her if she were alive, and are admissible against her representatives.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 876–882; Dec. Dig. § 236.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Oscar J. Broaddus, administrator, and others against Melvin Monroe and others. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

See, also, 110 Pac. 164.

McNab & Hirsch and D. W. Burchard, for appellants. Mannon & Mannon, for respondents.

BURNETT, J. The facts may be stated substantially in the language of appellants as follows: Mary F. Broaddus died intestate in October, 1906. At the time of her death she had been a widow for more than 30 years. Two children, both daughters, were born to her during coverture. One of these, Jane, died in 1885 and the other, Mary Ann, in 1906. The sons and only heirs of the daughter Mary Ann are defendants and respondents, and the descendants and heirs of the other daughter are plaintiffs and appellants herein. Prior to the death of the daughter, Jane, the mother had broken up housekeeping, divided her household effects between the two families, spent part of her time with one and part of the time with the other daughter until Jane's death when she went to live with Mary Ann and remained there until the latter's death, as aforesaid, in 1906. On October 27, 1904, and for a long time prior thereto, the said Mary F. Broaddus was the owner and seized in fee of a certain tract of land in Mendocino county of the value of about $7,000, and it is claimed that at the time of her death she was the equitable owner and entitled to the possession of the same, and that plaintiffs, by right of inheritance, succeeded to an undivided one-half thereof. On said 27th of October, the said Mary F. Broaddus made a deed of this property to her said daughter, Mary Ann James, thereby divesting herself of all her possessions except a pension which expired at her death. As stated by appellants, "The purpose of this action is to set aside the deed so made, on the grounds that Mary F. Broaddus, at the date thereof and for a long time prior thereto, was of unsound mind, incapable of transacting business, of understanding or appreciating any business or of managing her property, and was insane, and on the further ground that said transfer was improvident, without sufficient or any consideration and was a mere gift, and was made, without independent or any counsel or advice of any character whatever, to one occupying a position of trust and extreme confidence." The judgment was in favor of defendants, and from this and the order denying a motion for a new trial, the appeal was taken.

The court found "that the deed was, on the 27th day of October, 1904, signed, executed, acknowledged and delivered by the said Mary F. Broaddus to the said Mary A. James freely and voluntarily, and with full knowledge and understanding on the part of the said Mary F. Broaddus of the contents of said instrument, of what she was doing, and of its results to herself and all her relatives, and of its nature, operation, and legal effect; that said Mary F. Broaddus received a good and valuable consideration from the said Mary A. James for the execution of said deed, and for the lands and premises conveyed thereby." There is also a finding that no undue influence was exerted, that no advantage was taken of the grantor, Mary F. Broaddus, and that she "had full, free and independent advice and information concerning the execution of said deed and of its effects upon herself, her property and all her relatives."

Appellants rely for a reversal of the judgment principally upon the ground that the evidence is insufficient as a matter of law to support these various findings of the trial court. It must be apparent, however, that if the evidence is sufficient to support the conclusion that the grantor fully understood the nature of the transaction, and that the conveyance was the effect of her untrammeled and voluntary act, the questions as to consideration and independent advice become unimportant. This follows from the incontrovertible right of every one, in the absence of fraud, to dispose of his own property according to his volition. The first inquiry suggested, then, is, Can a rational conclusion be drawn from the evidence that the grantor had sufficient understanding to appreciate the nature of the transaction and to realize the significance of the conveyance?

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellants dwell with persuasive skill upon the mental and physical infirmities of the grantor detailed by various witnesses, and it is confidently asserted that she was afflicted with senile dementia to that extent that she could not comprehend the nature or consequences of the deed in question. Among other circumstances related, attention is called to the following: For 20 years prior to the execution of the deed she had been stone blind. She went to bed one night able to see and awoke in the morning with her eyesight gone forever. Thereafter she rapidly declined, both mentally and physically, and she manifested less and less interest in things about her. She was a cripple and had walked with crutches and cane for nearly 20 years or more prior to that date. She was addicted to the use of tobacco from early years, she was tremulous with extreme age and so emaciated that she resembled a mummy. Her hearing had become bad progressively, and when the notary attempted to read portions of the deed to her he had to sit down alongside her and talk in a loud voice directly in her ear. Physically she was so weak and decrepit that for 10 years or more she could not move without assistance and had to be clothed and fed by her daughter. Conversation in her later years had to be carried on through Mary Ann and at last she took no notice of what went on around her. In later years her relatives seemed lost to her memory although they had been before the objects of her affectionate regard. Whenever she attempted to speak during these later years she could not carry on a connected conversation, her sentences would halt midway, and it was impossible to secure rational or intelligent answers. In later years, she suffered a sunstroke after which she more rapidly declined. It seemed as if she was merely being kept alive to celebrate her one hundredth birthday. Witnesses also testified that, in their opinion, at the time of the execution of the deed, she was irrational and of unsound mind.

But when we turn to the witnesses for respondents we find an entirely different story. It is not claimed, indeed, that she had survived unscathed the ravages of time, but, viewing the testimony as the law requires of us, it is impossible to avoid the conclusion that the court below was justified in finding that she thoroughly understood the nature and consequences of her act. Mrs. Parker Hall testified: "I had known Grandma Broaddus at that time about 25 years, I guess. I can't exactly tell how often I had seen her during that 25 years, but as often as convenient would visit. When she would be sick I would always go and see her—visit her. I was a friend of Grandma Broaddus, and visited at her house as I visited at the houses of other friends in Willits. In my opinion Grandma Broaddus on the 27th day of October, 1904, was sane. At all times when I talked with Grandma Broaddus I had no difficulty in talking to her. Her answers to my questions were always intelligent." Nine other disinterested and four interested witnesses testified to the same effect. They related conversations with her and gave reasons for their opinion that she was entirely of sound mind. One of these disinterested witnesses who had known Mrs. Broaddus since 1864 and had visited her frequently declared that she "never met the old lady when she could detect anything wrong with her mind." As to the circumstances immediately surrounding the execution of the deed, the three subscribing witnesses testified that it was fully explained to her at the time it was executed. The conclusion from their testimony is irresistible that she understood the nature and effect of the deed. Furthermore, as indicative of her knowledge of the significance of said transaction, there is the testimony of three witnesses to her subsequent declaration that the grantee owned the property.

It may be admitted that the case is a peculiar one. The great age of the grantor renders it somewhat unprecedented. No case has been cited and probably none can be found where, as here, the action was to set aside a deed executed by a person lacking only a few days of being 100 years of age. Still, it cannot be said that the testimony of the witnesses as to her mental condition is inherently improbable. This court cannot say, in the face of the evidence to the contrary, that her extreme age had so impaired her mental faculties as to render her incapable of conveying her property. If allusion were to be made to common knowledge or to historical examples, we would find many illustrations in extreme old age of the truth of Cicero's statement that "occasionally the mind seems to stand out of reach of the body's decay." The instances are, of course, rare, but at least one case in an adjoining county is familiar to many where an individual still lives, having passed the century milestone, whose acquaintances would not hesitate to pronounce of sufficient mentality to execute a valid conveyance. Mitchnikoff, in his work on "The Prolongation of Life," declares that women live to much greater ages than men, but yet, among the former, it is the rarest chance to find a centenarian. He mentions, however, the case of one Mme. Robineau, with whom he became acquainted, who lived in a suburb of Paris and had reached the age of 106. The physical condition of this woman, he declares, showed extreme decay, but notwithstanding her physical weakness, Mme. Robineau "retained her intelligence fully, her mind remained delicate and refined and the goodness of her heart was touching. Her conversation was intelligent, connected and logical." He proceeds to state that "at the age of 106 her intelligence suddenly became weak. She lost her memory almost completely and sometimes wandered." He concludes with the assertion that "The facts that I have brought together justify the conclusion that human beings who reach extreme old age may preserve their mental qualities notwithstanding serious physical decay." In this connection he calls attention to the fact that "philosophers such as Plato, poets such as Goethe and Victor Hugo, artists such as Michael Angelo, Titian and Franz Hals produced some of their most important works when they had passed the age of 75."

The position of respondents in relation to the voluntary character of the transfer is equally impregnable. The testimony of the defendants and of the three witnesses, who were present at the execution of the deed, justifies the conclusion of the court that the grantor was free from undue or any improper influence of the grantee or any other person. The evident affection that existed between mother and daughter, the kindly and continued ministration of the latter to the comfort and happiness of the former, and the declaration of the grantor as to her reason for making the deed are all significant circumstances tending to rebut any unfavorable inference against the grantee. As clearly indicative that she was following her unaided inclination and volition, we find, according to the testimony, the old lady declaring: "Mary Ann was good and kind to her, and she didn't know how she could have got along without her, and she said she wanted her to have what property she had. She had deserved it all." Upon the theory of the uniform kindness of said Mary Ann to her mother which finds abundant support, and in view of the fact that her attentions had continued for so many years, and that she was the only living child, the conveyance is easily explicable and seems entirely reasonable. While her considerate and tender care of her mother was no more than required by filial duty, yet the great infirmities of the aged woman while rendering the duty no less imperious, imposed an onerous burden and responsibility, and the acceptance and acquittance of this duty with cheerful and persistent zeal deserve unstinted commendation and generous reward. This seems to have been recognized and appreciated by Mrs. Broaddus.

It is, moreover, the contention of appellants that the evidence disclosed a confidential relation between the parties to the deed of such a nature that the presumption would follow that the deed was the result of the undue influence of the grantee, which could not be overcome except by her testimony. As the grantee was not living at the time of the trial, this view would manifestly require a reversal of the lower court's finding. But conceding, for the sake of the argument, the existence of said relation and presumption, they cannot have the operation and effect claimed by appellants.

In Hemenway v. Abbott, 8 Cal. App. 450, 97 Pac. 190, a somewhat similar contention was made, but it is therein held that it was not necessary for the grantee to take the stand, the court saying: "It would doubtless have been more satisfactory had she made a full explanation of her relations with Proctor, but it cannot be said, as matter of law, that her failure to testify destroyed the probative force of the evidence submitted in the case in her behalf."

A fairer statement, however, of plaintiffs' position probably is that in view of the said relation and presumption the evidence, in the absence of any testimony from the grantee, is insufficient to show that no undue influence was exerted. However, we feel satisfied that the showing was sufficient to overcome any adverse presumption that may have existed in the premises. Again, the court was justified in the view that no such presumption should be indulged. As pointed out by respondents: "Mrs. James did not transact any business for her mother. She held no power of attorney and did not manage the property. According to the testimony of Albert James, the old ladies gave him joint direction concerning the leasing of the ranch," it being conceded that Mrs. James owned a part of it in her own right. The mere relation of parent and child is not sufficient to invalidate a deed from the former to the latter. It is a circumstance, of course, inviting careful consideration to the transaction, but before it can justify the inference of undue influence there must be added imposition, fraud, importunity, or something of that kind. It is so expressed in Pomeroy's Equity Juris. 962, and Mackall v. Mackall, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84, cited by respondents. In the former it is said: "Where the positions of the two parties are reversed where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conveying benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid."

In the Mackall Case, supra, it is said by the court, through Mr. Justice Brewer, that: "Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under these circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress or something of that nature must appear; otherwise, that disposition of property which accords with the natural inclinations of the human heart must be sustained." The cases cited by appellants in which the presumption is said to exist involve a different state of facts from what we are now considering.

The character of Brown v. Burbank, 64 Cal. 99, 27 Pac. 940, is clearly shown by this statement in the opinion: "The plaintiff, while still an inexperienced girl, still under the care and control of her grandparents, still subject to the influence acquired by them in the double relation of parent and guardian of her person and estate, accustomed to consult their wishes and obey their commands, ignorant of her rights, purposely misled and kept in ignorance by those to whom she naturally looked for the protection of her interests, without the aid of legal advice or time for reflection, made a conveyance of her whole estate without any valuable consideration to one standing in loco parentis." It is well said "that a deed obtained under such circumstances cannot be permitted to stand is one of the clearest of propositions."

While, in Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, it is declared that the relation between husband and wife is confidential, it was held that the plaintiff was induced to make the deed by the confidence which he had in his wife and that the betrayal of such confidence was constructively fraudulent. For this reason and also upon the ground that there was actual fraud, the transaction was construed as creating a trust. This case is reviewed in Tillaux v. Tillaux, 115 Cal. 673,[1] wherein it is said: "By the foregoing authorities and others not here collated, the principle is clearly declared that the marriage relation does not ipso facto raise the presumption that a deed of conveyance from the husband to the wife has been the result of undue influence; but such deed prima facie conveys to the wife whatever, according to rules of conveyancing, its terms embrace. We have discussed the subject at some length, because an expression or two in one or two former opinions give some faint color, scarcely visible, to a different doctrine. Appellant contends that there are facts at bar which, viewed in the light of the marriage relation, are sufficient to make the deed in question invalid; and the case of Brison v. Brison, 90 Cal. 323 [27 Pac. 186] and also 75 Cal. 525 [17 Pac. 689, 7 Am. St. Rep. 189], is cited in support of the contention. The facts in that case were very peculiar and presented an instance of a wife violating an express promise made by her to a husband, upon which he had the right to implicitly rely, not only on account of the legal confidential relation between them, but also on account of the actual confidence which he had in her, as the relation between them had always been most affectionate and confiding." It is apparent, of course, that the same result would follow in any case where actual confidence existed and there was a wrongful violation of that confidence.

The decision in Ross v. Conway, 92 Cal. 632, 28 Pac. 785, rested upon evidence that there was actual undue influence exercised by the spiritual adviser of one who was of weak mind and in a dying condition. It is undoubtedly true, as therein declared, "that the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised."

In Odell v. Moss, 130 Cal. 352, 62 Pac. 555, it is held that the relationship of brother and sister is not of itself fiduciary, "but it is a material circumstance in determining whether, as a matter of fact, a fiduciary relation existed between them, which is more easily superinduced by reason of the blood relationship; and where it appears that special trust and confidence is reposed by one of them in the other, the one who occupies the superior position has the duties and responsibilities of a trustee, with the attendant consequences of the trust relation."

The case of De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059, was an action to set aside a deed from a mother to her son and it was held that the transfer was valid where it was made "freely and voluntarily in the execution of a purpose conceived by her to so dispose of the property, without the exercise of any fraud on the part of the son, and with full understanding on her part of all the facts and the effect of such a transfer." Therein the rule announced in Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910, is quoted with approval, wherein it is said: "When the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily and with full knowledge of all the facts and with perfect understanding of the effect of the transfer." Granting that this is a correct exposition of the rule, the burden, as we have already seen, was sufficiently met by respondents.

In Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289, the judgment of the lower court was affirmed, which was based upon findings and sufficient evidence to the effect that "when the deed was executed, the plaintiff was old, infirm, of failing memory and of unsound mind, and by reason thereof incapacitated from attending to business and defendant took advantage of such incapacity and procured her to sign and acknowledge the deed without consideration; that the plaintiff was without independent advice and that defendant by taking advantage of plaintiff's mental weakness, and by the use of undue influence arising out of the relationship between them of mother and son and of principal and agent induced plaintiff to execute the deed."

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[1] 47 Pac. 691.

Aside from the foregoing, appellants are mistaken, we think, in the view they take of the elements of independent advice and of the consideration for the transfer. They are not essential, as we have seen, to the validity of the transaction, but they are important elements to be regarded by the trial court. Under some circumstances, they might be decisive of the controversy, but here they were simply an important part of the evidence the weight and effect of which were committed to the judgment and conscience of the trial judge in the determination of the status of the property.

While there is no direct evidence that the notary who prepared the deed "advised" the grantor, as that term is generally understood, yet it does appear that she told the witness Mrs. Cook that she wanted to make a deed of her property to her daughter and asked the witness to see Mr. Baechtel and have him come to the house. It is true that Mrs. James saw the notary first and informed him of her mother's desire. Mr. Baechtel, in pursuance of the request, visited Mrs. Broaddus to ascertain what she wanted, and she then told him that she wanted to deed the property to her daughter. He then went to his office, prepared the deed as requested, and the same evening returned with it to Mrs. Broaddus. He informed Mrs. James that two witnesses would be required as her mother was blind. They were summoned and Mr. Baechtel read the deed over to Mrs. Broaddus, explained it and satisfied himself that she thoroughly understood it. Among other questions, he asked her if she understood that she was deeding her property to her daughter and she said she did. Not very much was said, but, according to the witnesses, the notary was careful in the performance of his duty, and it seems difficult to understand how anything more could have been expected of him. The declarations of the grantor show that she needed no particular advice or information in the premises, and for the notary to have undertaken to tell her what she already understood about the effect of the deed would have been entirely gratuitous and rather impertinent. The circumstance as to independent advice is to be regarded as bearing upon the question whether the deed is the voluntary act of the grantor, and it is not so significant, as contended by appellants, that a deed made "without the benefit of full, free and independent advice and counsel from a competent lawyer of her own selection will not be allowed to stand." It is deemed unnecessary to review the cases cited as to this point, but the rule in this state does not require, as declared in the case of Soberanes v. Soberanes, 97 Cal. 146, 31 Pac. 912, that "the donor acted upon independent advice in transactions between parent and child, when it appears that the gift was made freely, voluntarily, and with full understanding of all the facts and the effect of the transfer."

As to the consideration, while the evidence is somewhat meager, we cannot say it is insufficient to support the finding. It is conceded by respondents that if the services were rendered by Mrs. James without expectation of reward or agreement therefor, they must be considered as gratuitous and, in the absence of evidence, such would be the presumption, but it is insisted—and to this we assent—that the presumption is not conclusive but may be and has been rebutted "by showing circumstances which will support the implication that the services were to be paid for." The rule is so stated in Am. & Eng. Ency. of Law, vol. 18, p. 1085, with citation of authorities. It is added that "The burden is, of course, on the person rendering the services to overcome the presumption which the law raises that such services were rendered gratuitously." Among the cases so holding is Finch v. Green, 225 Ill. 304, 80 N. E. 318, where a son and his wife cared for his aged father for over 20 years, and, in discussing the question of consideration, the Supreme Court of Illinois, after stating the general rule that "there can be a recovery only by proving the making of an express contract or circumstances from which a reasonable inference would arise that such a contract was in fact made," the court further says: "The evidence shows that David Finch recognized to the fullest extent a moral obligation on his part to pay for the valuable and unusual personal services rendered to him; but there is no evidence that prior to the making of the will there was an express contract to pay for them. * * * The evidence, however, justifies an inference of an express contract between the parties when the will was made, or certainly at the time of the execution of the deed. The deed was executed in the presence of appellant and his wife, and it is clear that it was made in consideration of the services rendered and to be rendered and the care and trouble which the grantor had caused to his son and wife. The services were of such a nature that they could scarcely be measured in money, and it was entirely competent for David Finch to place such a value upon them as he saw fit."

The declarations of the grantor as to her reasons for executing the deed would undoubtedly be admissible against her if she were alive and contesting the deed and they are equally admissible against her representatives. Code Civ. Proc. § 1853; Donnelly v. Rees, 141 Cal. 56, 74 Pac. 433; Stoddard v. Newhall, 1 Cal. App. 111, 81 Pac. 666. Such testimony may not be altogether satisfactory but it was the best that could be obtained, since the grantor and grantee were dead, and its weight was for the trial court.

We have considered all the points made in the full and able briefs of appellants, but we can see no reason to interfere with the conclusion of the court below, and the judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 478

BROADDUS et al. v. JAMES et al. (Civ. 699.)

(Court of Appeal, Third District, California. May 26, 1910. Rehearing Denied July 21, 1910.)

EXCEPTIONS, BILL OF (§ 58*)—SETTLEMENT—SERVICE.

Under the express terms of Code Civ. Proc. § 650, no service of a certified bill of exceptions is necessary, where all amendments proposed by the opposite party are accepted and incorporated into the bill.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100–105; Dec. Dig. § 58.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Oscar J. Broaddus, administrator, and others against Melvin Monroe James and others. From an order made after judgment refusing to dismiss proceedings for a new trial, defendants appeal. Affirmed.

See, also, 110 Pac. 158.

McNab & Hirsch and D. W. Burchard, for appellants. Mannon & Mannon, for respondents.

BURNETT, J. The appeal is from an order made after judgment denying a motion to dismiss the proceedings for a new trial. The only ground for the motion was that the bill of exceptions, after having been certified by the trial judge, was not served upon respondents in the action, who are appellants herein. After plaintiffs served their proposed bill, the defendants in due time proposed their amendments to the same. These were all accepted by said plaintiffs, whose counsel so informed one of the attorneys for defendants on the 29th day of July, 1908. On the same day plaintiffs presented to the trial judge the proposed bill and the amendments, and the judge thereupon, in the absence of and without notice to the defendants or their counsel, certified the bill so presented. The certified bill was filed, but not served upon the defendants or their counsel.

We think the motion was properly denied. Section 650 of the Code of Civil Procedure, under which the proceeding was taken, as it read at the time of the said settlement of the bill, did not require, where all the amendments proposed are allowed, that the certified bill should be served upon the adverse party. As pointed out by plaintiffs: "Two proceedings are evidently contemplated by said section 650—one in which the adverse party proposes amendments which are contested, and subsequently settled on notice to the parties designating the time for settlement, and another in which there is no controversy in regard to amendments, but either no amendments are proposed, or if any such are proposed, they are adopted by the person seeking the settlement of the bill, and the bill is filed with the clerk." In regard to the first contingency, the section provides how the matter may be brought to a hearing, and then directs that "At the time designated the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified by the party presenting it, within ten days, and upon being certified must, within five days thereafter, be served upon the adverse party." The statute then provides for the case where there is no contest in reference to the bill, as follows: "If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee for settlement, without notice to the adverse party. * * * When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and must then be filed with the clerk." It is thus to be seen that in a case like the one before us no service of the bill as settled is required.

While it is true, as contended by defendants, that an appellant must follow closely the provisions of the statute in order to have his appeal perfected, it is equally true that he is not required to do more than the statute demands.

The order appealed from is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(158 Cal. 137)

WISHON v. GLOBE LIGHT & POWER CO. et al. (Sac. 1,748.)

(Supreme Court of California. July 16, 1910.)

1. WATERS AND WATER COURSES (§ 16*)—"NOTICE OF APPROPRIATION OF WATER"—NOTICE—SUFFICIENCY.

A notice of appropriation of water within a United States forest reservation, which states all the matters required by Civ. Code, § 1415, relating to the notice of appropriation of water, and which states the points of diversion as located on a designated section and township which the court judicially knows is within a reservation, is sufficient within section 1422, providing that where the place of intended diversion is within a reservation, and is so shown in the notice of appropriation, the claimant shall have a specified time after the grant of authority to occupy and use the reservation for such intended purpose within which to commence the construction of the works, etc.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8; Dec. Dig. § 16.*]

2. WATERS AND WATER COURSES (§ 16*)—APPROPRIATION OF WATER—NOTICE—SUFFICIENCY.

The form of notice of appropriation of water of a stream is fixed by Civ. Code, § 1415, requiring a person desiring to appropriate water to post a notice stating enumerated facts, and section 1422, relating to diversion of water within any reservation, does not affect the form of notice.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8; Dec. Dig. § 16.*]

3. WATERS AND WATER COURSES (§ 16*)—APPROPRIATION OF WATER—NOTICE—SUFFICIENCY.

The purpose of Civ. Code, § 1422, fixing the time within which to commence excavations on public reservations for the purpose of making a diversion of the water of a stream, is to protect claimants unable to proceed with the work necessary to perfect their claims by reason of the fact that the place of intended diversion or a part of the route of intended conveyance is within a national reservation, pending the procurement, with due diligence, of the authority from the federal government, and the provision that the fact that the place of intended diversion is within a reservation shall be shown in the notice is inserted simply for the purpose of requiring the notice itself to furnish evidence of the fact and of holding the claimant to a specific point of diversion within a reservation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8; Dec. Dig. § 16.*]

4. WATERS AND WATER COURSES (§ 16*)—APPROPRIATION OF WATER—NOTICE—SUFFICIENCY.

Civ. Code, § 1422, fixing the time within which to commence excavations on public reservations for the purpose of diverting water where the place of intended diversion or any part of the route of intended conveyance is within any reservation, is complied with where the notice gives such a description as will, with those matters of which courts take judicial notice, definitely locate the proposed point of diversion or the whole or some part of the proposed route of conveyance as within a reservation, and, when the facts stated in a notice enable a court to declare thereon that it is so located, the fact is sufficiently shown.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8; Dec. Dig. § 16.*]

5. WATERS AND WATER COURSES (§ 31*)—APPROPRIATION—RIGHT OF PRIOR APPROPRIATOR—TRANSFER OF RIGHTS.

A party claiming the right as a prior appropriator of the water of a stream by virtue of a right initiated by notice given by a third person as required by Civ. Code, § 1415, is entitled to show the agreements whereby the third person's rights are vested in him.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 31.*]

6. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in excluding questions asked a witness on cross-examination, is harmless where the witness testified fully in reply to subsequent questions asked on cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. § 1058.*]

7. WITNESSES (§ 372*)—IMPEACHMENT—INTEREST OF WITNESS—EXTENT OF CROSS-EXAMINATION.

Where, in a suit involving the priority of right to appropriate waters of a stream, one of the parties relied on the right acquired by a third person giving the notice prescribed by Civ. Code, § 1415, and such person on cross-examination testified that he had no interest in the action, and that he had received all that he was to receive, the sustaining of an objection to a question asked such person on cross-examination as to what he received at the time he disposed of his interest was not erroneous.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192–1199; Dec. Dig. § 372.*]

8. WATERS AND WATER COURSES (§ 33*)—APPROPRIATION OF WATER—NOTICE.

Where a party relying on the right to divert waters of a stream at a point within a reservation, the records of the local land office, the land department, and the interior and agricultural departments in the matter of an application for a permit to do the proposed work, and the opposition thereto, are admissible to show the fact of such application and its determination, and as bearing on the question of diligence in making and prosecuting the same and the carrying on of work within the requisite time after the determination thereof and the issuance of a permit.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 24; Dec. Dig. § 33.*]

9. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

In a contest involving the right of priority to appropriate the water of a stream, the error in admitting evidence to show that it was the intention of the successful party to expend a large sum in the installation of a power plant was not prejudicial to the defeated party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by A. G. Wishon against the Globe Light & Power Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Hannah & Miller, Frank H. Short, and F. E. Cook, for appellant. E. C. Farnsworth, N. O. Bradley, and E. O. Larkins, for respondents.

ANGELLOTTI, J. Plaintiff and defendant Globe Light & Power Company are conflicting claimants of the right to divert waters from points on the Tule river in Tulare county, said points of diversion not being far apart and both being within the United States forest reservation known as the "Sierra Forest Reserve." Each claim is based upon proceedings for the appropriation of such water had in accord with the provisions of title 8, pt. 4, division second of the Civil Code (sections 1410, 1422). The trial court found the claim of said defendant to be paramount to the extent of its right to take and divert from points described 50 cubic feet per second of the water, and that plaintiff's claim of the right to take and divert water of said river at a lower point which is otherwise sustained is subject and subordinate to the exercise of this right in said defendant.

This is an appeal by plaintiff from the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment, and from an order denying his motion for a new trial.

The claim of defendant corporation is based upon a notice of appropriation posted by its predecessor in title, James W. Bursell, on September 26, 1902. It is admitted that this notice was in due form, stating all the matters required by section 1415, Civ. Code, and that it was duly and properly recorded in the proper county recorder's office. The notice did not in terms state that the proposed points of diversion were "within, and a part of, any national park, forest reservation," etc., but did state that they were located on section 15, township 20 S., range 30 E., M. D. B. & M. It is admitted that it is a matter for judicial notice that all of this section was within and a part of the Sierra Forest Reserve. Plaintiff's notice of appropriation was not posted until April 18, 1903. This notice also was in proper form and duly recorded. Like defendant's notice, it did not state in terms that either the place of intended diversion or any part of the route of intended conveyance of water was "a part of" any forest reservation, though it may be conceded that it sufficiently described the location to show that it was a part of the Sierra Forest Reserve. A careful examination of the record has satisfied us that the conclusion of the trial court to the effect that work was commenced under the Bursell notice within 60 days after the posting thereof and prosecuted diligently and uninterruptedly to April 17, 1903, must be held to be sufficiently supported by the evidence. On the last named day, April 17, 1903, United States Forest Supervisor White notified those engaged in the work that they must cease work; no permit having been obtained from the United States government for the doing of the same. The statute then provided that permission for such purposes must be obtained from the government, and only upon a finding by the proper officer that the same is not incompatible with the public interest. 31 U. S. Stat. 790.[1] On March 5, 1903, said defendant had filed its application for such a permit. This application was diligently prosecuted, being resisted by plaintiff, and was finally granted July 28, 1906. From April 17, 1903, to July 28, 1906, practically no work was done under the notice. Within 60 days after the granting of such permit, viz., on September 9, 1906, said defendant resumed work and diligently prosecuted the same to the time of the commencement of this action, September 21, 1906, and thereafter to completion. Plaintiff also seasonably applied for a similar permit, and the same was granted August 30, 1906. No work has as yet been done by him thereunder, but this is a matter of no importance on this appeal.

The law being that "as between appropriators the one first in time is the first in right" (section 1414, Civ. Code), said defendant's right is superior to that of plaintiff, unless it has failed to comply with the rules relating to an appropriation of water. The material rule here is that declared in section 1416, Civ. Code, that "within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain." Section 1417, Civ. Code, provides that "by 'completion' is meant conducting the waters to the place of intended use," section 1418, Civ. Code, that "by a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted," and section 1419, Civ. Code, that "a failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith."

The evidence being sufficient to support the conclusion that the work was prosecuted diligently and uninterruptedly to April 17, 1903, the main question presented is as to the effect of the cessation of work from April 17, 1903, to September 9, 1906, under direction from the United States Forest Supervisor. By act approved March 24, 1903 (St. 1903, c. 272), taking effect immediately upon its approval, section 1422 was added to our Civil Code. It provides: "If the place of intended diversion or any part of the route of intended conveyance of water so claimed, be within, and a part of, any national park, forest reservation or other public reservation, and be so shown in the notice of appropriation of said water, then the claimant shall have sixty days, after the grant of authority to occupy and use such park or reservation for such intended purpose, within which to commence the excavation or construction of said works," provided that the claimant shall diligently proceed with such surveys and other work as may be required as preliminary to, or for use with, an application for such authority, and provided, also, that the claimant shall in good faith on completion of such survey and preliminary work apply to the officer having charge of such park or reservation for such authority, and thereafter prosecute his application with reasonable diligence.

If this section may be successfully invoked by defendant corporation in support of its claim based on the notice of appropriation posted on September 26, 1902, it must be held that the suspension of work from April 17, 1903, to September 9, 1906, in no way affected its claim, for concededly the application for authority to do the work was promptly made and diligently prosecuted, and the work was resumed within 60 days after the granting of authority and diligently pursued to completion. The claim of learned counsel for plaintiff in this behalf is that the Bursell notice was not in such form or of such nature as to take the benefit of the new section, the particular point being that it was not "shown" therein that the place of intended diversion or any part of the route of intended conveyance of water claimed thereby was "within, and a part of" the Sierra Forest Reserve. As was substantially said by the learned trial judge, if the words "shown in the notice" be construed as meaning expressly stated in so many words in the notice, it must be conceded that both the Bursell notice and plaintiff's notice are insufficient to bring the claimants thereunder within the provisions of section 1422, Civ. Code, for neither notice so states in express terms. But we are satisfied that no such construction should be given to the language in question. It was no part of the design of section 1422, Civ. Code, to change the rule as to the form of notice of appropriation. That was a matter wholly covered by section 1415, Civ. Code, which, so far as the form of notice is concerned, has not been changed since its adoption in 1872. The sole object of section 1422 was to protect claimants who were unable to proceed with the work necessary to perfect their claims by reason of the fact that the place of intended diversion or a part of the route of intended conveyance was within and a part of some national forest reservation, etc., pending the procurement with due diligence of the essential authority from the United States government, and the provision that this fact should be "shown" in the notice was evidently inserted simply for the purpose of requiring the notice itself to furnish evidence of the fact, and of holding the claimant to a specific point of diversion within and a part of, or a specified route of intended conveyance wholly or partly within and a part of, a forest reservation, etc. Clearly it would appear to answer any possible object of the provision that the notice should give such a description as will, with those matters of which courts take judicial notice, definitely locate the proposed point of diversion or the whole or some part of the proposed route of conveyance as being within and a part of a forest or other public reservation. And this, we think, is all the language of the section calls for. It will be observed that the requirement is not that the notice must "state" that any such point is within or a part of a reservation, but simply that such fact must be "shown in the notice," and we are satisfied that it should be held to be so "shown" when the facts stated therein are sufficient to enable a court to declare thereon that it is so located and is a part of the reservation.

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[1] U. S. Comp. St. 1901, p. 1584.

What we have said practically disposes of all the claims of plaintiff except certain alleged errors in the matter of the admission and exclusion of testimony.

On the objection of defendant, the court excluded a letter forwarded by the register of the United States Land Office at Visalia, transmitting the application of plaintiff for a permit to do his contemplated work to the proper officer at Washington, D. C. The letter is not in the record, and we certainly cannot say that it was in any way material, or constituted competent evidence in this cause. The application itself and the subsequent order granting the permit to plaintiff were introduced in evidence.

The evidence of Bursell as to his interview with Forest Supervisor White in charge of the Sierra Forest Reserve, just after White ordered the work stopped because no permit had been obtained from the government, in which White told him substantially that he could not proceed therewith without such a permit, was probably immaterial, in view of our conclusion that the claimant was fully protected by section 1422, Civ. Code, but its effect certainly was not prejudicial to plaintiff. The agreement between Bursell and Henley on the one hand and defendant corporation on the other was relevant and material to show the acquisition by said defendant of the right initiated by the Bursell notice.

We cannot see that certain questions asked Bursell on cross-examination as to the posting of other notices of appropriation prior to September 26, 1902, constituted proper cross-examination, and are of the opinion that the objections that the same were not proper cross-examination were properly sustained. It appears, however, that subsequent to the ruling complained of plaintiff cross-examined Bursell quite fully upon the matter of prior postings. What we have said is equally applicable to certain rulings on the cross-examination of Mr. Henley, Bursell's associate. Bursell, having testified upon cross-examination that he had no interest whatever in the defendant or in this action, was asked what he received at the time he disposed of his interest under the agreement with defendant corporation. An objection was sustained. The witness then testified that he had already received all that he was to receive, had been paid in full, and was not to receive any power or use of power from defendant corporation or any of the other defendants. We think the evidence thus given covered the question of pecuniary interest of the witness in the result of the action as fully as plaintiff could reasonably ask.

Two letters, one from Forest Supervisor White to the Commissioner of the General Land Office, dated April 23, 1903, and one from the acting commissioner to Forest Supervisor White, dated May 8, 1903, were introduced in evidence for the purpose of showing that the stopping of the work by the forest supervisor until a permit was obtained had the sanction and approval of the land department of the government. Assuming this evidence to be immaterial in view of our conclusion as to the effect of section 1422, Civ. Code, we are satisfied that it must be held to have been harmless. This appears to be practically conceded by learned counsel for plaintiff.

An objection that the proposed testimony is "irrelevant, immaterial, not competent or legal evidence" was made to various records of the local land office, the land department, and the interior and agricultural departments, in the matter of the application for a permit to do the proposed work by defendant corporation and the opposition of plaintiff thereto, and was overruled. These records included opinions and decisions of the various officers upon questions presented in the proceeding. We are satisfied that the whole record in the matter of the application of defendant corporation for a permit from the government was admissible, not only to show the fact of such application and its determination, but also upon the question of the diligence of such defendant in making and prosecuting the same, and the resumption of its work within the requisite time after the determination thereof and the issuance of a permit.

We do not see how the evidence of the president of defendant corporation to the effect that it is the intention of such defendant to expend some $250,000 in the installation of a power plant was material or relevant, but we cannot conceive that it may have operated to the prejudice of plaintiff.

There is no other matter requiring notice.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J; SLOSS, J.

(158 Cal. 119)

FOSS v. JOHNSTONE. (L. A. 2,558.)

(Supreme Court of California. July 15, 1910. Rehearing Denied Aug. 14, 1910.)

1. Appeal and Error (§ 937*)—Time to Appeal—Record—Presumptions.

Where the record on appeal from a judgment does not show the exact date of its entry, the presumption is that it was entered before the judgment roll was made up within Code Civ. Proc. § 939, allowing appeals from a final judgment within six months thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3788–3794; Dec. Dig. § 937.*]

2. Appeal and Error (§ 422*)—Notice of Appeal—Defects.

A mistake in the notice of appeal as to the date of the order or judgment appealed from does not invalidate the appeal where there is a description of the order or judgment in other parts of the notice reasonably sufficient to identify it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. § 422.*]

3. Appeal and Error (§ 348*)—Time to Appeal—Statutes—Record.

Under Code Civ. Proc. § 941b, allowing an appeal from a judgment or order at any time after the rendition thereof, provided it is within 60 days after service of the notice of entry thereof, or where no notice is given then within six months after entry, an appeal from an order denying a new trial is valid where the notice of appeal is filed 61 days after the rendition and entry of the order, where the record does not show the service of notice of entry.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

4. Appeal and Error (§ 505*)—Time to Appeal—Statutes—Record.

The purpose of notice of entry of order or judgment within Code Civ. Proc. § 941b, allowing an appeal from a judgment or order within a specified time after notice of the entry thereof, is to limit the time to appeal, and, though the statute does not direct that the notice shall be filed, it should be filed, and when notice is given, appellant may make the transcript show jurisdiction by inserting a copy of it with the admission of service, and a certificate of the filing where it is on file, and where no notice is given, and the appeal is taken more than 60 days after the entry, appellant can prove that his appeal is timely only by filing with the transcript an affidavit that no notice of entry has been served.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 505.*]

5. Appeal and Error (§ 505*)—Time to Appeal—Jurisdiction.

Jurisdiction of an appeal from an order or judgment taken after 60 days from the entry and within six months of the entry depends on matters not required to be of record under Code Civ. Proc. § 941b, allowing an appeal within 60 days after notice of entry, and where no notice is given within six months after entry, and respondent desiring to raise the question of jurisdiction should support his claim by affidavit, or other evidence showing service of the required notice of entry and the date of such service.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 505.*]

6. Judgment (§ 270*)—"Entry of Judgment"—Record.

The entry of a judgment is a matter of record, and it is the act which makes the judgment a record.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 270.*

For other definitions, see Words and Phrases, vol. 3, pp. 2400–2408.]

7. Waters and Water Courses (§ 111*) — Ponds — Right to Bed — Patents — Construction.

The incidents attaching to the ownership of property granted by the federal government are to be determined by the states, and, as an incident of such ownership, the right of a riparian owner on nontidal water will be limited according to the law of the state, either to high or low water mark, or to the middle of the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 111;* Boundaries, Cent. Dig. §§ 114–122.]

8. Waters and Water Courses (§ 111*) — Patents—Construction—"Any Other Water."

A nonnavigable pond is within the class of "any other water" in Civ. Code, § 830, providing that, except where a grant under which land is held indicates a different intent, the owner of upland bordering on tidewater takes to ordinary high-water mark, and bordering on a nontidal navigable lake or stream to low-water mark, and bordering on any other water to the middle of the lake or stream, so that, unless a different intent appears from a patent of land bordering on a nonnavigable pond, the patentee takes to its center.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 111.*]

9. PUBLIC LANDS (§ 114*) — PATENTS — CONSTRUCTION.

A reference in a patent by the federal government to the official plat and survey makes the plat and the field notes of the survey a part of the description of the land as if they were incorporated in the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314–322; Dec. Dig. § 114.*]

10. WATERS AND WATER COURSES (§ 111*) — PATENTS.

A federal government patent to land bordering on a nonnavigable pond, which expressly declares that it grants lots mentioned, and that they contain a stated number of acres which is the same number of acres mentioned in the plat referred to in the patent, does not show an intent to only grant the stated number of acres and to make the meander line the boundary, since it is the practice of the government in disposing of the public lands to measure the price to be paid by the quantity of upland granted without making any charge for the land under water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 111;* Boundaries, Cent. Dig. §§ 114–122.]

11. COURTS (§ 97*) — DECISIONS OF FEDERAL SUPREME COURT—CONCLUSIVENESS.

A decision of the federal Supreme Court on a federal question is controlling on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329–334; Dec. Dig. § 97.*]

12. PUBLIC LANDS (§ 58*)—SWAMP LANDS—GRANT BY FEDERAL GOVERNMENT—EFFECT.

The swamp land act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519) is a present grant to the state of all the swamp and overflowed lands then belonging to the United States situated within the state, and the title of the state does not depend on the actual issuance to it of a patent therefor, as directed in the act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 180–191; Dec. Dig. § 58.*]

13. PUBLIC LANDS (§ 116*)—PATENTS—SWAMP LANDS—GRANT BY FEDERAL GOVERNMENT—EFFECT.

The office of a patent of swamp and overflowed lands granted to the state by the swamp land act of 1850 (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519) is to make the description of the lands definite and conclusive as between the United States and the state, for identification is necessary to determine whether any particular tract comes within the general description of swamp and overflowed land so as to pass by the grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323–328; Dec. Dig. § 116.*]

14. WATERS AND WATER COURSES (§ 111*)—TITLE ACQUIRED.

Under Civ. Code, § 830, defining the boundaries of land bordering on tidewater, or other navigable water, or on any other water, lands within the limits of a nonnavigable lake or pond which may be uncovered by the recession thereof belong to the owners of the abutting upland granted by the federal government.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 120; Dec. Dig. § 111;* Boundaries, Cent. Dig. §§ 114–122.]

15. PUBLIC LANDS (§ 60*)—SWAMP LANDS—IDENTIFICATION—STATUTES.

Act Cong. July 23, 1866, c. 219, 14 Stat. 218, providing methods of identification of swamp and overflowed lands granted to the state, and requiring the Surveyor General of the United States to examine the segregation maps and surveys of the swamp and overflowed lands made by the state, etc., supersede all previous rules and methods of identifying swamp lands, and land represented on an official township plat approved by the United States Surveyor General, and acquiesced in by the state authorities, as land covered by the waters of a permanent pond, so as to belong to the United States, is a determination that the land is not swamp land; and an applicant to purchase the land from the state under St. 1893, c. 229, as land covered by the recession of inland lakes, acquires no title as against a prior patentee from the federal government of the land bordering on the pond, since the survey made in pursuance of the applicant's application is not a segregation map within the prescribed method of identifying swamp lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 186, 187; Dec. Dig. § 60.*]

16. EVIDENCE (§ 23*)—JUDICIAL NOTICE.

Under Code Civ. Proc. § 1875, subd. 3, requiring the court to take judicial notice of the public acts of the executive department of the state and the United States, the court must take judicial notice of proceedings of the executive officers of the state and of the United States in identifying swamp lands granted to the state by the act of 1850 (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.*]

17. PUBLIC LANDS (§ 106*)—SWAMP LANDS—DECISION OF FEDERAL AUTHORITIES—CONCLUSIVENESS.

Where land has been identified by the federal authorities intrusted with that duty, as land which did not pass to the state under the act of 1850 (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519), granting swamp lands to the state, parol evidence is not admissible to prove that the land was in fact swamp land in 1850, so that, by virtue of the grant, it became the property of the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 301, 302; Dec. Dig. § 106.*]

18. PUBLIC LANDS (§ 108*)—SWAMP LANDS—GRANTS.

A grant to the state by the swamp land act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519) of swamp lands unfit for cultivation, and requiring the Secretary of the Interior to make a list of the lands described and cause a patent to be issued to the state, is conditional and is limited to the lands listed by the Secretary of the Interior as lands described, and the subsequent act of 1866 (Act Cong. July 23, 1866, c. 219, 14 Stat. 218), committing the selection of the lands to other officers, does not alter the binding effect of the decision as to the lands described, and, where a decision is sought to be revised on the ground of fraud or mistake, the revision must be by direct proceeding for that purpose.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 304, 306; Dec. Dig. § 108.*]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Rebecca A. Foss against John Johnstone, Jr., and another. From a judgment for plaintiff and from an order denying a new trial, defendant John Johnstone, Jr., appeals. Affirmed.

E. Swift Torrance, J. B. Mannix, and Stearns & Sweet (E. S. Torrance, of counsel), for appellant. E. E. Keech, for respondent.

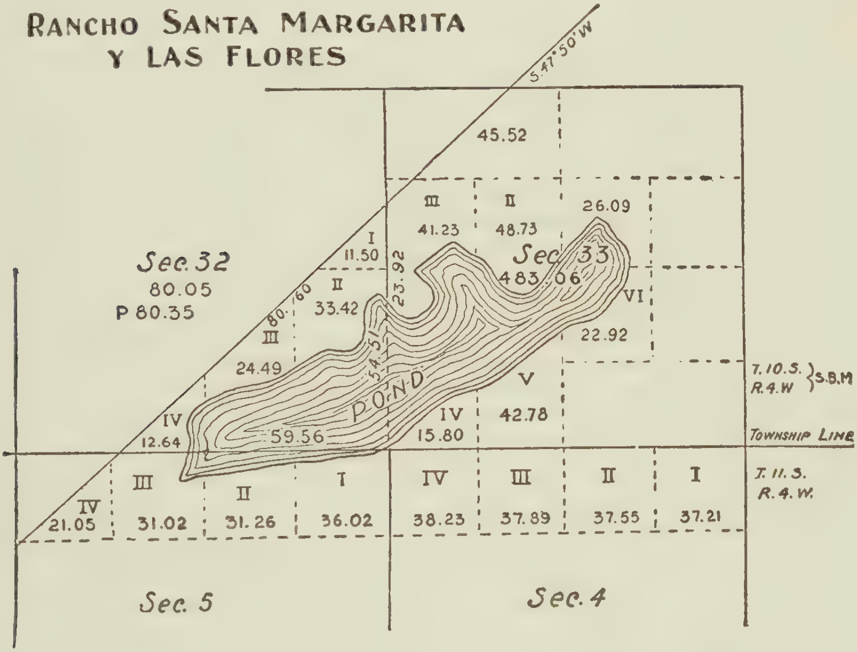
SHAW, J. This is an appeal by Johnstone from the judgment and from an order denying his motion for a new trial.

The plaintiff makes a preliminary objection to the jurisdiction of the appeal, on the ground that the notice of appeal was filed after the time limited for such appeals had expired. The notice of appeal was filed on September 29, 1909. It purports to appeal both from the judgment and from the order. The judgment was rendered on April 2, 1909. The record does not show the exact date of its entry, but the presumption is that it was entered before the judgment roll was made up, which was on April 8, 1909. The order denying the new trial was made and entered on July 30, 1909. The appeal from the judgment was taken within six months after the entry thereof. Hence it was in time, under section 939, Code Civ. Proc. If no notice of the entry of the judgment was served on the attorney for the appellant, as provided in section 941b, within 60 days before the taking of the appeal, then under sections 941b and 941c the sufficiency of the evidence may be considered on that appeal. But, as we have concluded that this may be done on the appeal from the order, it is not material in this case whether it can be done on the other appeal or not. With respect to the order, the notice of appeal states that Johnstone appeals "from the order made and entered in the minutes of said court on the 7th day of April, 1909, denying the motion of the said defendant, John Johnstone Jr., for a new trial of said action." The order was not made on that date, but was made on July 30, 1909. It is settled that a mistake in the notice of appeal, as to the date of the order or judgment appealed from, does not invalidate the appeal, where there is a description of the order or judgment referred to, in other parts of the notice, reasonably sufficient to identify it. Weyl v. Sonoma, etc., Co., 69 Cal. 202, 10 Pac. 510; Anderson v. Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284.

The filing of the notice of appeal on September 29, 1909, 61 days after the 30th of July, the true date of the rendition and entry of the order, would make it too late if the provisions of subdivision 3 of section 939, were the only statute applicable to the case. But section 941b allows an appeal to be taken from a judgment, order, or decree at any time after the rendition thereof, provided it is within 60 days after notice of the entry thereof has been served on the attorney of record of the adverse party, or, if no such notice is given, then not later than six months after such entry. The appeal from the order would therefore be valid, unless notice of the entry of the order was served on July 30th. The record does not show that any notice of such entry was ever given or served. The plaintiff has not moved to dismiss the appeal, nor filed any affidavits or other evidence that such notice of entry was served. He raises the point solely by the objection that the record, upon its face, does not show that this court has jurisdiction of the appeal. The statute (941b) does not direct that the notice of the entry of the judgment or order shall be filed or put on record. In the orderly course of procedure it should be filed, even if the statute does not direct it. The sole purpose of the notice is to mark the beginning of the period limited for taking an appeal. When such notice is given, the appellant could make the transcript show jurisdiction by inserting a copy of it with the admission of service, and of the certificate of filing, if it is on file. But, if none is given and the appeal is taken more than 60 days after the entry, the appellant can make no showing of record on the subject, and can prove that his appeal is timely only by filing with the transcript an affidavit that no notice of entry has been served. In the absence of notice, the statute fixes the arbitrary limit of six months from the time of the entry. Jurisdiction of such appeals, taken prior to that time and after 60 days from the entry, must therefore depend upon matters not required to be of record. In these circumstances it seems that the better rule is to require the respondent, if he desires to raise the question, to support his claim by affidavit or other evidence, showing service of the required notice of entry of the order appealed from, and the date of such service.

We think the case may be distinguished from the Estate of More, 143 Cal. 495, 77 Pac. 407. That was an appeal taken before the enactment of section 941b. The transcript on appeal failed to show that the judgment had been entered, and as, under the construction uniformly given to section 939, Code Civ. Proc., an appeal before such entry was premature, and there was no other evidence before the court on the subject, it was held that there was a failure to show jurisdiction and a motion to dismiss the appeal on that ground was granted. The entry of a judgment is a matter of record. It is, indeed, the act which makes the judgment a record. If the transcript purports to be complete and does not show the entry of the judgment upon record in the judgment book as the law directs, there would be some sort of presumption that it had not been entered. It would be incumbent on the appellant in such a case to explain the omission or supply it if, in point of fact, the judgment had been entered. The present case is almost the opposite of that, so far as the legal presumptions and intendments are concerned, and we think the burden should be upon the respondent to show the service and establish the bar of the limitation, or the lack of jurisdiction. He can always protect himself from an unauthorized or invalid appeal by putting the proof of such service on file in the court below and bringing it to the attention of the appellate court.

The complaint states an ordinary cause of action to quiet title. The land in question, according to the contention of the plaintiff, is that part of sections 32 and 5, which underlies the pond as shown on the subjoined plat. Her claim thereto is based on certain patents from the United States for the land abutting upon the alleged pond, and its validity depends on the effect of these patents. They include lots numbered 2, 3, and 4 of section 32, of township 10 S., range 4 W., and lots numbered 1, 2 and 3, of section 5, township 11, S., range 4 W., all in San Diego county. These sections adjoin each other. The patents state that these lots are so numbered "according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General." The following is a copy of the part of the official plat which embraces the lots described and the pond in controversy:



The township line shown on this map was surveyed in 1854 by James E. Freeman. His field notes referring to natural objects near the post set at the common corners of sections 4 and 5, 32 and 33, say: "A lagoon containing a few acres bears north about six chains." The section lines of these townships were surveyed in 1869 by James Pascoe. His field notes relating to the survey of the section line between sections 4 and 5, starting from the south end, contain the following: "At seventy-nine chains twenty links, to an old corner on township line on the south bank of large pond of alkaline water. Then back on a true line. A large pond lying North of the corner to sections thirty-two and thirty-three, the corner being immediately at the edge of the pond. I set my instrument up at the corner of sections thirty-two and thirty-three on the South line of the township, with a variation of thirteen degrees East. Set a flag due North from the corner and on the north side of the pond. I then meandered around the pond." Then follow notes of courses and distances around the edge of the water designated on the map as a pond. These courses and distances correspond with and include the land claimed by the defendant Johnstone. The plat of township 10 was approved April 5, 1881. That of township 11 was approved December 24, 1870. One patent was executed on July 25, 1882; the other, that for lots 1 and 2 of section 5, on May 13, 1890.

The defendant Johnstone claims under a patent from the state of California issued March 10, 1906, purporting to convey to him all the land included in the meander lines of the pond as set forth in the field notes of the Pascoe survey aforesaid, as "swamp and overflowed lands," obviously referring to the lands granted to the state of California by the act of Congress of September 28, 1850. Act Sept. 28, 1850, c. 84, 9 Stat. 519. This patent does not refer to the field notes or any plat of the United States survey, but it sets forth the courses and distances thereof at length, and it includes all the land marked as "pond" on the aforesaid plat. The defendant Hale has no interest except as a mortgagee under a mortgage executed by Johnstone to her.

The theory of the plaintiff is that the patents from the United States are to be construed as grants of land bordering upon a body of water, and that in consequence thereof the titles of the owner of the land, under the laws of California, extends to and includes the bed thereof up to the center. The defendant Johnstone, on the other hand, claims that the line of the land is the meander line described, that the pond in controversy is not such a body of water as would give riparian rights to the owner of land along its border, and that it was of the character known as swamp and overflowed land, which vested in the state of California upon the passage of the act of 1850 aforesaid, and by the patent from the state became vested in him. The rule controlling the construction of a patent and its effect upon the title to the land granted is stated by the Supreme Court of the United States in Packer v. Bird, 137 U. S. 669, 11 Sup. Ct. 210, 34 L. Ed. 819, a case arising in California, in the following words: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the state for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states. * * * As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to high or low water mark, or will extend to the middle of the stream." This rule is approved and followed in Hardin v. Jordan, 140 U. S. 384, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Mitchell v. Smale, 140 U. S. 412, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; Kean v. Calumet, etc., Co., 190 U. S. 459, 23 Sup. Ct. 651, 47 L. Ed. 1134, and Hardin v. Shedd, 190 U. S. 519, 23 Sup. Ct. 685, 47 L. Ed. 1156. The law of California, with respect to the incidents attaching to land bordering upon waters, is settled by section 830 of the Civil Code as follows: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

It is conceded that the pond in controversy is not navigable. The question whether it was navigable or not was not directly put in issue by the pleadings, and there is no express finding on the subject, but the findings give a description of the pond, showing it to be of such a character that it could not be navigable, and the evidence shows without doubt that it is not navigable. Consequently, if it is a pond at all, it comes within the class described as "any other water" in the last clause of the section, and, unless a different intent appears from the patents and documents referred to therein, the patentee of the land bordering upon it takes to the center of the pond. The reference in the patents to the official plat and survey make the plat and the field notes of the survey a part of the description of the land granted, as fully as if they were incorporated at length in the patents. This rule is followed both by the courts of this state and by those of the United States. Chapman v. Polack, 70 Cal. 493, 494, 11 Pac. 764; Seaward v. Malotte, 15 Cal. 306; Vance v. Fore, 24 Cal. 444; Powers v. Jackson, 50 Cal. 429; Heath v. Wallace, 138 U. S. 583, 11 Sup. Ct. 380, 34 L. Ed. 1053; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566.

The patents expressly declare that they grant the lots mentioned, and that they contain a stated number of acres, being the same number of acres mentioned in the plat of the corresponding lots. It is claimed that this shows an intent to grant no more than the stated number of acres, and to make the meander line the boundary, and not the shore line of the pond. This claim is disposed of by the following passage from Hardin v. Jordan, supra: "It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary." See, also, Railroad Co. v. Schurmeir, 74 U. S. 287, 19 L. Ed. 74. And in that case, upon this rule, it was held that the title of the owner of a lot bounded by the meander lines of a lake extended over the line to the water's edge, and by construction, according to the law of the state in which it lay, to the center of the lake. In that case, as in this, the patent stated the number of acres granted to be the same as those marked upon the plat as the area of the particular lot mentioned, and that acreage included only the acreage inclosed by the survey lines, and did not include any part of the area beyond them, or between them and the water's edge. This rule of construction was followed in all of the other cases in the United States above cited.

In opposition to these views the appellant cites Grant v. Hemphill, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; Carr v. Moore, 119 Iowa, 152, 93 N. W. 52, 97 Am. St. Rep. 292; Schlosser v. Hemphill, 118 Iowa, 452, 90 N. W. 842; Wright v. Council Bluffs, 130 Iowa, 274, 104 N. W. 492, 114 Am. St. Rep. 412;

Horne v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68; Niles v. Cedar Point Club, 175 U. S. 305, 20 Sup. Ct. 124, 44 L. Ed. 171; French-Glenn Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800. In some of these cases it is held that a marsh is not a body of water within the meaning of the aforesaid rule as to meander lines. Others merely follow the Iowa rule regarding riparian rights, to the effect that the owner of land along any body of water, whether navigable or not, has no right or title beyond the edge of the water. None of these has any application to this case. Horne v. Smith is not favorable to the appellant. In French-Glenn Co. v. Springer the court says: "While the plats are conclusive as to the meander line, and while, if there is a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that in such a state of facts there could be no intervening land and no accretion by reliction." The trial court had found that at the time of the survey and since there was not any lake abutting the lots. The evidence in the case at bar would not justify such a finding, and the court below found the contrary. Taken most favorably to the defendant, the evidence tended to show that the area of the pond varied according to the seasons, that there was always some water in it, and that, when it was full, the meander line practically coincided with its margin. It was full at the time of the sectional survey. At all times when the water did not come to the line, the character of the exposed land plainly indicated that it was the bed of a pond or lake. The case is not at all parallel to French-Glenn Co. v. Springer. The language of the court in Mitchell v. Smale, supra, is exactly applicable here: "The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary in the matter of riparian rights and title to land under water regularly follow." Page 413, 140 U. S., page 821, 11 Sup. Ct. (35 L. Ed. 428). By section 830 aforesaid the title to the land patented to the predecessors of the plaintiff extends to the center of the pond. There is no distinction in this respect between lakes and ponds. Whether or not such title should be extended beyond the lines of the subdivisions bordering on the pond if they were extended into the pond, so as to include other subdivisions lying wholly within the pond, is a question which, as we understand the plat, does not arise in the case. But see 3 Farnham on Waters, § 843, and Grand Rapids, etc., Co. v. South Grand R., etc., Co., 102 Mich. 227, 60 N. W. 681, 25 L. R. A. 815, 47 Am. St. Rep. 516.

It remains to consider whether or not the title to the land within the meander lines and constituting the pond passed to the state of California by virtue of the swamp land act of 1850. As this is a federal question, the decisions of the United States Supreme Court regarding it are controlling. It has been repeatedly decided that the swamp land act of September 28, 1850 was, in effect, a present grant of all the "swamp and overflowed lands" then belonging to the United States situated within the limits of the state, and that the title of the state thereto did not depend on the actual issuance to the state of the patent therefor, as directed in the act itself. Owens v. Jackson, 9 Cal. 322; Summers v. Dickinson, 9 Cal. 554; Kernan v. Griffith, 27 Cal. 89; Tubbs v. Wilhoit, 73 Cal. 63, 14 Pac. 361; French v. Fyan, 93 U. S. 170, 23 L. Ed. 812; Wright v. Roseberry, 121 U. S. 488, 509, 7 Sup. Ct. 985, 30 L. Ed. 1039; Tubbs v. Wilhoit, 138 U. S. 137, 11 Sup. Ct. 279, 34 L. Ed. 887. It "is a present legislative grant of all the public lands within the state of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive, as between the United States and the state." Owens v. Jackson, supra. The act of 1850, however, did not identify the particular lands granted. It granted them only by the general description "swamp and overflowed lands." Identification was necessary in order to determine whether or not any particular tract came within the general description and passed by the grant. To facilitate this identification of such lands in California, Congress passed the act of July 23, 1866. Act July 23, 1866, c. 219, 14 Stat. 218. That act provided four methods of identification by the executive departments of the state of California and the United States: First. When the government survey and plat is approved, it directed the Commissioner of the General Land Office to certify to the state, as swamp and overflowed land, all lands represented as such on the approved plat. This was to be done within one year after the approval of the plat. Second. The Surveyor General of the United States was to examine the "segregation maps and surveys of the swamp and overflowed lands made by said state," and, if they conformed to the United States system of surveys, he was directed to make township plats conforming to said state surveys, and such amended plats, showing as swamp and overflowed lands those represented as such by the state surveys, were to be approved by the Commissioner of the General Land Office. Third. Where such state surveys did not conform to the system of the United States, and in all townships not then surveyed, upon application to the Surveyor General by the governor of the state, the Surveyor General within one year after such application was to make segregation surveys and maps showing what land was swamp and overflowed, under the grant, according to the best evidence he could obtain. Fourth. If the authorities of the state should claim as swamp and overflowed land any land not represented as such in the maps and surveys made and approved by the United States authorities, the character of such land at the date of the grant, September 28, 1850, was to be decided by the Surveyor General, upon testimony taken before him, subject to the approval of the General Land Office.

On May 13, 1861, the Legislature of California passed an act establishing a board of swamp land commissioners, and providing that immediately after its organization the several county surveyors should make surveys and plats of the lands within their respective counties, showing thereon all the swamp and overflowed lands, and file the same with the state Surveyor General, who should compile a general state map therefrom which should be forwarded by the Governor to the United States as an exhibit of the lands claimed by the state under the said act of 1850. Stat. 1861, p. 355, §§ 19, 20, 21, 22. In Heath v. Wallace, supra, it was held that the "segregation maps" to be examined by the United States Surveyor General according to the second plan of identification provided in the act of July 23, 1866, as above stated, were the state maps forwarded under the act of 1861 aforesaid to the United States authorities, and that surveys made after the passage of the act of 1866 by county surveyors under the direction of the state Surveyor General, at the instance of one applying to purchase the land from the state, were mere private surveys, of no official force, and were not those referred to by the act of 1866. In this, that court, deeming it a matter of state cognizance, avowedly followed the decision of this court in Sutton v. Fassett, 51 Cal. 12, to the same effect.

The defendant Johnstone in the year 1905 made application to the state Surveyor General to purchase the land in dispute from the state, as land covered by the recession of inland lakes under the California statute of 1893. Stat. 1893, p. 341. Apparently the state by that statute intended to treat such land as swamp and overflowed land coming within the grant of 1850. McCord v. Slavin, 143 Cal. 329, 76 Pac. 1104. It had no other title thereto. The United States has not granted to the state the lands uncovered by the recession or drainage of inland lakes or ponds. Whether or not the lands of navigable lakes or ponds so uncovered is or is not the property of the state is a question not involved here, since this pond has never been navigable. Under the provisions of section 830 of the Civil Code, aforesaid, the lands within the limits of a nonnavigable lake or pond, which may be uncovered by the recession thereof, belongs to the owners of the abutting upland. Hence the title, if any, which Johnstone obtained by the patent issued to him upon this application is good only upon the condition that the land passed to the state as swamp and overflowed land under the said act of 1850. The survey made in pursuance of his application in 1905 was not a "segregation map" within the meaning of the second method of identification provided by the act of July 23, 1866. It did not determine that the land had passed to the state.

In Tubbs v. Wilhoit, 138 U. S. 139, 11 Sup. Ct. 279, 34 L. Ed. 887, the Supreme Court of the United States declared that the scheme provided by the act of July 23, 1866, for the identification of swamp and overflowed lands in California, superseded all previous rules and methods for that purpose. This land does not appear to have been identified as such by either of these methods. On the contrary, it has been identified as land of the United States by the method first above stated. It was represented on the official township plats, approved in 1870 and 1881, respectively, by the United States Surveyor General and acquiesced in by the state authorities, not as swamp and overflowed land, but as land covered by the waters of a permanent pond; that is, as lands belonging to the United States. This was a determination as to the fact of the matter intrusted to that officer to decide. McCabe v. Goodwin, 106 Cal. 486, 489, 39 Pac. 941. It was not certified to the state as swamp and overflowed land, or represented as such on those official plats. Nothing was done which would class it as swamp land within the first method of identification above mentioned. It was not included within any segregation map prepared by the state under the statute of 1861, as provided by the second method. The United States surveys of these townships were made after the passage of the act of 1866 and they were unsurveyed at that time. If the governor has applied to the United States Surveyor General to have the swamp lands in those townships segregated and certified to the state, the result has been that these lands have been excluded from the segregation, and certification thereof has been refused. Consequently they have not been identified as provided by the third method. It does not appear that the Governor or any other state officer has claimed these lands as lands belonging to the state and in reality swamp and overflowed, although not represented as such on the official plats of the United States survey, and therefore the state could not have obtained them under the fourth method. If any such proceedings had been taken, we would be required to take judicial notice of them as public official acts of the executive officers of this state and the United States. Code Civ. Proc. § 1875, subd. 3.

Under these circumstances, parol evidence is not admissible to prove that, although the land has thus been identified by the authorities of the United States, intrusted with that office, as lands which did not pass to the state under the act of 1850, it was nevertheless in fact swamp and overflowed land at that date and by virtue of that grant became the property of the state. The only decision that lends color to the proposition that such evidence is admissible for that purpose is Railroad Co. v. Smith, 76 U. S. 95, 19 L. Ed. 599. In that case there had been a failure on the part of the Secretary of the Interior, extending through many years after the passage of the swamp land act, to examine the lands within the state of Missouri, in which the land in dispute lay, and to segregate the swamp and overflowed land and certify it to the state as directed by the act of 1850. In the meantime the state had disposed of this and other lands to private persons, claiming the right to do so on the ground that it was swamp land, and that the grant of 1850 had vested title in the state. The title coming in question between the purchaser and persons claiming under a subsequent disposition thereof by the United States, evidence was admitted to show the actual character of the land at the date of the act of 1850. This was held to have been properly admitted; the court saying: "The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for that purpose." But in the case at bar there has been no failure on the part of the officers of the United States to perform the duty of identifying this land. It has been identified as land of the United States. It is not contended that the official plat did not purport to show its character and thereby identify it in the manner provided by the act of 1866. Appellant's claim is that the showing made on the map was false, that the "pond" shown thereon as covering this land was not a permanent pond as shown, but a mere temporary and intermittent collection of surface water from the adjacent land.

The subsequent decisions of the United States Supreme Court expressly limit the rule of Railroad Co. v. Smith to cases where the officer of the United States, whose duty it was to identify and certify swamp and overflowed lands to the states, has neglected and failed to do that duty. In Wright v. Roseberry, 121 U. S. 509, 7 Sup. Ct. 985, 30 L. Ed. 1039, after an elaborate review of the authorities relating to the steps necessary to complete the transfer of the legal title to such lands to the states, the court says: "The result of these decisions is that the grant of 1850 is one in præsenti, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object." Speaking of California lands, which were under consideration, it was further stated that the act of July 23, 1866, changed the law so far as lands in that state are concerned, and "no longer left their identification to the Secretary of the Interior, but provided for such identification by the joint action of the state and federal authorities." Under the joint action thus provided, the land has been identified, and under the principle just stated that identification is conclusive against collateral attack, such as that here proposed. In French v. Fyan, supra, parol evidence was held to be inadmissible, and, referring to Railroad v. Smith as holding the contrary, it is said: "The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or list of the land and would issue no patents, although many years had elapsed since the passage of the act. * * * There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication that, if in that case the Secretary had made any decision, the evidence would have been excluded." The early California decisions, inconsistent with this, were expressly disapproved. Justice Miller wrote the decisions in both cases. Similar explanations of Railroad v. Smith were made in Ehrhardt v. Hogaboom, 115 U. S. 67, 5 Sup. Ct. 1157, 29 L. Ed. 346, Chandler v. Calumet, etc., Co., 149 U. S. 79, 13 Sup. Ct. 798, 37 L. Ed. 657, and McCormick v. Hayes, 159 U. S. 338, 16 Sup. Ct. 37, 40 L. Ed. 171; and parol evidence to controvert the decision actually made by the proper officers in identication of such lands was declared to be inadmissible.

On principle this would seem to be the effect of the terms of the act of 1850, without reference to authority. The description of the lands thereby granted in præsenti as "swamp and overflowed lands, made unfit thereby for cultivation," was general and indefinite. Identication was necessary. The act provided therefor by making it the duty of the Secretary of the Interior to make a list of "the lands described as aforesaid, and transmit the same to the Governor of the state," and cause a patent to be issued, on which the fee simple was to vest in the state. Obviously the grant was in a certain sense conditional and was limited to the lands listed by the Secretary as "the lands described." He was appointed by the grantor as the person to make the selection according to the facts and his determination was binding on the states, in the absence of fraud or mistake. The act of 1866 committed the selection to other officers, but did not alter the binding effect of the decision. And, if it is to be revised on the ground of fraud or mistake, such revision must be by a direct proceeding for that purpose. It is not to be allowed at any time and in any collateral matter in which the fact may appear to be material.

The court below correctly held that the plaintiff was the owner of the part of the pond lying within sections 32 and 5 and in giving judgment to that effect. The defendant obtained no title thereto by his patent from the state.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

158 Cal. 158

PEOPLE v. BENJAMIN. (Cr. 1,586.)

(Supreme Court of California. July 20, 1910.)

CRIMINAL LAW (§ 406*)—EVIDENCE—CONFESSIONS—ADMISSIBILITY.

Where the preponderance of the evidence on the issue whether extrajudicial statements by accused were freely and voluntarily made without improper persuasion was in favor of the view that they were so made, the court did not err in admitting them as evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 406.*]

In Bank. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Wilbur Benjamin was convicted of murder in the first degree, and he appeals. Affirmed.

T. A. Ragain, for appellant. W. A. Anderson for the People.

ANGELLOTTI, J. The defendant was informed against in the superior court of Yolo county on October 16, 1909, for the crime of murder in the killing of one Violette Gilmer. His trial resulted in a verdict of murder in the first degree on November 19, 1909, and on November 22, 1909, he was adjudged to suffer death. He appeals to this court from the judgment and from an order denying his motion for a new trial. The record on appeal was filed herein on December 11, 1909. No brief has been filed on appellant's behalf, nor did any one appear for him when the case was regularly called for argument. This being a capital case, we nevertheless have examined the record and find nothing warranting interference with the action of the lower court.

The evidence shows that the killing of Violette Gilmer was a most atrocious and brutal one, amounting beyond the possibility of a doubt to murder in the first degree. No one could claim that the person guilty of this crime should not suffer the extreme penalty of the law. The question of fact on the trial was whether this defendant was the person who committed the homicide. His own extrajudicial statements, made in the presence and hearing of his father, the district attorney, an official stenographer, and certain other officers, shortly after his arrest, considered in connection with the evidence of other witnesses as to his whereabouts at and about the time of the commission of the crime, were certainly sufficient to warrant the conclusion that he was the perpetrator. Indeed, in view of the evidence, it is difficult to see how one could have a reasonable doubt on that question.

Perhaps the most debatable question presented by the record is whether the statements of the defendant above referred to were made under such circumstances that they could properly be received in evidence. There was, it is true, some conflict in the evidence as to whether they were freely and voluntarily made, without improper persuasion or inducement. But the preponderance of the evidence on this question was in favor of the view that the statements were freely and voluntarily made, without improper persuasion or inducement, and it cannot be held that the court erred in admitting them in evidence.

We have read the whole record in this case and find no reason to doubt that the defendant has had a fair trial on the merits, and that he has been deprived of no substantial right.

The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; SHAW, J; SLOSS, J.; LORIGAN, J.; MELVIN, J.

158 Cal. 145

In re BEDFORD'S ESTATE. (L. A. 2,491.)

(Supreme Court of California. July 18, 1910. On Petition for Rehearing, Aug. 15, 1910.)

1. GUARDIAN AND WARD (§ 10*)—RIGHT OF PARENT—APPOINTMENT—DISCRETION.

The determination from the evidence as to the character of the father and other facts bearing on the condition and welfare of his child, whether he should have the guardianship of her person, is largely one of discretion in the trial court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23-33; Dec. Dig. § 10.*]

2. GUARDIAN AND WARD (§ 10*)—GUARDIAN OF PERSON—CONFLICTING PROPERTY INTERESTS.

It is no sufficient objection to the appointment of one as guardian of the person only of an infant that they are adversely interested in property, there being nothing to indicate this will prevent the guardian giving the child proper care, or to show she has not kind and friendly feelings for the child.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

3. WITNESSES (§ 373*)—IMPEACHMENT—FOUNDATION.

To impeach a witness by proof of declarations and conduct tending to show an unfriendly feeling towards a party, foundation must be laid by the witness being asked concerning, and given an opportunity to explain, the alleged acts and declarations.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1200; Dec. Dig. § 373.*]

4. GUARDIAN AND WARD (§ 13*)—APPOINTMENT OF GUARDIAN—EVIDENCE OF FITNESS.

As bearing on the fitness of a father seeking to be appointed guardian of the person of his daughter, a judgment of divorce for his wife against him on the ground of desertion, awarding custody of the child to the mother, and a subsequent statement signed by them consenting to adoption of the child by her grandmother, are admissible.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

In the matter of the estate and guardianship of Lucile Richmond Bedford, a minor. From orders relative to the appointment of a guardian, Charles A. Bedford appeals; Lucie M. Lambourn being the respondent. Affirmed.

Geo. P. Adams, McNutt & Hannon, and J. G. McNutt, for appellant. Horace S. Wilson and Constan Jensen, for respondent.

SHAW, J. This is an appeal from an order appointing Lucie M. Lambourn guardian of the person of Lucile Richmond Bedford. There is also an appeal from an order denying a motion for a new trial of the issues. The minor is the daughter of Bedford and his wife, Eileen Mitchell Bedford, now deceased. Lucie M. Lambourn is the aunt of the minor. She was a sister of the mother. Bedford filed a petition asking that he be appointed guardian of the person and estate of the child. Mrs. Lambourn filed a counter petition, asking that she be appointed such guardian, alleging that Bedford, the father, was not fit, proper, or competent to receive such appointment. She also filed an opposition or answer to the petition of Bedford, again setting up his unfitness for the trust. Bedford filed an answer or opposition to her petition, alleging that she should not be appointed guardian for the reason that she had property interests adverse to those of the minor, and that because of this interest she was not a proper person to be appointed such guardian. The court denied both petitions, so far as the guardianship of the estate of the minor is concerned, and appointed the Los Angeles Trust Company as such guardian. There is no appeal from this part of the order. The only matter in controversy here is the guardianship of the person. The order denies the petition of Bedford and appoints Lucie M. Lambourn guardian of the person of the minor. These parts of the order are presented for review.

Upon the main question no question of law arises. The determination from the evidence concerning the character of a father and other facts bearing on the condition and welfare of the child, whether or not he should have the guardianship of the person of his child, is a question largely in the discretion of the court below. The minor is a little girl of tender years, born on April 6, 1904. The father is unmarried at the present time. It is not necessary to repeat here the evidence concerning his character and fitness. Suffice it to say that it is sufficient to support the conclusion of the court below that he was not a suitable or fit person to have the guardianship of the person of a female child of that age. The court made findings covering the issues and therein states the facts with perhaps unnecessary detail. We need not discuss the sufficiency of the evidence to prove all of these details. There are clearly enough circumstances sustained by the evidence to justify the general conclusion as to the ultimate fact.

Inasmuch as the guardianship of the estate was awarded to the Los Angeles Trust Company and both parties acquiesce in that appointment, the contention that Lucie M. Lambourn is interested in certain property adversely to the interest of the ward is not material or at all events not decisive. Doubtless the court below intended to remove any objection of this character by the appointment of a disinterested person, the trust company, as the guardian of the estate. Whatever property interest the child may have that is opposed by the respondent will, it is to be presumed, be properly and effectively protected and preserved by the guardian of the estate whose duty it is and will be to defend and protect her property rights. The hostility in interest is not of a character that would require this court to reverse the decision of the court below with respect to the control of the person of the child. There is nothing to indicate that the interest of the aunt would prevent her from giving the child proper care, nurture, and attention, or to show that she has not kind and friendly feelings for the child.

A large number of rulings upon the admission and rejection of evidence are assigned as error. With regard to nearly all of them, it is sufficient to say that they are either correct or entirely unimportant and harmless and too trivial for discussion. Appellant sought to impeach a witness against him by proof of declarations and conduct tending to show an unfriendly feeling on the part of the witness toward appellant. The witness was not asked concerning these acts or declarations. There was therefore no foundation laid for the introduction of the impeaching testimony of third persons and the ruling excluding it was correct. It is necessary to lay the foundation for such evidence by calling the attention of the main witness to the alleged acts and declarations and giving him an opportunity to explain them, as in the case of inconsistent statements. Baker v. Joseph, 16 Cal. 177; Silvey v. Hodgdon, 48 Cal. 188; People v. Blackwell, 27 Cal. 68; Fagan v. Lentz, 156 Cal. 689, 105 Pac. 951. The court allowed in evidence the record of a judgment of divorce between Bedford and the child's mother, on the ground of desertion of her by him, in which the custody of the child was awarded to the mother; also a statement signed by him and his wife afterward consenting to the adoption of the child by its grandmother under an order to be made by the judge of the superior court of Los Angeles county. These two rulings the appellant declares to be the most important of the alleged errors against him. The rulings were not erroneous. The documents were admissible as evidence of circumstances bearing on the issue of fitness, the weight of which was for the consideration of the trial court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

On Petition for Rehearing.

PER CURIAM. The petition for rehearing is denied. We concede that there is not sufficient evidence to support the finding of the trial court that the father abandoned his minor child. That finding, however, is not essential to support the order appointing a guardian, and insufficiency of evidence to support it is therefore not a sufficient reason for reversal. The finding of abandonment is disapproved.

(158 Cal. 74)

PLATT v. CITY AND COUNTY OF SAN FRANCISCO et al. (Sac. 1,852.)

(Supreme Court of California. June 25, 1910.)

1. Municipal Corporations (§ 273½,* New, vol. 2, Key No. Series)—Powers—"Public Utilities"—Acquisition.

San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), and previous charter provisions authorizing acquisition of "public utilities," includes municipally owned street railways; the term comprehending any utility employed in rendering quasi public service, such as waterworks, gasworks, telephone system, etc.

2. Municipal Corporations (§ 273½,* New, vol. 2, Key No. Series)—Powers—Acquisition of Public Utilities.

A municipality can acquire a street railway only under express authority from the state.

3. Municipal Corporations (§ 70*)—Powers—Acquisition of Public Utilities.

The state may empower municipalities to acquire and operate any such necessary public utility as is generally owned and operated in a city by public service corporations, such as waterworks, gas or electric light plants, street railways, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 70.*]

4. States (§ 1*)—Subdivisions—Powers.

It is purely a question of local policy with each state what shall be the extent and character of the powers which its various political organizations shall possess.

[Ed. Note.—For other cases, see States, Dec. Dig. § 1.*]

5. Municipal Corporations (§ 57*)—Powers.

Municipalities can exercise only such powers as are expressly or by necessary implication conferred upon them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

6. Municipal Corporations (§ 11*)—Freeholders—Charters—Effect.

A freeholders' charter, authorized by Const. art. 11, § 8, as to all proper provisions, has the same force as a special charter enacted by the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 11.*]

7. Municipal Corporations (§§ 8, 11*)—Municipal "Charter."

A municipal "charter" is the municipality's constitution enumerating and giving to it all the powers it possesses, unless other statutes are applicable to it, and the term applies to special acts creating cities adopted before the present Constitution, and to the portions of the general municipal corporation act adopted under Const. art. 11, § 6, providing for particular classes of municipalities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 8, 11.*

For other definitions, see Words and Phrases, vol. 2, pp. 1088–1090; vol. 8, p. 7600.]

8. Municipal Corporations (§ 273½,* New, vol. 2, Key No. Series)—Powers—Acquisition of Public Utilities.

A freeholders' charter under Const. art. 11, § 8, may authorize the municipality to acquire public utilities such as street railways, and action by the Legislature other than approval of the charter is unessential; the provision of the section empowering a municipality to frame a charter for its own "government" not precluding such authority.

9. Words and Phrases—"Government."

"Government" is the exercise of authority in the administration of the affairs of a state, community, or society.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3139.]

10. Municipal Corporations (§ 870*)—Constitutional Law (§ 205*)—Powers—Acquisition of Public Utilities—Constitutional Law.

San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), authorizing the municipality to acquire public utilities and to sell or lease them is not unconstitutional, as authorizing a lending of public credit, nor as conferring special privileges and immunities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 870;* Constitutional Law, Cent. Dig. § 622; Dec. Dig. § 205.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

11. Municipal Corporations (§ 279*)—Acquisition of Public Utilities—Proceedings—Validity.

Under San Francisco Charter, art. 12, § 2, as amended in 1903 (St. 1903, p. 591), providing that before submitting a proposition to the electors to acquire a public utility, offers to sell existing utilities must be invited and considered, offers may be solicited before adoption of the ordinance declaring the necessity for acquiring a utility, provided for by section 1.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 279.*]

12. Municipal Corporations (§ 279*)—Acquisition of Public Utilities.

Under San Francisco Charter, art. 12, § 2, as amended in 1903 (St. 1903, p. 591), providing that before submitting a proposition to the electors to acquire a public utility, offers to sell existing public utilities must be invited and considered, action in soliciting offers may be by resolution.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 279.*]

13. Municipal Corporations (§ 293*)—Acquisition of Public Utilities—Proceedings—Validity.

A resolution under San Francisco Charter, art. 12, § 2, as amended in 1903 (St. 1903, p. 591), inviting offers to sell a public utility, is not within article 2, c. 1, § 13, requiring resolutions for specific improvements, etc., to be published for five successive days before final action thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 293.*]

14. Municipal Corporations (§ 293*)—Acquisition of Public Utilities—Proceedings—Validity.

An ordinance under San Francisco Charter, art. 12, § 5, as amended in 1903 (St. 1903, p. 593), requiring the necessity for the acquisition of a public utility to be declared by ordinance, is not vitiated by omitting the words "by the city and county."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 293.*]

15. Municipal Corporations (§ 304*)—Acquisition of Public Utilities—Proceedings—Validity—"Construction."

The word "construction" in an ordinance under San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), and previous charter provisions, authorizing the acquisition, construction, or completion of public utilities, means the original construction of the utilities proposed to completion.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 304.*

For other definitions, see Words and Phrases, vol. 2, pp. 1465–1468.]

16. Municipal Corporations (§ 911*)—Acquisition of Public Utilities—Right to Issue Bonds.

That money appropriated by a municipality to construct a street railroad has not been expended for that purpose does not show want of authority to issue bonds for that purpose, in the absence of a showing that the funds are still available.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 911.*]

17. Injunction (§ 120*)—Demurrer.

An affidavit presented on a hearing for a preliminary injunction cannot be considered on demurrer to the complaint.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 120.*]

18. Municipal Corporations (§ 325*)—Acquisition of Public Utilities—Determination of Necessity.

San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), authorizing acquisition of public utilities, the determination by the board of supervisors of necessity for acquisition is conclusive, in the absence of fraud.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 847; Dec. Dig. § 325.*]

19. Municipal Corporations (§ 323*)—Acquisition of Public Utilities.

On construing a complaint against acquisition of a street railroad under San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), on the ground that the road would parallel an existing road for more than ten blocks, a franchise granted in 1878 will be presumed to have expired, in the absence of allegation to the contrary.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 323.*]

20. Municipal Corporations (§ 682*)—Railroads—Joint Use of Streets—"Ten Blocks."

San Francisco Charter, art. 2, c. 2, § 1, subd. 27, as amended February 5, 1903 (St. 1903, p. 586), precluding authorization of the joint use by two or more street railways of more than ten blocks, means "ten consecutive blocks."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 682.*]

21. Municipal Corporations (§ 323*)—Acquisition of Street Railroads.

It cannot be assumed on suit to enjoin issuance of bonds to acquire a street railroad under San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), that arrangements have not or cannot be made permitting use of streets occupied by an existing road, within the provision of St. 1907, p. 837, permitting competing roads to use the same streets by arrangement between themselves.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 323.*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Horace G. Platt against City and County of San Francisco and others. From a judgment for defendants and an order refusing a preliminary injunction, plaintiff appeals. Affirmed.

Morrison & Brobeck (Platt & Bayne, of counsel), for appellant. Percy V. Long, City Atty., and Thos. E. Haven and John T. Nourse, Asst. City Attys., for respondents.

ANGELLOTTI, J. This is an action brought by a taxpayer of the city and county of San Francisco to obtain a judgment perpetually enjoining defendant city and county and certain of its officers from proceeding in the matter of printing or lithographing, signing, etc., advertising for sale, opening bids for the purchase of and selling certain municipal bonds in the sum of $1,900,000, to be known as the "Geary Street Railway Bonds," and other municipal bonds in the sum of $120,000, to be known as the "Market

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Street Railway Bonds." A demurrer to the complaint was sustained and judgment was thereupon entered for defendants. These are appeals by plaintiff from said judgment and from an order denying plaintiff's application for a preliminary injunction.

We shall assume for the purposes of these appeals that all questions raised by the plaintiff as to the validity of the proposed bonds may be raised by a taxpayer in a proceeding of this character. The proposed bonded indebtedness is one purporting to be authorized by a vote of the electors of the city and county at a special election held on December 30, 1909, for the purpose of the construction and completion of certain proposed municipally owned street railways.

Assuming for the moment the validity of the provisions of the freeholders' charter of the city and county of San Francisco, which was framed, adopted, and approved under the provisions of section 8 of article 11 of our Constitution, relative to the acquisition, construction, and completion of public utilities by said city and county, there can be no doubt that they are comprehensive enough to authorize the acquisition, construction, and completion of municipally owned street railways. In so saying we may freely concede, as claimed by the plaintiff, that such a power in a municipality can exist only when expressly conferred by the state. It is true that the charter of the city and county nowhere specifically designates a "street railroad" as a thing which may be so acquired, constructed, or completed, but the grant of power to acquire "any public utility" clearly includes street railroads. Section 14 of article 12 of the charter, adopted by the electors of the city and county in the year 1907 and approved by the Legislature of the state November 23, 1907 (St. Ex. Sess. 1907, p. 37), is as follows: "The city and county shall have power to acquire, construct or complete any public utility from funds derived from taxes levied for that purpose, or from funds derived from the sale of bonds issued for that purpose, as is provided in this charter, and may operate, maintain, sell or lease the same subject to the other provisions and limitations of this charter."

This is the last section of the article in such charter, entitled "Acquisition of Public Utilities," an article contained in the charter when originally adopted in 1899 (St. 1899, p. 346). Unless the effect of the section just quoted is limited by other provisions of the article, it constitutes a clear authorization, in express terms, to the city and county to acquire, construct, or complete whatever is embraced by the term "public utility" used therein. We do not desire to be understood as intimating that the article as it existed prior to the addition of this section was not sufficient to show such an authorization, but the section certainly conferred the power as clearly and definitely as any language that could be used. The only question, then, is as to the meaning of the term "public utility" as used in this section and in the other sections of the same article. The term is certainly broad enough to include a street railroad; is one that would ordinarily be understood as including any such utility as is employed in the rendition of quasi public service, such as waterworks, gasworks, a telephone system, street railroads, etc., and was manifestly used throughout this article of the charter as embracing all such utilities. As originally adopted, article 12 of the charter expressly declared the purpose and intention of the people of the city and county to gradually acquire and ultimately own its "public utilities." Section 1 provided that at least every two years until this object had been attained, the supervisors must procure through the city engineer plans and estimates of the actual cost of the original construction and completion by the city and county "of waterworks, gasworks, electric light works, steam, water, or electric power works, telephone lines, street railroads, *and such other public utilities* as the supervisors or the people by petition to the board may designate," and contained an additional special provision as to waterworks, which is of no importance here. The following sections provided that the supervisors should, at as early a date as they may deem for the best interests of the city and county, enter into negotiations for the permanent acquisition of such, or any, "of said public utilities" as they may regard most important to be first acquired, and submit to the electors propositions for such acquisition, that they must submit such a proposition as to "any public utility" whenever petitioned so to do by a certain proportion of the electors, and that whenever the cost of any public utility sought to be acquired could not be paid out of the annual revenues of the city, a proposition for a bonded indebtedness must also be submitted to the electors. It is not and could not be questioned that the terms "public utility" and "public utilities," as used in the article as originally adopted, included street railroads. Learned counsel for plaintiff rely entirely on certain amendments to the charter, approved by the Legislature February 5, 1903, and particularly on the amendment of section 1 of said article (St. 1903, p. 591). The express declaration of the purpose to gradually acquire and ultimately own its "public utilities" was not changed. By the amendment of section 1, the requirement that the supervisors must at least every two years procure plans and estimates of the cost of public utilities was eliminated. This provision, it will be borne in mind, was the one designating certain public utilities by name. For this was substituted a provision to the effect that whenever the supervisors shall by ordinance determine that the public interest or necessity "demands the acquisition, construction or completion *of any public utility* or *utilities* by the city and county," or whenever a sufficient petition therefor is presented by the electors, the supervisors must procure such plans and estimates of cost thereof. The special provision as to waterworks was left practically untouched, thus leaving "waterworks" the only utility anywhere designated by name in the article. The other amendments were of no importance so far as the question before us is concerned. It is obvious that the meaning of the term "public utilities" as used in the original article was in no way changed or intended to be changed by the amendment of 1903, and that it was used in that amendment and likewise in section 14, art. 12, adopted in 1907, with the same meaning.

The principal object of the amendment of 1903 cannot be more clearly stated than it was by the learned judge of the trial court, who said: "The only object and purpose in amending section 1 was to relieve the city engineer and the board from the duty of having plans, specifications, and estimates of the cost and construction and completion of all these named public utilities drawn up every two years. It was evidently found to impose a useless and onerous burden on the board of public works and the city engineer. So the section was changed to provide that the city engineer need not draw plans and estimates every two years, but whenever the board decided to acquire *any public utility* then, and only then, it should be his duty to draw plans and estimates. This was the sole purpose of the amendment, and it cannot be held to be an expression of intent that thereafter the city and county could not acquire any of the utilities specifically named in the original, but omitted from these sections as amended." To this may be added the statement that the omission in section 1 as amended, of any designation of specific utilities, was, as stated in a quotation contained in defendant's brief, "for the purpose of making it broader rather than narrower and to meet the possible application of the principle of ejusdem generis." There is no possible foundation for the claim that the intention was to make waterworks the only public utility that could be acquired by the city and county. There is nothing in Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41, in any way inconsistent with our conclusion on this branch of the case.

This brings us to the question of the validity of the charter provisions relative to public utilities. We do not understand that it is seriously claimed that the state may not invest its municipalities with the power to acquire and operate any such necessary public utility as is generally owned and operated in a city by what is ordinarily known as a public service corporation, such as waterworks, gas or electric light works, street railways, etc. The existence and proper conduct of such utilities in cities clearly constitute public affairs, one relating very closely to the well-being, safety, health, advantage, and convenience of all the inhabitants thereof, and are well within the legitimate functions of government. If the state deems it conducive to the welfare of the inhabitants of a city that the municipality shall have the power to itself acquire and operate for their benefit any such utility, in order that they may not be dependent solely on the establishment or operation thereof by some private corporation, or person, there can be no doubt of its right to confer such power on the municipality. As to such utilities as waterworks and artificial light works this power has long been exercised by municipalities in various sections of the United States under authorization from their respective states, and this is particularly true in California. We do not understand that the right of a state to invest its municipalities with such power has ever been doubted. There is no difference material here between an artificial lighting plant to supply the inhabitants with light and a street railway. Both are matters pertaining to the internal affairs of the state, as to which the state has absolute power. It is purely a question of local policy with each state what shall be the extent and character of the powers which its various political organizations shall possess (see Claiborne v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. 489, 28 L. Ed. 470; In re Pfahler, 150 Cal. 71, 79, 88 Pac. 270, 11 L. R. A. [N. S.] 1092). There is no provision of our state Constitution which either expressly or by implication forbids the acquisition, ownership, or operation of any of such public utilities by a municipality or prohibits the granting to a municipality of the power to acquire, own, and operate them. To the contrary, the Constitution expressly recognizes that a municipality may be invested with the power to acquire and control public utilities by declaring in section 19, article 11, that any individual or company incorporated for that purpose shall have the privilege of using the public streets of a city for pipes and conduits so far as necessary to supply the city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, "in any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light."

Of course, a grant by the state of such power is essential to its exercise by a municipality, municipalities being confined to the exercise of such powers as are expressly or by necessary implication conferred by the state. The question presented here is whether, under the provisions of our Constitution, such power in regard to public utilities can be granted or conferred by the state by provisions contained in a freeholders' charter framed by the municipality itself under section 8 of article 11 of the Constitution and approved by the Legislature of the state by concurrent resolution. If this question be answered in the negative, the provisions of the San Francisco charter relative to the acquirement of public utilities would be ineffectual for any purpose, and there being no other law purporting to confer such power on San Francisco, that city and county would be without the power.

But it seems very clear to us, that, under our system, the power can be so conferred or granted, and that action by the state Legislature, other than its action in approving the charter by concurrent resolution, is in no wise essential. Section 8, article 11, of the Constitution, provides that any city of the requisite population named therein, through a board of freeholders elected by the electors "may frame a charter for its own government, consistent with and subject to the Constitution." A charter so framed must be submitted to the qualified electors for approval. If approved by the electors it must be submitted to the Legislature of the state for approval or rejection as a whole. "Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or, if such city be consolidated with a county, then of such city and county, and shall become the organic law thereof, and supersede any existing charter, * * * and all amendments thereof, and all laws inconsistent with such charter." The section provides a method for amendments to such charter, under which approval by the electors and state Legislature must be had as in the case of the original charter.

It cannot be questioned, in view of our decisions, that, as to all matters properly embraced therein, the provisions of a freeholders' charter so framed and approved have the same force and effect as they would have if contained in a special charter enacted as an ordinary law by a Legislature not restrained in any manner by constitutional limitations. The section of the Constitution thus referred to provides a special mode for the enactment of the "organic law" of such of the cities having the requisite population as desire to take advantage of its provisions. It was said by this court in Sheehan v. Scott, 145 Cal. 684, 688, 79 Pac. 350, 351, speaking of such a charter: "The act of the city in formulating the charter and determining the provisions to be included therein has the same force and authority as would a charter with the same provisions enacted by a Legislature that was not restrained by any constitutional limitations. Its adoption by the city and approval by the Legislature in the manner prescribed by said section is the mode prescribed by the Constitution for its enactment, and has the same effect as that of a law which is passed by bill, under the provisions of section 15 of article 4." Again it was said, speaking of the validity of provisions in a freeholders' charter providing for the direct exercise of legislative power by the electors: "If the Legislature, in providing by general statute for the organization and government of municipalities, can grant such power to the people thereof, there can, of course, be no question that such power may be vested in the people of a city by the provisions of a freeholders' charter framed by the city, ratified by the electors thereof, and approved by the Legislature under section 8 of article 11 of the Constitution." In re Pfahler, 150 Cal. 71, 92, 88 Pac. 270, 279 11 L. R. A. (N. S.) 1092.

The only question then appears to be whether such provisions as are here involved may be properly included in a freeholders' charter, or to state it in another way, is it within the scope of such a charter to define the powers that shall be exercised by a municipality? It is only by finding some limitation in our Constitution as to freeholders' charters that distinguishes them in this regard from ordinary municipal charters that any but an affirmative answer can be given to this question. The "charter" of a municipality is, as Mr. Dillon says, "its constitution," giving to it "all the powers it possesses (unless other statutes are applicable to it)," and invariably defines its powers, including its special and peculiar powers, and includes "a minute and detailed enumeration of the powers" of its legislative body. 1 Dillon's Mun. Corp. § 39. Prior to our present Constitution the charter of each municipality was the special act of the state Legislature creating it, defining its powers, and providing for all the details of its government. Some of such charters still remain in force; the municipalities possessing the same not having elected to organize under the general laws for the organization of municipal corporations or to obtain a freeholders' charter under section 8 of article 11 of the Constitution. As to these, such special legislative act constitutes the "charter" of the municipality. See Ex parte Helm, 143 Cal. 553, 77 Pac. 453; Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946. The Constitution of 1879 forbade the creation of municipal corporations by special law, and required the Legislature in lieu thereof to provide by general laws for the incorporation, organization, and classification of municipal corporations according to population. Section 6, art. 11, Const. This is the scheme referred to by Mr. Dillon in section 41 of his work on municipal corporations, being, as he says, to grade corporations into classes according to their size as into cities of the first class, second class, etc., "and to bestow upon each class such powers as the Legislature deems expedient." Under this section we have our general municipal corporation act, providing for each of the six classes of municipal corporations established thereby "such a municipal charter as was considered by it [the Legislature] to be necessary for cities of the population embraced within that class." Ex parte Jackson, 143 Cal. 564, 568, 77 Pac. 457. The portion of such act applicable to any city organized thereunder is in fact the "charter" of such city "in the same sense that a special act incorporating a city, adopted prior to our present Constitution * * * is a charter" (Ex parte Jackson, 143 Cal. 569, 77 Pac. 459), and there can be no doubt that provisions therein prescribing and conferring the powers of such a city, including the power to acquire, own, and operate such a public utility as is here involved are within the proper scope of such an act. Certainly such has been the construction uniformly given to this section of the Constitution by the Legislature ever since the adoption of the Constitution (see R. R. Commission v. Market St. Ry. Co., 132 Cal. 680, 64 Pac. 1065), and the construction uniformly adopted by the courts. There is no distinction material to the question we are now considering between the charters we have referred to and the freeholders' charter provided for by section 8, article 11, of the Constitution. The whole purpose of the scheme of such freeholders' charter originally was to enable any city having more than a certain number of inhabitants, originally 100,000, to adopt, subject to the approval of the Legislature and in lieu of the charter provided by the general municipal corporation act or the old special legislative charter, such a charter, to use the language of the learned trial judge, as the people thereof "deemed appropriate and adequate to its situation and condition and the full and proper administration of all its affairs." The charter so adopted was to be "the charter of such city" and "the organic law thereof." There never could have been any suspicion in the minds of the framers of this section or in the minds of the people adopting it that the charter thus provided for should not be as comprehensive in its scope as the ordinary legislative charter. That such charter should define the powers which the city should have, and that the adoption and approval of the charter in the manner provided should confer the powers (provided, of course, no law of the state prohibited the conferring of such powers) just as in the case of the ordinary legislative charter, was so obviously intended that it should not be necessary to discuss the matter at all.

Learned counsel for plaintiff seek to find a limitation on the scope of such freeholders' charter in the use of the words "for its own government," in the permissive provision of section 8, article 11, "any city * * * may frame a charter *for its own government*, consistent with and subject to the Constitution," etc. The theory appears to be that the word "government" was used with reference to the recognized distinction between governmental and proprietary powers of a municipality, with the design to strictly limit the powers that could be conferred by such a charter to the exercise of purely public and governmental functions as distinguished, to use the language of Mr. Dillon, from "powers * * * not * * * conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality." 1 Dillon on Mun. Corp. § 66. The operation by a municipality of an electric lighting plant for the purpose of furnishing light to its inhabitants for domestic purposes has been held by this court to fall within the latter class (Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. [N. S.] 536). On this distinction, says Mr. Dillon, in the section last referred to, rests the doctrine of implied liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties or powers. This division of "municipal functions" exists for certain purposes, among which is the purpose just stated of making municipalities liable to private action in certain cases (see 1 Dillon, Mun. Corp. § 67; concurring opinion of Justice Shaw in Davoust v. City of Alameda, supra), but it affords no warrant whatever for the narrow and unusual meaning sought by learned counsel to be attributed to the word "government" as used in section 8 of article 11 of the Constitution. "Government" is defined as being the "exercise of authority in the administration of the affairs of a state, community, or society" (Century Dictionary), "the act of governing, or the state of being governed, especially authoritative administration of the affairs of a state or other community" (Standard Distionary). These definitions include every function which may lawfully be allotted to a municipality to perform. No other meaning can reasonably be attributed to the word "government" as used in the section under consideration. To hold otherwise would be to defeat in a most material part the manifest purpose of the whole scheme of freeholders' charters which we have hereinbefore described.

As we have seen, under section 14 of article 12, the charter purports to authorize the city and county of San Francisco not only to acquire, construct, and complete any public utility and operate and maintain the same, but also to sell or lease the same subject to the other provisions and limitations of the charter. It is urged that a sale or lease might be made upon such terms and under such circumstances as to constitute a lending of public credit, or a conferring of special privileges and immunities upon a private individual or corporation in a manner violative of certain provisions of the state Constitution, and the theory of counsel, as we understand it, is that the whole section must be held void because it purports to authorize such a sale or lease. That there may be either a sale or lease upon such terms and under such circumstances as not to be violative of any constitutional provision we do not understand to be disputed. Of course, the charter cannot be construed as purporting to authorize any other kind of sale or lease.

The only other matters requiring discussion are some of the claims made by plaintiff as to the validity of the proceedings taken by the various officials, "tested in the terms of the charter."

Section 1 of article 12 of the charter, as amended in 1903 (St. 1903, p. 591), provides that "whenever the board of supervisors by ordinance, as hereinafter provided, shall determine that the public interest or necessity demands the acquisition, construction, or completion of any public utility or utilities by the city and county," or whenever a proper petition "for the acquisition" thereof by electors is filed, the supervisors must procure from the board of public works, through the city engineer, plans and estimates of the cost of original construction and completion by the city and county of the same. Section 5 of the same article, as amended in 1903 (St. 1903, p. 593), provides that whenever the board of supervisors shall determine that the "public interest or necessity demands the acquisition, construction, or completion of any public utility or utilities, it shall specifically declare such determination by an ordinance, which shall also direct the board of public works to procure and file plans and estimates," etc. When the cost of the same can be paid out of the annual revenues the supervisors shall, as soon after the filing of such plans and estimates as it may deem for the best interests of the city and county, enter into such negotiations and contract "as may be necessary for the acquisition of the same." If such cost shall so far exceed the annual revenues as to make a bonded indebtedness essential, a proposition or propositions for the acquisition of such utility or utilities must be submitted to the electors at a special election. Section 2 of article 12, as amended in 1903 (St. 1903, p. 591), provides that "before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities, the board of supervisors must solicit and consider offers for the sale to the city and county of the existing utility, in order that the electors may have the benefit of acquiring the same at the lowest possible cost thereof."

On October 18, 1909, the board of supervisors adopted and on October 20, 1909, the mayor approved a resolution soliciting offers for the sale to said city and county of any existing street railway system on any of the streets over which the proposed railroads were to be constructed, such offers to be submitted at any time prior to November 15, 1909, notice of which ordinance it must be assumed was given in the manner prescribed therein.

On October 25, 1909, the board of supervisors adopted, and on October 26, 1909, the mayor approved, an ordinance whereby it was "determined and specifically declared that the public interest and necessity demand the *construction* of street railways over and along" said streets, and directing the board of public works to procure and file with the supervisors plans and estimates of the cost of original construction and completion of said railways, the same to be based upon the use of electricity as motive power. On November 15, 1909, the board of public works filed said plans and estimates with the board of supervisors, showing the cost to be $1,900,000 for the Geary street road and $120,000 for the Market street road.

On November 22, 1909, the board of supervisors adopted and the mayor approved ordinances declaring the necessity of a bonded indebtedness and calling a special election for December 30, 1909.

It is urged that the resolution soliciting offers for the sale to the city and county of existing utilities was void, because adopted seven days prior to the passage of the ordinance declaring that the public interest and necessity demand the construction of said utilities, and passed in the absence of the adoption of any ordinance declaring the necessity for the acquisition by *purchase* of said utilities, and that all subsequent proceedings looking to the original construction thereof are in consequence void. We have no doubt that the soliciting of offers for the sale of any existing utility may precede the ordinance declaring the demands of public interest and necessity for the acquisition by construction or purchase of a similar utility. Indeed it would seem advisable that it should so precede, in order that the board may know whether and upon what terms an existing utility can be acquired and consequently be enabled to more satisfactorily determine exactly what the public interest and necessity demand, the acquisition by purchase of an existing utility or the original construction of such a utility. It is true, as said by counsel, that no purchase can be consummated, except after ordinance declaring the determination of the board as to the demands of public interest and necessity; but we do not see that this in any way affects the validity of the resolution soliciting offers for consideration. If any offer is made in response to the solicitation such procedings may then be taken, looking to its acceptance, as are required by law, including the preliminary and essential ordinance determining the necessity of acquiring by purchase the existing utility which is offered. The mandate of the charter is simply that "before *submitting propositions to the electors* for the acquisition by original construction," etc., the board must solicit such offers of sale. The ordinance submitting the propositions to the electors was adopted and approved November 22, 1909, *after* the soliciting of offers and *after* the expiration of the time named in the resolution during which offers would be received and considered. It is not alleged in the complaint that any offer of sale was made by the owner of any existing utility. It is further suggested that the board in soliciting offers should have acted by ordinance, rather than by resolution. We find nothing in the charter requiring such action to be by ordinance rather than by resolution. It is further suggested that under the provision of section 13 of chapter 1 of article 2 of the charter, this resolution should have been published for five successive days before final action thereon. It does not appear by the complaint that such publication was not had, but a complete answer to plaintiff's claim in this regard is that this resolution was not one coming within the purview of that section. It did not provide for any specific improvement, or the granting of a franchise or privilege, or the expenditure of public money, and did not levy any tax or assessment. We conclude, therefore, that there was a full compliance with the requirements of section 2 of article 12 of the charter.

We concede the necessity for the determination by ordinance of the demands of public interest or necessity for "the acquisition, construction, or completion by the city and county" of the utility proposed to be acquired. The ordinance in this case ordained that "it is hereby determined and specifically declared that the public interest and necessity demand the construction of street railways over and along the following streets," etc., and directed the board of public works to procure and file plans and estimates of cost. This determination, it will be observed, was in the precise form specified in section 5, article 12, of the charter, but it is not declared in terms that such construction so demanded is a construction "*by the city and county.*" Upon the omission of these words learned counsel base a claim that the ordinance is void, it being contended that there was no adjudication by the board of the necessity of such construction "*by the city and county.*" This ordinance was one of a series of essential steps in a proceeding provided for by the charter, leading up to the acquisition by the city and county of public utilities. The determination of the board expressed therein was in the form prescribed by the particular section relating to such ordinance, which sufficiently answers what is said by counsel as to the mode prescribed being the measure of power. Throughout the article of the charter relating to the acquisition of public utilities, the words "acquisition," "construction," and "completion" necessarily refer to an acquisition or construction or completion "*by the city and county.*" The word "construction" could mean nothing else in the ordinance declaring the determination as to the demand of public interest and necessity therefor, especially where this declaration is followed therein by an order for plans and estimates of cost. We are satisfied that the ordinance sufficiently expressed the determination of the board that the public interest and necessity demand the construction of these street railways *by the city and county.*

It is further urged that the ordinance was defective in that it confined the determination to one of necessity for the "construction" of street railways, and did not include a determination of the necessity of the "acquisition" of an existing street railway. It is said, "jurisdiction was never obtained, therefore, to acquire an existing utility." We fail to perceive the point of this, inasmuch as the bonded indebtedness authorized by the electors and proposed to be incurred is not, in whole or in part, for the acquisition by purchase of any existing utility. What is said by counsel in this connection is doubtless said upon the theory that such a determination was essential to the validity of the resolution soliciting offers for sale of existing utilities, a matter to which we have already referred. Of course, the word "construction" as used in this ordinance means the original construction of the street railroads proposed to *completion.*

We are unable to perceive any irregularity in the matter of the calling for plans and estimates of cost of the proposed street railway, or in the plans and estimates themselves. There was a description of the utility proposed to be constructed sufficient for the purpose in the resolution calling for plans and estimates. The plans submitted by the board of public works are not shown and there is no allegation of the complaint indicating them to be "meager" or "inadequate." The ordinance of the board of supervisors determining that a bonded indebtedness is essential to the construction of such utilities sufficiently adopts the estimates of cost by the board of public works as its own.

The complaint alleges that the city and county has heretofore appropriated out of the current revenues in different years for the construction of a municipal railroad on Geary street, the aggregate sum of $1,395,000, being $350,000 in 1905, $325,000 in 1906, and $720,000 in 1907, none of which has ever been expended in the acquisition or construction or completion of said municipal street railroad. It is urged that so far as current revenues are available, a bond issue is unauthorized. There is, however, no allegation that the moneys so collected are now in the possession or control of the city and county, or available for use in the construction of this utility. It must be presumed against the pleader that such money is not so available. It is asserted in an affidavit presented on the hearing of the application for an injunction that these moneys not having been used for the purpose of constructing a street railroad, they were at the expiration of the respective fiscal years during which they were set apart for that purpose merged in the surplus fund of the city and county in accordance with the provisions of section 3, chapter 2, article 3, of the charter, and also that the city and county was perpetually enjoined by the superior court from using for such purpose the $720,000 set apart in 1907. While this affidavit may not be considered in the matter of the demurrer to the complaint, it presents a theory not negatived thereby, affording a sufficient basis for holding that the complaint does not show that this money is available for the construction of these utilities.

The complaint alleges many facts as the basis of a claim that public interest or necessity does not demand that the city and county should construct any street railroad, such as the existence in said city and county of street railroads owned and operated by private corporations, furnishing "ample and adequate means of transportation" to the people thereof. It appears very clear that the determination of the question of public interest or necessity by the board of supervisors in a matter of this character is conclusive upon the courts, at least in the absence of fraud. As intimated by the learned trial judge, there is no material difference in this regard between such a determination and one by a board of supervisors to the effect that an ordinary public road, or street, or public ferry, is necessary, and it is well settled that the latter is not subject to review by the judicial department of the state. See Pool v. Simmons, 134 Cal. 621, 625, 66 Pac. 872, and cases there cited; 1 Dillon on Mun. Corp. §§ 94, 95.

It is said that the ordinance provides for the construction of a road that will cover more than ten blocks occupied by another street railway, and that it is therefore void under the city charter. Without admitting that such a condition would render the ordinance invalid, it is sufficient to say that it affirmatively appears from the allegations of the complaint that, if the existing road on Geary street constructed under the franchise alleged to have been granted to Charles Main et al. on November 6, 1878, and assigned to the Geary Street, Park & Ocean Railroad, be excluded from consideration, there is no existing franchise for any ten *consecutive* blocks on the portions of any of the streets over which it is proposed to construct these railways. The Geary Street, Park & Ocean Railroad franchise is to be excluded from consideration because there is no allegation in the complaint tending to show that it has not expired by limitation. The pleader with scrupulous care has abstained from alleging, as in the case of the other franchises granted, the term for which this franchise was granted, and from appending to his complaint a copy of the ordinance granting the same. But under well-settled rules of pleading we must assume, in the absence of allegations to the contrary, that the franchise has expired. If we assume that the charter provision (subdivision 27, § 1, c. 2, art. 2, as amended February 5, 1903 [St. 1903, p. 586]) is applicable in the case of municipally owned street railways, it is clear that the utmost that can be claimed for it is that it precludes the authorization by the supervisors of the joint use by two or more street railways of more than ten *consecutive* blocks of any street.

There is nothing in any of the ordinances granting franchises to private street railroad corporations, copies of which are appended to plaintiff's complaint, which can be construed as purporting to apply to street railroads owned and operated by the municipality. So far as the Sutro franchise covering six consecutive blocks on a portion of Point Lobos avenue to be traversed by the municipal Geary street railroad is concerned, there is no provision whatever referring to the right of the board of supervisors in regard to grants by it to other corporations of privileges over the streets embraced therein, except the general provision that the rights and privileges granted shall be held and enjoyed, "upon such terms, conditions, and restrictions as are now or may be hereafter imposed by the laws of the state of California."

The express prohibition of section 499 of the Civil Code against the occupation and use of the same street or track for a distance of more than five blocks by two lines of street railway operated under different managements was eliminated by amendment in 1907 (St. 1907, p. 837), and the section now expressly permits two or more lines of street railway, operated under different managements, by arrangement among themselves, to use the same streets or tracks for any distance exceeding five consecutive blocks; the use for not exceeding five consecutive blocks being authorized without any arrangement. As we understand the allegations of the complaint, the only joint use of a street in excess of five consecutive blocks by any two or more railway lines, in consequence of the construction of the proposed municipal railroads, will be that of one block on Point Lobos avenue and that of two blocks on Market street. Assuming solely for the purposes of this decision that section 499, Civil Code, is applicable to municipally owned and operated street railroads, and also that it controls the charter provision above referred to, certainly we cannot assume in this proceeding to enjoin the incurring of the bonded indebtedness proposed, that arrangements have not or cannot be made that will permit such a use as is authorized thereby.

We see nothing in the allegations as to existing franchises that can be held to preclude the issuance of the proposed bonds. No other points are made in the briefs against the proposed bond issue.

Whatever basis there may be for the doubts expressed as to the wisdom of the policy of the acquisition and operation by the city and county of San Francisco of the proposed municipally owned street railways, we have no doubt that the city and county has the power to construct and operate the same and the power to incur a bonded indebtedness for such purpose, and also that the proceedings in that behalf presented for review on this appeal are free from substantial irregularity. It necessarily follows that the conclusion of the trial court was correct.

The judgment is affirmed, as is also the order denying plaintiff's motion for an injunction.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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158 Cal. 149

UNION OIL CO. v. STEWART et al.

(L. A. 2,489.)

(Supreme Court of California. July 19, 1910.)

1. Deeds (§ 114*)—Construction—Land Conveyed.

A grantor conveyed land described as the central portion of J. ranch containing about 20,000 acres, bounded on the east by the L. ranch owned by W. Previous to the execution of the deed, a dispute had arisen concerning the boundaries of the land of the grantor and the L. ranch, and in settlement thereof the owner of the L. ranch deeded to the grantor a strip of land lying along the eastern patent boundary of the J. ranch. *Held*, that the descriptive words carried the boundary beyond the ranch line, so as to include the strip conveyed from the L. ranch to the land owned by W., which would answer the whole of the description given, any uncertainty being resolved against the grantor, under Civ. Code, § 1069, providing that a grant is to be interpreted in favor of the grantee, and section 1654 providing that, in cases of uncertainty not removed by certain rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316, 331; Dec. Dig. § 114.*]

2. Husband and Wife (§ 16*)—Adverse Possession by Wife of Land of Husband—Statutes.

While a wife may not acquire title to her husband's land by continuous, exclusive possession, adverse to him, while they are living together and he remains the head of the family, yet when a husband deserts his wife, remaining permanently separate from her, and at the same time delivers to her possession of his land, she may claim title to it as her separate estate and acquire the legal title in fee by adverse possession against him in view of Civ. Code, § 162, providing that all property of the wife acquired by her after marriage by gift, devise, bequest, or descent, with the rents and profits thereof, are her separate property, and that she may without her husband's consent convey her separate property, under which she may own and control her separate property the same as her husband could own his, and section 157 providing that neither spouse has any interest in the separate property of the other, and Code Civ. Proc. § 370, providing that a married woman may sue or be sued alone when the action is between herself and her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 102; Dec. Dig. § 16.*]

3. Husband and Wife (§ 126*)—Separate Property of Wife—"Accumulations."

Civ. Code, § 169, declares that the accumulations of a wife while she is living separate from her husband are her separate property. *Held*, that property of the husband by him put in possession of the wife and acquired by her by adverse possession during the marriage while living separate from her husband is an accumulation, and is not subject to execution for the husband's debts, accumulations of property generally meaning any property which a person acquires and retains without regard to the means by which it is obtained.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 459, 464; Dec. Dig. § 126.*

For other definitions, see Words and Phrases, vol. 1, pp. 103, 104.]

4. Appeal and Error (§ 1051*)—Harmless Error—Admission of Evidence.

In an action to quiet title to land, error in admitting immaterial testimony of the father of plaintiff's predecessor in title that the land was regarded by such predecessor and her husband as included in a tract part of which was conveyed by the husband to the wife was not prejudicial, where the facts that the land when acquired by the husband was immediately fenced so as to be within the same inclosure as the tract, and that it was afterwards maintained in that condition, were proved by other evidence, and was not contradicted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4165; Dec. Dig. § 1051.*]

5. Deeds (§ 200*)—Delivery—Evidence.

A letter of a grantor to a third person, inclosing a deed to the grantee, and directing such person to deliver it to the grantee, was admissible to prove delivery of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.*]

6. Evidence (§ 269*)—Declarations—Showing Intent.

In an action to quiet title which involved the adverse possession of plaintiff's predecessor in title as against such predecessor's husband who had abandoned her, leaving her in possession of the land in question, a letter from the husband to a third person stating that he had left his wife and family for all time was admissible to establish the husband's intent to desert his wife.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1063; Dec. Dig. § 269.*]

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Union Oil Company against Nat. Stewart and another. Judgment for plaintiff, and, from an order denying a new trial, defendants appeal. Affirmed.

B. F. Thomas, for appellants. C. A. Storke and E. W. Squier, for respondent.

SHAW, J. This is an appeal from an order denying defendants' motion for a new trial.

Plaintiff's action is to quiet its alleged title to certain land, and to enjoin defendant, Stewart, from selling said land on an execution issued to him, as sheriff of Santa Barbara county, upon a judgment in favor of the defendant Mullenary against one J. Ben Burton. The suit of Mullenary v. Burton was begun January 8, 1903, and on that day an attachment therein was issued and levied on the land in dispute. Judgment was recovered from Burton for $2,710.63, and it became final on June 14, 1906. Mullenary v. Burton, 3 Cal. App. 263, 84 Pac. 159. The defendant's claim is that the land was at the time he levied the attachment the property of J. Ben Burton, or at least subject to execution for his debts. The plaintiff claims title to the land by mesne conveyances from Stella F. Burton; her conveyance being subsequent to the levy of the attachment. The sole question presented in the case is whether at the date of the levy the land was the property of J. Ben Burton, or the property of Stella F. Burton.

J. Ben Burton was the owner of the land on February 7, 1895. He was then and still is the husband of Stella F. Burton. On that day, as the court found, he deserted and abandoned her, and left the state of California, and he has ever since that time lived separate and apart from her and outside of this state. On that day he executed to her a deed of conveyance, the effect of which to convey the land in dispute is one of the main questions in the case. The court finds that the descriptive clause in this deed included the land in controversy. Immediately after its execution Stella F. Burton entered into possession of the entire tract described therein, including the land in controversy, claiming title thereto under the deed, and the court finds that from that time continuously until January 28, 1903, she occupied and possessed the same openly, notoriously, exclusively, adversely to all others, under a claim of right and title thereto, cultivating the same in the usual manner and paying all taxes thereon. On January 28, 1903, she conveyed it to one Rudisell who upon March 13, 1903, conveyed it to the plaintiff, and plaintiff has ever since held possession thereof in the same manner above described.

Two principal points upon which the defendant urges reversal are that the finding that the deed of 1895 included the tract of 139.54 acres, which comprises the land in dispute, is contrary to the law and the evidence, and that under the law Stella F. Burton could not acquire title to her husband's land by adverse possession against him while the marriage relation continued to exist. There is some contention that the finding of the court with relation to the facts constituting adverse possession is not supported by the evidence. We do not think it necessary to discuss the evidence upon the point. It is sufficient to say that there is ample evidence to support the finding on that subject.

The court correctly held that the deed to Stella F. Burton included this land. The defendant Mullenary is a mere attaching creditor of J. Ben Burton. He has no standing, with respect to this question, different from that which J. Ben Burton would have if he were claiming the land for himself. He is not a bona fide purchaser for value. Burton became the owner of the 139.54 acres in 1891. At that time he was the owner of a large tract of land which the evidence indicates contained exactly 20,000 acres, situated in what is called the central part of the rancho Jesus Maria. This rancho according to the United States patent therefor contained 42,179 acres of land bordering on the Pacific Ocean. The 20,000 acres belonging to Burton extended from the ocean easterly through the rancho to its easterly boundary. Another large rancho designated as La Purisima adjoined it on the east. A dispute arose concerning the boundaries between the lands of Burton and the owners of La Purisima. In settlement thereof the owners of La Purisima on November 17, 1891, executed a deed to J. Ben Burton purporting to convey to him a strip of land containing 139.54 acres, 12 chains in width, east and west, and 116 chains in length, north and south, lying along the eastern patent boundary of the Jesus Maria rancho. The boundaries of this tract, as described in the deed, indicate that it lay entirely within the rancho La Purisima. It constitutes the land in controversy. Immediately after acquiring it Burton extended his fences so as to include it in the same inclosure as the 20,000-acre tract, and thereafter it was occupied and used by him in connection with his 20,000 acres and as a part of the same ranch or farm. The land in La Purisima rancho adjoining this strip on the east belonged to John H. Wise and Thomas Denigan at the time Burton acquired the strip, and it is referred to in the evidence as the land of Wise.

On February 7, 1895, Burton, being at San José, Cal., drew up and signed the deed to his wife, inclosed it in an envelope and mailed it to George Tebbetts, his wife's father, who was then at Santa Barbara, accompanying it with a letter to Tebbetts stating that he had left his wife and family for all time and directing him to deliver the deed to her. She was at that time residing in San Francisco. This deed describes the land intended to be conveyed as follows: "All that certain lot, piece, or parcel of land, * * * bounded and described as follows, to wit: The central portion of the Rancho Jesus Maria containing about 20,000 acres, bounded on the north by the land owned by H. Dutard, on the east by the Rancho of La Purisima owned by John H. Wise, on the south by land owned by A. Packard, on the west by the Pacific Ocean (for more particular description see patent on record in city of Santa Barbara, California.)" On February 21, 1903, after the levy of the Mullenary attachment, Burton executed to her a deed purporting to convey the 139.54-acre tract, declaring therein that it was a part of the premises which he intended to convey to her by the deed of February 27, 1895, and that this later deed was executed to render more certain the description of the premises intended to be conveyed by the deed of 1895.

A grant of this character is to be interpreted against the grantor. Civ. Code, § 1069. In other respects grants are to be interpreted in like manner with other contracts. Civ. Code, § 1066. In cases of uncertainty in a contract, it is to be interpreted most strongly against the party who causes the uncertainty to exist. Civ. Code, § 1654. It was Burton himself who caused the existence of such uncertainty as appears in the description in the deed of 1895. It clearly appears from the evidence that after the execution of that deed he never attempted to exercise any ownership over any part of the land and that he intended to give it all to his wife for the support of herself and her children. The deed states that the land conveyed is "the central portion of the rancho Jesus Maria containing about 20,000 acres," and that it is bounded "on the east by the rancho of La Purisima owned by John H. Wise." If the phrase "owned by John H. Wise" had been omitted, it would have been clear that the land actually conveyed included only the land within the proper patent boundaries of the rancho Jesus Maria and that no land included in the rancho La Purisima could have been considered as passing by the conveyance. But Wise did not own that part of the rancho La Purisima adjoining the rancho Jesus Maria. His land lay 12 chains easterly of that line. The effect of the descriptive words was to carry the boundary beyond the ranch line to the land, which, by reason of the fact that it was owned by Wise, would answer the whole of the description above given. It might be urged perhaps that the language of the description leaves some uncertainty whether the eastern boundary line was intended to be the surveyed line of the rancho or the boundary of the land owned by Wise. But, by reason of the rules above stated, this uncertainty is to be resolved against the grantor in favor of the grantee, and the last phrase must be considered as the controlling part of the description. The result is that the deed conveys all of the lands owned by Burton at the time extending easterly to the lands owned by Wise, and therefore that it includes the land in controversy. The situation of the respective tracts at that time and all the attending circumstances, as well as the subsequent conduct of the parties with regard to its possession, all lead to this conclusion as the only reasonable theory.

We see no sufficient reason for the determination that a wife cannot, under any circumstances, acquire title to her husband's land by continuous exclusive possession adversely to him. It may be conceded that she could not do so while they were living together and he remained the head of the family. This has in effect been decided by this court in Frink v. Alsip, 49 Cal. 103, First N. Bank v. Guerra, 61 Cal. 113, and Mauldin v. Cox, 67 Cal. 390, 7 Pac. 804. But the language of these decisions is carefully qualified by the phrases we have stated above. In Bank v. Guerra the court says: "She could not claim adversely to him, or to those claiming under him, so long as he remained the head of the family." In Mauldin v. Cox it is said: "We conclude that during coverture, while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other." This qualified language shows an intent to distinguish those cases from one where the husband has deserted his family and no longer remains at its head. But, when he has left his family, has ceased to contribute to its support, and has abandoned his property to the use of his wife for that purpose, there is no consideration of public policy which prevents her from exercising the same powers and acquiring the same rights with respect to the property left in her hands as if she were an unmarried person. Our liberal statutes concerning the rights and powers of married women invest her with sufficient power to hold adversely to her husband. She may own, hold, and control her separate property as fully and completely as the husband can own and control his separate property. Civ. Code, § 162. Neither spouse has any interest in the separate property of the other. Civ. Code, § 157. Either may sue the other to recover possession of his or her separate property. Code Civ. Proc. § 370; Wilson v. Wilson, 36 Cal. 453, 95 Am. Dec. 194. It is true that neither spouse can be excluded from the other's dwelling. Civ. Code, § 157. Perhaps there could not be adverse possession in law of the dwelling, although doubtless there could be, in fact, an exclusive hostile holding thereof by one spouse. The point is not involved here for the wife did not dwell on any part of the land in dispute or on the other part of the rancho during the time of the adverse holding. She resided in San Francisco in 1895, and thereafter so long as she continued to own the land. It was occupied by a tenant or managing agent, and she only made occasional short visits to it.

Property acquired by either spouse during coverture, other than by gift, devise, bequest, or descent, is declared to be community property. Civ. Code, §§ 162–164. If these sections stood alone and controlled this case, it might be argued that property acquired by adverse possession by the wife during the marriage would be community property and as such subject to execution for the debts of the husband. But this argument does not apply to the present case. Section 169 of the Civil Code declares that "the earnings and accumulations of a wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." The word "earnings" according to its ordinary meaning would not apply to property acquired by adverse possession. But property so acquired and held in ownership would clearly be included in the term "accumulations." When one speaks generally of accumulation of property, he is understood to refer to any property which a person acquires and retains, without regard to the means by which it is obtained. Of course, if it were acquired by the wife by purchase with community funds, or in exchange for other community property, it would not be accumulated in the sense here involved. Such an acquisition would be a mere exchange, and it would have the character possessed by that given in exchange for it. But where the wife, while living separate from her husband, through her own industry, labor, skill, or efforts of any kind, obtains property and holds it in possession, it is what would ordinarily be called an accumulation of property, and, under the rules stated in section 169, it would be a part of her separate estate.

The decision of this court in Siddall v. Haight, 132 Cal. 320, 64 Pac. 410, goes even farther than this. There a parol gift of land was made to the wife by her sister and in pursuance of the gift the wife was put in possession of the property. The husband was living with his wife on the property, but did not claim any interest therein under the gift. The decision was that she acquired the title to the property from the donor by adverse possession in pursuance of the parol gift, and that the character of the property as separate or community was determined by the fact that it first became hers by gift, and that in consequence thereof the title gained by adverse possession was a title in her as of her separate estate If it be suggested that title by adverse possession is founded on a presumed grant to her, the result would be the same. Under the provisions of section 164, Civ. Code, such a grant to the wife raises a presumption that it is her separate property.

We conclude, therefore, that when a husband abandons and deserts his wife, remaining permanently separate from her, and at the same time delivers to her the possession of his land, she may claim title to it as her separate estate and acquire the legal title in fee by adverse possession against him. The case of Warr v. Honeck, 8 Utah, 61, 29 Pac. 1117, is substantially to the same effect. There a decree of divorce had awarded to the wife a certain segregated part of the property of the husband. She took and held possession of it thereafter, claiming it as her own, and lived upon it separate and apart from her husband. The decree was absolutely void both as to the property and the divorce. The court held that, notwithstanding the continuance of the marriage relation in point of law, she could and did acquire the title to the land from him by adverse possession.

Some rulings upon the admission of evidence are assigned as error. The testimony of Tebbetts, the father of Mrs. Burton, to the effect that the land in dispute was regarded and treated by Burton and his wife as a part of the Jesus Maria rancho, should not have been allowed. His opinion as to how they treated and considered this land was immaterial and incompetent. But its admission could not have caused any substantial injury to the appellant. The fact that the 139.54 acres when acquired by Burton was immediately fenced so as to be within the same inclosure as the adjoining part of the land previously owned by him, and that it was thereafter maintained in that condition, was proven by other evidence and there was no contradiction thereof; nor was the fact ever disputed. The letter of Burton to Tebbetts, inclosing the deed to Mrs. Burton and directing Tebbetts to deliver it to her, was admissible to prove the delivery of the deed. Its contents also established the intent of Burton to desert his wife, and it was admissible for that purpose. The other alleged errors are so insignificant that we do not consider it necessary to discuss them.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

13 Cal. App. 605

OAK HILL WATER CO. v. GILLETTE et al. (Civ. 822.)

(Court of Appeal, Second District, California. June 16, 1910. Rehearing Denied by Supreme Court Aug. 11, 1910.)

Municipal Corporations (§§ 488, 489*) — Street Improvements — Assessments—Validity.

Under Street Improvement Act (Henning's Gen. Laws Cal. p. 1322) § 11, making the acts of the street superintendent as to street improvements the subject of appeal to the city council, and empowering the council to modify or correct the assessment and direct the superintendent of streets to correct the diagram in any particular, etc., the inclusion in a sidewalk construction by contractors under the direction of the superintendent of a certain strip projecting into the street, but not a part thereof, though such inclusion was not authorized, did not render the assessment and lien thereof void; the owner of the property not having appealed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Oak Hill Water Company (a corporation) against T. W. Gillette and others. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

McNutt & Hannon, for appellant. Gibson, Trask, Dunn & Crutcher, for respondents.

SHAW, J. Action to quiet title to two certain lots fronting on Glenarm street in the city of Pasadena, described as lots 24 and 25, Mills tract.

Defendants admit plaintiff's title to the property, but claim and assert a lien thereon by virtue of an assessment for the cost of certain street improvement work done under the street improvement act, which lien they ask, by cross-complaint, to have foreclosed. The court made its findings upon which a decree of foreclosure was rendered in accordance with the prayer of defendant's cross-complaint. Plaintiff appeals from the order denying its motion for a new trial.

The city council of Pasadena by resolution in due form declared its intention to improve Glenarm street from the east line of Fair Oaks avenue to the original east boundary line of the city, the width of which street is not disclosed by the record. It is admitted that on the face thereof all the proceedings were duly had and taken. Nevertheless appellant claims that the resolution of intention and all the proceedings had thereunder were wholly void for the reason that in said resolution of intention and proceedings had thereunder the city council included therein the private property of plaintiff. This claim is based upon the fact that said lots 24 and 25, which front upon the north side of the street, extended across the north line thereof as the same was located on either side of said lots, and that they projected into the street a distance of 10 feet, and the sidewalk, the construction of which was included among other improvements ordered, was by the contractors constructed over this 10-foot strip so projecting into the street.

Appellant lays much stress upon a finding made by the court to the effect that the city of Pasadena unlawfully and without right claimed said 10-foot strip as a part of the street; and it contends that by reason of such claim on the part of the city it necessarily follows that it was the intention of the city council to improve the strip by constructing the sidewalk thereon. "The whole fault," says appellant, "lies in the fact that in the resolution of intention and the ordinance ordering the work to be done the private property was claimed to be a part of the street and was proposed to be improved as such." It is undoubtedly true that the intention of the city in this regard must be determined from the resolution of intention and proceedings had thereunder. Neither the resolution of intention nor other proceedings, however, so far as disclosed by the record, make any reference to property other than that embraced within the side lines of the street between the points named, which is conceded to have been an open public street. Regardless of what its undisclosed claim may have been as to lands other than those actually embraced in the street, it cannot be said that by such proceedings the city council proposed or attempted to exercise jurisdiction over such land, to which it had no right and which in fact was no part of the street. There is absolutely nothing in the resolution of intention or other proceedings which tends in the slightest degree to show that the city authorized, or that it was its intention to authorize, the improvement of the private property of plaintiff, or the laying of the sidewalk other than along the side of the street. Hence there is no analogy between this case and Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249, cited by appellant. It was there held that what was designated in the proceedings as "Union street," between Larkin and Franklin streets, in San Francisco, was not a public street, but that it was held in private ownership, and had not been dedicated to public use. The proceedings there taken contemplated the improvement, not of a public street, but of a piece of land held in private ownership, known as "Union street." Clearly no warrant existed in the street improvement act for the doing of the work thus described in the resolution of intention.

In the case at bar, as the council did not order other than the area embraced in Glenarm street to be improved, it follows that the contractors had no authority by virtue of said proceedings to construct a sidewalk upon the 10-foot strip which was no part of the street. The superintendent of streets should not have accepted the work as completed for the reason that the sidewalk was constructed on and not in front of these lots. Neither should the cost thereof have been included in the assessment made to cover the total cost of the improvement. Conceding, however, that the contractors constructed the sidewalk upon this strip under the direction of the superintendent of streets, nevertheless, inasmuch as it was not included in the resolution of intention and the council did not order it, there was no authority for doing it; and hence the officer erred, both in directing it to be done and in accepting the work thus incomplete, as well as including the cost thereof in the assessment. None of these acts, however, rendered the assessment and lien thereof void. By the provisions of section 11 of the street improvement act (Henning's Gen. Laws Cal. p. 1322), the determination and acts of the street superintendent in relation to all of these matters is made the subject of an appeal to the city council by the owners or any person interested. Upon the hearing of such appeal the city council is given the power to "confirm, amend, set aside, alter, modify, or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council; and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option"; "and revise and correct any of the acts or determinations of the superintendent of streets relative to said work." Plaintiff did not exercise its right to appeal. Had it done so, and the attention of the council been directed to the fact that not only was the work incomplete by reason of the failure of the contractors to construct the sidewalk in front of the lots instead of on and across the ends thereof so projecting into the street, but also to the fact that the cost of the sidewalk so constructed had been included in the assessment for the total cost of the work, no doubt the council would have met the objections by an exercise of the power vested in it by section 11 and caused the errors to be corrected. At all events, we must indulge in that presumption. Lambert v. Bates, 137 Cal. 676, 70 Pac. 777; Warren v. Riddell, 106 Cal. 352, 39 Pac. 781; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J

13 Cal. App. 632

PEOPLE v. DAVENPORT. (Cr. 118.)

(Court of Appeal, Third District, California. June 18, 1910. Rehearing Denied by Supreme Court Aug. 11, 1910.)

1. WITNESSES (§ 397*) — IMPEACHING TESTIMONY—EFFECT.

Evidence of inconsistent statements does not in any way tend to establish the truth of the matters contained in the contradictory statements.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1266; Dec. Dig. § 397.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for rape, the instruction: "I instruct you that the testimony of the oral declaration or admission of a witness or party should be viewed with caution," though in conflict with the rule forbidding judges to charge juries with respect to matters of fact, is harmless, as stating a mere commonplace within the general knowledge of jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154, 3163, 3169; Dec. Dig. § 1172;* Rape, Cent. Dig. § 104.]

3. CRIMINAL LAW (§ 778*) — INSTRUCTIONS—PRESUMPTION OF INNOCENCE—"SHOWN."

In a prosecution for rape, the instruction that one accused of a crime "is presumed to be innocent until the contrary is shown and his guilt established by the evidence," was not defective in the use of the word "shown," which plainly meant "proved," nor because of the failure to repeat "beyond a reasonable doubt," as the jury was repeatedly told this in other portions of the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1857, 1960, 1967; Dec. Dig. § 778.*

For other definitions, see Words and Phrases, vol. 7, pp. 6500, 6501.]

4. CRIMINAL LAW (§ 778*) — INSTRUCTION — PRESUMPTION OF INNOCENCE.

In a prosecution for rape, while the instruction that "the presumption of innocence remains with the defendant at every stage of the trial unless it has been overcome by the evidence" was not very clear, yet the jury must have understood it to mean that the presumption of innocence remained to the last with defendant, and until in their deliberations upon the evidence they became convinced of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1857, 1960, 1967; Dec. Dig. § 778.*]

5. CRIMINAL LAW (§ 318*) — EVIDENCE — ADMISSIBILITY.

In a prosecution for rape, the testimony by a friend of defendant that he had been directed by defendant "not to tell any more about the story and to say 'no' to everything they would ask me," and to "change my name," and that defendant told the father of witness that "I got in some trouble up here and he had to send me to Roseville and keep me out of the way," was properly admitted, leaving it for the jury to determine whether it indicated a purpose on the part of defendant to suppress testimony against himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 735; Dec. Dig. § 318.*]

6. WITNESSES (§ 289*)—REDIRECT EXAMINATION—SCOPE.

Where, in a prosecution for rape, testimony was shown that the reason why defendant wished to conceal the witness was because the witness had gotten into trouble, and not because defendant wished to suppress testimony against himself; and then it was shown on cross-examination that witness had really had such trouble, it was improper on the redirect examination to show that defendant had encouraged the improper relations between the witness and B. which caused the trouble referred to, as it would be prejudicial to defendant, and was collateral to the object of the testimony which was to discover whether defendant had attempted to conceal witness in order to suppress testimony against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1004; Dec. Dig. § 289.*]

7. WITNESSES (§ 277*) — CROSS-EXAMINATION —SCOPE.

In a prosecution for rape, it was proper to ask defendant on the cross-examination where he was on the preceding and succeeding nights of the offense in order to test the accuracy of his memory as to where he was at the time of the offense, and also to clarify his explanations as to his movements at that time.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979–984; Dec. Dig. § 277.*]

8. WITNESSES (§ 277*) — CROSS-EXAMINATION —WHAT MAY BE SHOWN.

In a prosecution for rape, the prosecution may seek upon cross-examination, to bring out evidence which tends directly to explain, qualify, or contradict defendant's testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979–984; Dec. Dig. § 277.*]

9. WITNESSES (§ 268*) — CROSS-EXAMINATION —SCOPE.

Where, in a prosecution for rape, evidence was admitted of defendant's having taken prosecutrix to a doctor, defendant should have been allowed the widest latitude to show on cross-examination that defendant was not responsible for the condition of prosecutrix, for which medical aid was sought.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

10. CRIMINAL LAW (§ 700*)—TRIAL—CONDUCT OF PROSECUTING ATTORNEY.

While the prosecuting attorney should exhibit industry and zeal commensurate with the importance of the case and the gravity of the opposition, yet he should be mindful of the rights of the defendant and endeavor to maintain the equipoise of judgment and demeanor becoming to one engaged in the pursuit and administration of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1658; Dec. Dig. § 700.*]

11. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE—OMISSION OF "FELONIOUSLY."

Where an information for rape described the offense in the language of the statute, the word "feloniously" was not necessary.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. § 110.*]

12. INDICTMENT AND INFORMATION (§ 91*)—INFORMATION—NECESSITY FOR "WILLFULLY."

Where an information for rape alleged that the offense was committed, it was not necessary to aver that it was "willfully" done, as that would be inferred from the allegation that the act was committed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 261–265; Dec. Dig. § 91.*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Isaac T. Davenport, was convicted of rape, and he appeals. Reversed.

J. R. Hughes and A. C. Huston, for appellant. U. S. Webb and J. Charles Jones, for the People.

BURNETT, J. Appellant seeks a reversal of the judgment and the order denying his motion for a new trial upon the grounds that the court committed error in the giving and refusing of instructions and in its rulings upon the admissibility of evidence during the trial, that the district attorney was guilty of prejudicial misconduct, that the demurrer to the information was improperly overruled, and the evidence is insufficient to support the verdict.

1. The portion of instruction No. 4 given by the court, to which criticism is directed, reads as follows: "It is wholly immaterial whether Martha J. McManus, the prosecuting witness, was of previous chaste character or not, at the time of the alleged offense. Want of chastity of a female under the age of 16 years is no defense to a charge of rape upon her. Any statement reflecting on the previous chastity of Martha J. McManus is to be wholly disregarded by you." It is admitted that "as an abstract proposition of law these expressions are probably correct." But it is contended that they were erroneous by reason of the fact that certain evidence admitted by the court as to improper relations between the prosecutrix and parties other than the defendant was material, in the determination of the question whether the act charged against the defendant in the information really occurred. But it is apparent that the court was dealing with the particular phase of the law involved in the suggestion that it might be no crime to have sexual intercourse with a female under the age of consent, if she was of previous unchaste character. The court had stated that it was immaterial whether the prosecutrix had consented or not to the act of intercourse, and then proceeded to declare, susbtantially, that "for the same reason" it was immaterial what was her previous character as to the element in question, and therefore any statement reflecting on her previous chastity should be disregarded.

But appellant is mistaken in the contention that the court admitted evidence of the relations existing between the prosecutrix and persons other than the defendant. Mrs. Manchester testified that the prosecutrix had stated to her that the defendant was not responsible for her "condition." What was meant by "condition" does not appear, but attributing to it the scurrilous signification contended for, there is no evidence as to when the "condition" originated, and, besides, it is only impeaching testimony and therefore could not be considered as evidence of the want of chastity. The rule is that "impeaching testimony does not establish, or in any way tend to establish, the truth of the matters contained in the contradictory statements." 3 Jones on Evidence, 861. The purpose of such testimony is, of course, as the term implies, to affect the credibility of the witness impeached and an instruction to that effect would have been proper had appellant desired it.

The court instructed the jury as follows: "I instruct you that the testimony of the oral declaration or admission of a witness or party should be viewed with caution." It is the contention of appellant that this has been before the Supreme Court many times for construction and it has been held to be in conflict with section 19 of article 6 of the Constitution of the state, which provides that: "Judges shall not charge juries with respect to matters of fact; but may state the testimony and declare the law." In support of the position these cases are cited: Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481; People v. Rodley, 131 Cal. 240, 63 Pac. 351; People v. Wardrip, 141 Cal. 229, 74 Pac. 744; People v. Buckley, 143 Cal. 375, 77 Pac. 169, and Gross v. Steiger Terra Cotta, etc., Works, 148 Cal. 155, 82 Pac. 681. Appellant seems to place a proper construction upon those decisions. It is equally true, however, as admitted by appellant, that these authorities "take the view that such an instruction is harmless, for the reason that 'it states mere commonplace matter within the general knowledge of the jury.'" Indeed, the language used in People v. Wardrip, supra, is that the instruction "states a mere commonplace within the general knowledge of jurors; and we

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do not think that either the giving or refusing of such an instruction would warrant a reversal." It may be, as insisted by appellant, that upon further consideration, the Supreme Court will hold that such an instruction is not only violative of the Constitution, but also prejudicial to the defendant; but the propriety of our declination to anticipate and forestall such a decision must be apparent.

Some of appellant's objections to instruction No. 8 seen quite hypercritical. Therein the jury were told that "the defendant is presumed to be innocent until his guilt is clearly established by the evidence. All presumptions of law are in favor of the innocence of persons accused of the commission of crime, and every person so accused is presumed to be innocent until the contrary is shown, and until his guilt is established by the evidence in the trial of the case, and this presumption of innocence remains with the defendant at every stage of the trial, unless it has been overcome by the evidence." The use of the word "shown" is criticised, but it is apparent that it was employed in the sense of "proved." It was not necessary for the court to repeat the expression "beyond a reasonable doubt," as in other portions of the charge the jury were told repeatedly that the prosecution must prove the charge to a moral certainty and beyond all reasonable doubt. Upon this point one of the instructions was: "Before you can convict the defendant you must be satisfied from the evidence that he is guilty beyond all reasonable doubt. A bare preponderance of the evidence in support of a criminal accusation against the defendant is not sufficient to warrant his conviction, but on the trial of this and all other criminal causes, the guilt of the defendant must be established to the satisfaction of the jury to a moral certainty and beyond a reasonable doubt, or he should be acquitted." They were further instructed that "the burden of the proof never shifts, but remains upon the prosecution throughout the whole case to prove the defendant guilty beyond a reasonable doubt." The jury could not, therefore, have understood from the criticised instruction that a less degree of proof was required of the prosecution than "beyond a reasonable doubt." There is some ground for the objection to the instruction in reference to its statement of the presumption of innocence. The language is not as clear as it should be but we think the jury could not have been misled thereby.

In People v. McNamara, 94 Cal. 514, 29 Pac. 953, cited by appellant, the instruction was: "And the presumption of innocence goes with him all through the case, *until it is submitted to you.*" The Supreme Court properly said that "the presumption of innocence does not cease upon the submission of the cause to the jury, but operates in favor of the defendant, not only during the taking of the testimony, but during the deliberations of the jury, until they have arrived at a verdict." But appellant's contention is directly answered by the case of People v. Arlington, 131 Cal. 231, 63 Pac. 347. The language there, being almost identical with what we have here, was, "and it is a presumption that abides with him throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt." In commenting upon this language and in reply to the suggestions of appellant, the Supreme Court said: "We do not think the language conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution or at any time before the jury had finally determined upon a verdict. The court meant, and we think must have been by the jury understood to mean, that the presumption remained to the last with defendant, and until in their deliberations upon the evidence they became convinced of his guilt. When the jury reached that conclusion on the whole evidence and beyond a reasonable doubt, of course, the presumption disappeared and should disappear." The instruction upon this subject requested by defendant, it may be remarked, has been approved by the Supreme Court as an entirely accurate statement of the law and might well have been given by the trial judge, but, as already declared, we think the jury were substantially so instructed.

2. One George Blohm was allowed to testify to certain movements made by him upon the contention of the district attorney that they were directed by the defendant for the purpose of having the witness concealed, that he might not be called to testify at the trial. It appears that the witness was at Mr. Davenport's house at the time the offense is claimed to have been committed, and acquired knowledge of certain facts incriminating the defendant. He testified that he was directed by Davenport "not to tell any more about the story and say, 'no,' to everything they would ask me," and also "to change my name and say it was George King," and furthermore that the defendant went to Roseville and brought the witness down to Sacramento, and directed him to conceal his identity in crossing the Sacramento river, and they went together to San Francisco and defendant told the father of witness that "I got in some trouble up here and he had to send me to Roseville and keep me out of the way."

It was for the jury to determine whether this testimony indicated a purpose on the part of defendant to suppress testimony against himself. Any act or declaration on his part in pursuance of that object, it is admitted, would be admissible; and while the testimony thus far detailed of the witness Blohm might be construed as indicative of defendant's desire to shield said Blohm, it was for the jury to determine whether that was the motive of defendant, or whether he was trying to further his own exculpation. The evidence was probably admissible, since a rational inference might be drawn from it that defendant thereby manifested a consciousness of guilt.

The witness was then asked the question: "Had you been in trouble?" and he answered, "No, sir," and then he qualified the answer by adding, "Not at Roseville; no." On the cross-examination he said the trouble he was in related to his conduct with Gladys Bryant at Mr. Davenport's house. On the redirect examination he was permitted to state, over objection, that the defendant was present when the incident occurred with Gladys Bryant and that he told the girl to come upstairs. The witness was persistently questioned in regard to the matter by the district attorney, and he stated quite positively that the defendant encouraged and advised the unseemly conduct on the part of the witness and the said Gladys Bryant. The evidence was admitted on the theory, as stated by the court, that "the matter was brought out on cross-examination as to the cause of his trouble, and the cause of the trouble having come in, it is admitted solely for the purpose of explaining that trouble." But we think the prosecution was allowed to go too far. The direct examination was for the purpose of showing that the defendant endeavored to conceal the witness, to prevent him from giving adverse testimony on the present charge. During this examination it developed that the defendant had told the father of the witness that the latter had gotten into trouble and that on this account he sent the witness to Roseville and kept him out of the way. It was certainly proper for the defendant, on cross-examination, to show by the witness that this statement was true, that he did have trouble, and that it was on this account that the defendant sought to conceal him. This did not open the door for a recital, at the instance of the district attorney, of the details of that separate offense in a manner so calculated to prejudice the defendant. It was entirely collateral to the main question, which was whether the boy's trouble or the present charge against the defendant was the moving cause of the so-called attempt to conceal said witness. It was not the occasion for explaining the boy's trouble in the sense of permitting an inquiry beyond its general nature, and the rule invoked did not sanction evidence of a separate offense which could not fail to be of decisive importance in the estimation of the jury. If the evidence had been offered on the direct examination of the witness, no one would deny that it should have been rejected. As presented it was no less objectionable. It is within the principle announced in People v. Fong Ching, 78 Cal. 174, 20 Pac. 396, and People v. Altmeyer, 135 Cal. 82, 66 Pac. 974. If the jury believed the testimony of Blohm, the effect upon their minds can be easily imagined. It would require little, if any, additional evidence to induce a conviction of defendant.

It is undoubtedly true, as said by the Supreme Court in People v. Baldwin, 117 Cal. 249, 49 Pac. 187, that: "In this class of prosecutions the defendant, owing to the natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence." Scarcely anything could more fully arouse the just indignation of the jury or awaken a spirit of resentment against the defendant than such a recital as was given by said witness. We cannot but feel that the defendant's rights were grossly transgressed in this respect.

There was no error committed in the cross-examination of defendant. Complaint is made that the district attorney was permitted to ask him as to his movements at other times than the occasion involved in the charge. The questions were limited, however, to the preceding and the succeeding night. This was entirely proper to test the accuracy of his memory as to where he was at the time of the alleged offense, and also to throw a side light upon the validity of his explanation of his movements on the said night of September 30th. He had stated in the direct examination that he had spent that night on the oil barge down the river, and he had done so because he had seen some tramps near the place and he was afraid that they might steal something. Of course, it would have been proper for the district attorney to ask him if it were not the night before or the night after instead of the night in question that he stayed on the barge. This was the effect of the cross-examination, and besides, the answers disclosed nothing prejudicial to the defendant. There is no doubt that the prosecution may seek, upon cross-examination, to bring out evidence which tends directly to explain, qualify, or contradict his testimony. People v. Arrighini, 122 Cal. 127, 54 Pac. 591.

On the direct examination of the prosecutrix the district attorney asked this question: "Did you prior to that time (the arrest of defendant) go with Mr. Davenport to a doctor's office in Sacramento?" and the witness answered, "Yes, sir." No inquiry was made as to the purpose of the visit or as to what occurred there, but it would seem that only one inference—not necessary to state here—could be drawn from the testimony. On cross-examination it was sought to show by the witness than on the 30th of September—at the time when the offense is charged against the defendant—she had intercourse with another person, and she was further asked the question: "After going into the front room, Mrs. Manchester said to you: 'Martha, who was it got you in the fix?' You says: 'I don't know.' Mrs. Manchester says: 'Was it Del Lawrence or any of his company?' You said: 'No.' Mrs. Manchester said: 'Is it the man with the glasses?' You said: 'No.' Mrs. Manchester said: 'Is it Mr. Davenport?' You said: 'No.' Mrs. Manchester said: 'Haven't you any idea who it was, Martha?' You said: 'You know who it was; it was Gussie Deuche.' Were these things said?" The questions were answered but after some discussion the court virtually excluded the testimony from the consideration of the jury, stating: "You can ask any question in regard to any act or contradiction of any act of this defendant, but I will exclude the testimony in reference to any condition of the little girl." As we have already seen, the evidence would not be admissible for the purpose of showing her unchastity at the time of the alleged offense, but if it had a logical tendency to rebut any unfavorable inference against the defendant that might be drawn from any act testified to on the direct examination, it should have been admitted for that purpose. Indeed, that was the ground upon which defendant bases his contention that it was proper cross-examination, stating to the court: "Your honor has permitted evidence to go in here that this defendant took this girl to a doctor, the district attorney will argue from that he took her there from an ulterior motive, and that is the inference to be drawn. Haven't we a right, on cross-examination, to show, as against her testimony on that point, that immediately and at that time she denied that Davenport was responsible for her condition, and if she denied that Davenport was responsible for her condition, isn't that legitimate testimony for us to take before the jury to argue that this evidence of her going to the doctor is of no detriment to us?" The answer of the district attorney to this contention was: "We haven't proved any evidence in this case that this girl was in any condition whatever." But the jurors, not possessing the technical skill, perhaps, of the district attorney in making nice distinctions or in turning phrases, would not be slow to conclude as to what her condition was that seemed to make it necessary for the defendant to take her to see a doctor, and the defendant should have been allowed the widest latitude to rebut the unfavorable inference necessarily drawn from said testimony.

3. Appellant complains bitterly of the conduct of the district attorney in asking improper questions and in transgressing the limits of official decorum in his argument to the jury, thereby depriving defendant of a fair and impartial trial. Every one familiar with the execution of the criminal law knows that to convict the guilty when ably defended by attorneys of high standing at the bar and in the community, the district attorney must be not only a man of consequence, but he must exhibit industry and zeal commensurate with the importance of the case and the gravity of the opposition; but he should, of course, be mindful of the rights of the defendant and endeavor to maintain that equipoise of judgment and demeanor so becoming to one engaged in the pursuit and administration of justice.

The only specification in this regard, though, that we consider of sufficient importance to notice is the comment made by the district attorney carrying the implication that the defendant was guilty of another offense in his treatment of the witness George Blohm. The remarks were calculated to arouse the most bitter resentment on the part of the jury, and to disqualify them to view dispassionately and fairly the evidence against the defendant upon the particular charge in the information. It is true, as said in People v. Wells, 100 Cal. 459, 34 Pac. 1078, that "if a defendant cannot be fairly convicted he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent."

4. The demurrer to the information was properly overruled. It was not necessary to use the word "feloniously," as the offense was described in the language of the statute. People v. Olivera, 7 Cal. 403; People v. Murray, 10 Cal. 309; People v. Garcia, 25 Cal. 531. Nor was the district attorney required to aver that the act was "willfully" done. When it is alleged that a person does an act it implies willfulness.

5. There is no merit in the claim that the evidence is insufficient to support the verdict. The testimony of the prosecutrix was sufficient for that purpose. There was also additional evidence lending aid to the inference of guilt, but for the reasons stated we cannot uphold the verdict.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 444

RAND v. COLUMBIAN REALTY CO. et al.
(Civ. 811.)

(Court of Appeal, Second District, California. May 18, 1910. Rehearing Denied June 17, 1910.)

1. PLEADING (§ 369*) — ELECTION BETWEEN COUNTS.

Where all the counts in the complaint have reference to the same transaction and are for recovery of the identical sum, a refusal to require an election is proper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199–1209; Dec. Dig. § 369.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MONEY RECEIVED (§ 8*)—COMMON COUNTS—SCOPE OF REMEDY AT COMMON LAW.

At common law the common count for money had and received could be used to recover for money obtained by false and fraudulent representations.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 30; Dec. Dig. § 8.*]

3. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS—CONCLUSIVENESS.

An appellate court will sustain the judgment, and support the findings, if there is any evidence in the record tending to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

4. TRIAL (§ 398*)—FINDINGS — INCONSISTENT FINDINGS.

One count of a complaint in an action to recover money alleged that defendants obtained the money under a scheme to defraud through an agent or title-holding branch, and alleged an express promise of repayment. Another count was in indebitatus assumpsit alleging indebtedness to plaintiff for money had and received, with an allegation of an express promise to repay it; the amount being the same in both counts. The court found against plaintiff on the first count, which involved all facts upon which an agency might be predicated, and found for plaintiff on the second count, which finding could only be supported on the theory that the court determined under the evidence that the money was received fraudulently, or by means of some agent or representative. *Held*, that the two findings were so inconsistent as to require a reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.*]

Appeal from Superior Court, San Diego County; E. S. Torrance and W. R. Guy, Judges.

Action by S. W. Rand against the Columbian Realty Company and another. From a judgment for plaintiff and an order denying a new trial, the mentioned defendant appeals. Reversed and remanded.

Wadham & Pritchard, for appellant. Eugene Daney and Cassius Carter, for respondent.

ALLEN, P. J. The complaint as originally presented to the trial court contained five counts. The first thereof alleged that the defendants the Columbian Realty Company and the Columbian Investment Company were each regularly organized corporations carrying on business under the same management and control, acting jointly in real estate operations; that appellant was a solvent affair, while its codefendant was wholly irresponsible; that appellant took the title to all property purchased by the investment company, paying the purchase price thereof; that this was in furtherance of a scheme through which the appellant was to acquire property without incurring liability on account of the purchase, and the investment company was to assume the obligations, thus affecting a fraud upon those with whom it contracted to purchase property or do business; that at the date named, under this arrangement and agreement, the investment company acquired an option to purchase certain premises in San Diego county, such option being taken in the name of the investment company, but, in fact, for the use and benefit of appellant realty company; that the investment company, pretending to be the owner of such option, contracted with plaintiff and his assignor to sell to them an undivided one-half of the land covered by said option for $17,500, part in cash and the balance on time; that when the cash payment came to be made the same was made to the appellant under representations by the managing officers thereof that the two corporations were the same, and that the investment company was a part and parcel of the realty company; that after the cash payment was made both corporations permitted the option to expire, but that after the expiration of such option the realty company collected from plaintiff, who had no knowledge of the expiration of such option, a large amount of the purchase money; that thereafter, and after plaintiff became aware of the expiration of the option and the failure of consideration, he demanded a return of his money and the same was agreed to; that the written agreement to refund such money was signed by the investment company; that after such agreement was entered into the realty company repaid a large part of the money received, but refused to repay the sum of $7,839 and more, for which the suit was brought; it being made to appear that a part thereof was paid by plaintiff and a part thereof by the assignor of plaintiff.

The second cause of action was one in indebitatus assumpsit, alleging indebtedness to plaintiff for money had and received, with the additional allegation of an express promise to repay the same; the amount being similar to that mentioned in the first cause of action. In such count there was no allegation that the money was had and received to the use of plaintiff. The other remaining three counts in the complaint were obviously for the recovery of the same sum in different forms.

Demurrer was interposed to the complaint and each count thereof and overruled by the court; and it is insisted that the second count was insufficient in that it omitted to allege that the money was had and received to the use of plaintiff. This omission would have been fatal were it not that the complaint contains an allegation of a direct promise to repay, which had the effect to state a cause of action. Motion to require the plaintiff to elect upon which count he would proceed at the trial was denied. All of the various counts in the complaint having reference to the same transaction, and being for the recovery of the identical sum, we see no error in the action of the court refusing to require an election.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the trial of the action the court found that within two years last past the appellant became and was indebted to plaintiff and to his assignor in the sum named on account of moneys had and received of the said parties, *as alleged in plaintiff's second cause of action;* found in favor of plaintiff as to the assignment of the portion thereof as alleged; found that the appellant had repaid the money which had been repaid under the agreement; and further found that all other allegations of plaintiff's complaint, except those admitted by the answer of defendant realty company, are not sustained, and judgment went for plaintiff and against appellant upon the second cause of action alone. Motion for a new trial was regularly filed, which was denied, and from the judgment and order denying a new trial the realty company alone appeals; the action having been dismissed by the court as to the investment company.

The record discloses that the evidence received upon the trial without contradiction showed facts and circumstances connected with the receipt of this money very similar to those involved in the case of Thomas v. Moody, 57 Cal. 215; but it will be observed that, notwithstanding the evidence, the trial court found against plaintiff upon the allegations of the first cause of action, which involved all facts upon which an agency might be predicated; the accuracy of which finding is not challenged. The judgment rendered must, therefore, rest upon the sufficiency of the evidence to support the finding of the court that the appellant was indebted at the date named to plaintiff for money had and received, together with the promise of repayment. At common law the common count for money had and received could be used to recover for money obtained by false and fraudulent representations. 1 Chitty's Pleadings, 364; Minor v. Baldridge, 123 Cal. 190, 55 Pac. 783. The promise to repay found by the court can only have support in the proposition that the money was received by appellant either directly or through an agency, or by one holding a representative relation, express or implied. There could be no difficulty in determining from the record that the circumstances of this transaction were such as to establish the receipt of this money by appellant without consideration and in furtherance of a scheme to defraud, or through the investment company as its agent or title-holding branch, were it not for the general finding of the court that the allegations contained in the first cause of action were not sustained. It is the duty, however, of an appellate court to sustain the judgment and support the findings of the trial court, if there be any evidence in the record tending to support such findings.

All presumptions are in favor of the correctness of the findings of the trial court and its conclusion. The finding that the money was received as alleged in the complaint, and the complaint alleging a contract of repayment, can only be supported upon the theory that the court determined under the evidence that the money was received fraudulently and through misrepresentation, or by means of some agent or representative as above suggested. This finding, however, which it must be presumed the court based upon the evidence in the record, is entirely inconsistent with the other finding in connection with the first cause of action which related to the same facts and circumstances surrounding the transaction. These two findings are so at variance that a reversal of the judgment is made necessary.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

13 Cal. App. 569

PEOPLE v. PETRUZO. (Cr. 126.)

(Court of Appeal, Third District, California. June 13, 1910.)

1. Homicide (§ 338*) — Appeal — Harmless Error.

Where deceased's dying declaration was admitted without objection, error in previously permitting a physician who attended deceased to answer the question, "From your experience in seeing persons wounded, what was your opinion as to his living or dying?" was not prejudicial; the witness having positively declared his opinion when he told deceased he would die, and the nature of the wound admitting of no difference of opinion as to its probable outcome.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 709; Dec. Dig. § 338.*]

2. Criminal Law (§§ 419, 420*)—Evidence—Declarations.

A witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 419, 420.*]

3. Criminal Law (§ 696*)—Objections to Evidence—Motion to Strike Out.

An objection to testimony as hearsay and incompetent cannot be taken for the first time by a motion to strike out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1640; Dec. Dig. § 696.*]

4. Homicide (§ 234*)—Evidence.

It was immaterial that the witnesses did not all agree as to whether defendant alone fired the fatal shot or aided and abetted in the consummation of the crime, where there was ample evidence on either theory to justify the conviction.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 234.*]

5. Criminal Law (§ 678*)—Trial—Election Between Offenses.

Where there was ample evidence to justify a conviction either on the ground that defendant alone fired the fatal shot, or aided and abetted in the consummation of the crime, the district attorney was not required to elect on which of such positions he would base his claim for a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1580; Dec. Dig. § 678.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. Criminal Law (§ 363*)—Evidence—"Res Gestæ."

While the facts, circumstances, or declarations growing out of and contemporaneous with the fact in question, and serving to illustrate, qualify, or explain it, constitute the "res gestæ," the term does not include declarations made on the day following and many hours after the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 363.*

For other definitions, see Words and Phrases, vol. 7, pp. 6130–6136; vol. 8, p. 7787.]

7. Homicide (§ 340*) — Instructions — "Involuntary Manslaughter."

While under Pen. Code, § 192, subd. 2, providing that a person is guilty of involuntary manslaughter where death results in the commission of an unlawful act not amounting to a felony, and that the aider and abettor can be guilty of no greater offense than the principal, an instruction in a murder trial that if defendant was present, aiding and abetting in the commission of an unlawful act, and that if in the commission thereof one R. was killed, a verdict of murder in the first degree should be rendered, was erroneous, abstractly considered, it was not prejudicial, the only unlawful act of which there was any evidence being a deliberate attempt to take the life of R. and his associates, unless it would be held that there was some evidence of an attempt to commit robbery, which latter contingency would bring the instruction within the contemplation of the statute.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 340.*

For other definitions, see Words and Phrases, vol. 4, pp. 3762–3763; vol. 8, p. 7692.]

8. Homicide (§ 287*) — Instructions — Motive.

An instruction, "If you are satisfied to a moral certainty and beyond a reasonable doubt that the crime of murder has been committed, and there is evidence sufficient to satisfy you to a moral certainty and beyond a reasonable doubt that defendant is guilty thereof, then the motive for its commission is unimportant and not material," was not erroneous, being simply equivalent to a direction that the jury might convict defendant of murder if they were satisfied of his guilt, though no motive for the crime was disclosed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 592; Dec. Dig. § 287.*]

9. Criminal Law (§ 759*)—Instructions.

In a murder trial an instruction that, if the jury found that after defendant was arrested he attempted to escape from jail, such fact, while not itself evidence of guilt, was a circumstance the jury might "well" consider in determining defendant's guilt or innocence, was not erroneous as indicating a purpose to throw the influence of the court into the balance against defendant, since, if the jury might consider the fact at all, they might "well" consider it.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 759.*]

10. Homicide (§ 305*)— Instructions.

An instruction that if one is killed by a bullet fired from a pistol, and two persons, each at the same time, fire loaded pistols at him, and one of the persons who fired is on trial, and there is no conspiracy proven between the two persons who fired, and the jury are in doubt as to which shot killed deceased, defendant is entitled to the benefit of that doubt and should be acquitted, would have precluded the jury from considering the theory that defendant was an aider and abettor, though there might be no conspiracy, and hence was properly refused.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 305.*]

11. Criminal Law (§ 829*)—Instructions—Instructions Covered.

The refusal in a criminal trial of instructions requested is proper, where the principles embodied therein, as far as they are correct and pertinent, are covered by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Rafaele Petruzo was convicted of murder and appeals. Affirmed.

L. N. Peter, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, and M. C. Kerr, for the People.

BURNETT, J. The evidence is clear and convincing that defendant was justly convicted of murder in the first degree. Indeed, he may consider himself fortunate that the jury fixed the punishment at life imprisonment, instead of leaving the severer penalty to be imposed by the court. There is no pretense of excuse or justification for the homicide, and the showing in behalf of defendant was meager and inconsequential, directed to the contention that he was somewhat under the influence of liquor, together with certain circumstances related by two or three witnesses tending to create a suspicion that a party not arrested may have committed the crime. The defendant did not take the witness stand, and, as far as the record shows, offered no explanation of the affair, and made no denial of the charge except what is implied in his plea of "not guilty."

The case for the people rested upon the dying declaration of the deceased, the testimony of eyewitnesses to the shooting, and the defendant's attempt to escape from jail after his arrest. The tragedy occurred after dark on a mountainous trail on the north fork of Feather river, while a party of seven Italians, including appellant, and a party of five Austrians, including the deceased, were returning to their respective camps from a Sunday afternoon visit to a saloon about two miles from the line of the Western Pacific Railroad, then in course of construction. The deceased, one Sam Radich, and another member of the Austrian party, named Peter Sunajko, were shot at the same time and both died the following day.

The said dying declaration was in writing, signed by the deceased, and in the following language: "Long Bar, California, 30th, 1908. Being in the fear of death and believing I am about to die, I make the following statement: That I was shot at by De Carlo Antonino and Raphael Petruzo and hit in the abdomen by a bullet from a revolver. This occurred at a point on the river trail near Long Bar, Plumas county, California, on November 29th, 1908, about 6:60 p. m., Peter Sunajko was coming to my assistance and was shot in the back." The members of the said Austrian party related, in somewhat broken English, the incidents of the homicide, from which it appears that they passed the party of Italians on the trail, greeting the latter in a friendly manner. Shortly afterwards some shots were fired from the rear, but without effect, and then, in the language of one of the witnesses: "After that two shots come, them two fellows, Raphael Petruzo and Spenelli. They come with a gun right in the hand. I say to Shorty: 'Where you going to, boys?' I call Spenelli 'Shorty.' He never tell me nothing, just pass me. They shoot Sam Radich right there by me, that man was in the lead. All these men were there at the time the shooting took place. These two had two revolvers in their hands. They were using them. They were shooting men with the revolvers." Another one testified: "I saw these two fellows (pointing to Spenelli and Petruzo) shoot. Antonio Spenelli and Raphael Petruzo both had guns in their hands. None of these Austrian boys did anything at the time of the shooting. When Spenelli had the gun, he was in the middle and shoot Sam Radich. Petruzo was going along the front shooting too."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The dying declaration was admitted in evidence without objection, but prior to its introduction Dr. A. S. Bradshaw testified that he treated Radich for the wound, which was in the lower right-hand portion of the abdomen, "in a place liable to produce death. He was suffering a good deal of pain when I was called upon. I informed Radich that he would die." He was then asked the question: "From your experience in seeing persons wounded, what was your opinion as to his living or dying at that time?" The defendant objected "on the ground that it is not pertinent or material to the case. The opinion is absolutely immaterial for any purpose that I can see. The question so far as this witness goes is whether he lived or died." It is perfectly apparent, however, that, if defendant was technically correct in his position, the ruling of the court in permitting the question to be answered was entirely without prejudice, as the doctor had quite positively declared his opinion when he stated to the deceased "that he would die." Considering, also, the nature of the wound, there could be no difference of opinion as to its probable outcome. The doctor proceeded to state: "At the time I told him he was going to die, my opinion was then he would certainly die. I think I informed him through another party at the time they were brought in before he made any statement. I told them to tell him he couldn't get well; he ought to tell the truth. I think these parties were brought before him at the time. I think they were all lined up before the bed where he could see them all. When these parties were brought before Sam Radich, he pointed out two who he said were shooting at him. Their names were Petruzo and De Carlo." On cross-examination he testified: "All that I had to do with him was done through an interpreter and the interpreter spoke to him." The defendant then moved "to strike out all the testimony of Dr. Bradshaw as to anything connected with a dying declaration on the ground that it appears to be irrelevant, immaterial, and incompetent, no proper foundation laid for its introduction, it being apparent the witness himself doesn't know what statement the man made."

It is, of course, well settled that a witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness. It is clearly hearsay, as the witness necessarily testifies to what the interpreter declares that the other party said. People v. Ah Yute, 56 Cal. 119; People v. John, 137 Cal. 220, 69 Pac. 1063. But here the doctor gave the testimony without objection after stating that his communication with the wounded man was through other parties. The defendant was therefore informed of the infirmity which he afterwards urged in support of his motion and he should have objected if he desired to have the testimony withheld from the jury. "An objection to testimony as hearsay and incompetent cannot be taken for the first time by a motion to strike out." People v. Samario, 84 Cal. 484, 24 Pac. 283; People v. Nelson, 85 Cal. 425, 24 Pac. 1006. The ruling of the court could be supported also upon other grounds, if required. For instance, the physician testified that the deceased "pointed out" the defendant and another person as those who had shot him. The purpose for which the various persons were brought into the room could hardly be misunderstood, and under the circumstances the testimony of the physician related to an exoteric physical manifestation rather than to the declarations of the wounded man. It is also true that this testimony amounted to nothing more than a repetition of the written declaration which was translated so as to be understood by Radich before he signed it. Besides, W. A. Look testified that he was present at the time and Radich identified the two men in English. Franklin H. Smith, an officer, also testified: "I spoke to Sam Radich at this time in English. He seemed to understand me. I asked him if he was sure that this was the man that shot him, to make no mistake about it, he was about to die and I wanted him to be sure and make no mistake as to the identity of the men. He said that was the man that shot him and that other man shot too. He pointed to Petruzo as the man that shot him. De Carlo was the man that was also pointed out as the man that also shot." If the said ruling, therefore, had been erroneous, it would simply constitute error without prejudice.

The same suggestions will apply to the ruling in relation to the similar testimony of the witness Cleveland, who prepared the said written dying declaration. It is true that one Marcus testified in regard to the identification that "then he (Officer Smith) bring them three together after this, they point them out. Sam Radich pointed these two men out here. (Pointing to Spenelli and De Carlo.) I don't know whether they gave their names at the time they were pointed out. Peter gave his name. Sam gave his name to these two men that they both shot at him. Sam Radich picked out the two men that shot at him at that time." The jury probably concluded that the witness was mistaken as to the two men identified by Radich, but, at any rate, the testimony of the other witnesses and the statement in the said dying declaration were positive and overwhelming as to the identification of the defendant as one of the parties participating in the homicide. It is entirely immaterial that the witnesses did not all agree as to whether defendant alone fired the fatal shot or aided and abetted in the consummation of the crime, since there was ample evidence on either theory to justify the conviction.

Nor was the district attorney required to elect one or the other of these positions upon which to base his claim for a verdict. His duty was done when he had presented the evidence. It was for the jury, under proper instructions, to follow the witnesses whose testimony carried conviction. The case is not like those where the evidence tends to connect the defendant with separate offenses. An example of this latter character is found in People v. Williams, 133 Cal. 165, 65 Pac. 323, where the evidence disclosed many separate acts of intercourse by the defendant with the prosecutrix, and it was properly held that the main charge relied upon for a conviction should be selected, and the defendant should be notified thereof at the beginning of the trial. After stating that the court below had charged the jury to the effect that if they believed that defendant had had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under the age of 16, they must find him guilty, the Supreme Court says: "The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses." But in the case at bar the witnesses testified to only one transaction and one offense. Under the law the defendant was a principal in either of the contingencies to which we have referred and he could justly be convicted of the charge of murder, although some of the jurors may have believed that he personally fired the fatal shot, while others were convinced that he was an aider and abettor in the crime. However, if it were necessary to uphold the verdict, we should be guided by the presumption that all the jurors adopted the same theory.

It can hardly be seriously contended that the court committed error in sustaining the district attorney's objection to a question asked of the witness Petrino as to a conversation he had with one Mangano. The question was: "Did he say anything to you about any shooting the night before?" It is true that "the facts, circumstances, or declarations which grow out of the principal fact in question which are contemporaneous with it and serve to illustrate, qualify, or explain it constitute the res gestæ (Gillam v. Sigman, 29 Cal. 638)," and for that reason are admissible, but the term "res gestæ" is not so comprehensive as to include declarations made upon the day following and many hours after the homicide.

The court gave this instruction to the jury: "You are instructed that if you believe upon the evidence to a moral certainty and beyond a reasonable doubt that the defendant was present, aiding and abetting in the commission of an unlawful act, and that in the commission of said unlawful act Sam Radich was killed, then it will be your duty to bring in a verdict of guilty of murder in the first degree." Abstractly considered, this is manifestly an erroneous statement of the law. Subdivision 2 of section 192 of the Penal Code provides that a person is guilty of involuntary manslaughter where death results "in the commission of an unlawful act not amounting to a felony," and the aider and abettor can be guilty of no greater offense than the principal. Indeed, the instruction is accurate only as applied to certain felonies. Section 189, Pen. Code. But this instruction, as others, must be considered in view of the undisputed evidence in the case. People v. Piner, 11 Cal. App. 542, 105 Pac. 780; People v. Whalen, 154 Cal. 475, 98 Pac. 194. The only unlawful act of which there is a particle of evidence is the deliberate attempt to take the life of Radich and his associates, unless it may be held that there is some evidence of an attempt to perpetrate robbery, and this latter contingency would bring the instruction within the contemplation of the statute. The instruction was, of course, intended to present the law applicable to a certain feature of the case disclosed by the evidence, and it must have been so understood by the jury. It is probably capable of the interpretation put upon it by appellant when he says: "The court in effect tells the jury that if they believe from the evidence that the defendant was present and abetting some other person in the shooting of wild game out of season, or any other trivial misdemeanor, and that in the commission of such an unlawful act Sam Radich was accidentally killed, the defendant would be guilty of murder in the first degree." But, if the instruction had been given in so many words, it would have been manifestly without prejudice, as there was no evidence of such hypothetical case.

In People v. Whalen, 154 Cal. 474, 98 Pac. 196, the Supreme Court, referring to a certain instruction, said: "Upon the other proposition, it may be conceded that if the instruction is taken alone, without reference to the facts of the case or the crime involved, and as an abstract proposition, it would be erroneous. * * * But an instruction may be incorrect as an abstract or general proposition and yet not erroneous when considered in connection with the particular case and the facts to which it relates." Here the unlawful act to which the court referred is pointed out in another instruction given at the request of defendant: "You are instructed that every defendant on a trial for homicide is to be judged according to his own intent, and, where he is charged as an aider and abettor, he is to be tried according to the intent with which he may have participated. It must therefore be proved to a moral certainty and beyond all reasonable doubt that the person charged as an aider and abettor of his malice aforethought was present, aiding and abetting his principal in the act of taking the life of the deceased. Unless you are convinced to a moral certainty and beyond all reasonable doubt that there existed in the mind of the defendant the intent to unlawfully take the life of Sam Radich, you cannot convict him of murder."

There is no error in the following instruction: "If you are satisfied to a moral certainty and beyond a reasonable doubt that the crime of murder has been committed, and there is evidence sufficient to satisfy you to a moral certainty and beyond a reasonable doubt that defendant is guilty thereof, then the motive for its commission is unimportant and not material." It was simply equivalent to a direction that the jury might convict the defendant of murder if they were satisfied of his guilt, although no motive for the crime was disclosed. This cannot be questioned. As stated in People v. Owens, 132 Cal. 471, 64 Pac. 771: "While the motive for the commission of the homicide is not plainly manifest from the evidence, yet the establishment of a motive is not at all essential as an element necessary to justify a conclusion. The presence or absence of motive is simply a circumstance in each particular case, sometimes weak and sometimes strong, going to the question of guilt or innocence. People v. Durrant, 116 Cal. 179 [48 Pac. 75]." That the court could not have been understood as minimizing or ignoring the importance of the question of motive is shown by this instruction given at request of defendant: "You are instructed that, if the evidence fails to show any motive on the part of the accused to commit the crime charged, this is a circumstance in favor of his innocence which the jury ought to consider together with all the other facts and circumstances in making up their verdict. The absence of all evidence of an inducing cause or motive to commit the crime when the fact is in reasonable doubt as to who committed it affords a strong presumption of innocence."

There was evidence that after the arrest and while the defendant was in the county jail he made an attempt to escape. The jury were instructed that, if they found this to be true from the evidence, "that fact of itself is not evidence of guilt, but it is a circumstance that the jury may well consider in determining the guilt or innocence of the defendant." The particular objection is to the use of the word "well," but it is apparent that, if the jury should consider it at all, they might well consider it. It cannot be said that it is an instruction as to a matter of fact or that it contains anything indicating a purpose to throw "the influence of the court into the balance against the defendant." A similar instruction was approved in the case of People v. Strong, 46 Cal. 302, and People v. Welsh, 63 Cal. 167. The instruction is probably more favorable to defendant than he could expect, since the court declared that the attempt to escape "of itself is not evidence of guilt," but of this appellant cannot complain.

In view of the facts and circumstances of the case, the jury could not have been misled by the following instruction: "You are instructed that every person is presumed to intend what his acts indicate his intention to have been; and if you find, from the evidence, beyond a reasonable doubt, that the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased, and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." A similar instruction was approved in People v. Langton, 67 Cal. 427, 7 Pac. 843, and People v. Bushton, 80 Cal. 162, 22 Pac. 127, 549. It was however, condemned in People v. Newcomer, 118 Cal. 263, 50 Pac. 405; People v. Solani, 2 Cal. App. 225, 83 Pac. 281, and People v. Grill, 3 Cal. App. 514, 86 Pac. 613. But in the first two of these the defendant claimed self-defense and there was evidence in support of it. Hence, while there was no controversy as to the intention to kill, it was error to instruct the jury that guilt would follow from such intention.

In the Grill Case the defense was based upon the claim of accidental homicide and the defendant so testified. Under the peculiar facts, it was held that the presumption that a person intends the natural consequences of his act must give way to the presumption of innocence. It is worthy of note, however, that in the Newcomer Case the court declared its indorsement of the position that an intention to kill would be inferred from "the shooting of the deceased with a pistol," and in the Solani Case it is said: "The shooting with a pistol would naturally indicate intent to kill, and would be sufficient proof of such intent if there was no other proof tending to show that he did not intend to kill." Here, as we have seen, the concluding portion of the said instruction which was the subject of animadversion in the cases cited by appellant is entirely without prejudice in view of the evidence and other instructions. See People v. Besold, 154 Cal. 363, 97 Pac. 871.

The court refused the following instruction requested by defendant: "You are instructed that if a person is killed by a bullet fired from a pistol, and two persons, each at the same time, fire loaded pistols at him, and one of the persons who fired is on trial, and there is no conspiracy proven between the two persons who fired, and the jury are in doubt as to which shot killed the deceased, the defendant is entitled to the benefit of that doubt and should be acquitted." The instruction would have precluded the jury from considering the theory that defendant was an aider and abettor, although there might be no conspiracy, and for that reason it was properly rejected. In the discussion of a somewhat similar instruction in the case of the People v. Woody, 45 Cal. 289, the contingency that we have just suggested seems to have escaped the attention of the court. It certainly would be a reproach to the law if it countenanced the doctrine that where A. and B. deliberately and unlawfully fire at C. with intention to kill him, and one shot takes effect causing his death, but it is uncertain whether A. or B. fired it, neither can be convicted of murder unless a conspiracy should be shown between them. In any rational view each must be considered as aiding and abetting the other and both responsible for the homicide.

Complaint is made of the action of the court in refusing some other instructions, but the principles embodied therein, as far as they were correct and pertinent, were covered by the instructions given.

It may not be amiss in conclusion to repeat the suggestion, which has been given substantially in other opinions of appellate courts, that if the district attorney in every criminal trial would carefully prepare and formulate the various principles of the law involved in the evidence presented on behalf of the people, scrupulously adopting the form of statement that has been approved by the Supreme Court in its latest utterances, and the trial court would adopt this, together with whatever pertinent and correct instructions may be requested by defendant, as its charge to the jury, only supplying what may seem necessary in the interest of justice, the probability of a reversal of a righteous verdict would be greatly reduced.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 584

UNION LUMBER CO. v. METROPOLIS CONST. CO. (Civ. 751.)

(Court of Appeal, Third District, California. June 13, 1910.)

1. VENUE (§ 61*)—CHANGE—TIME FOR MOTION.

Under Code Civ. Proc. § 396, requiring a party desiring to move for a change of place of trial to make demand therefor at the time he answers or demurs, his demand or motion therefor after his demurrer is overruled is too late.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 78, 94–99; Dec. Dig. § 61.*]

2. APPEAL AND ERROR (§ 622*)—TIME FOR FILING TRANSCRIPT.

Under rule 2 (78 Pac. vii), providing that appellant shall, within 40 days after the appeal is perfected, serve and file the printed transcript of the record, provided that, when there is a proceeding pending for the settlement of a bill of exceptions or a statement "which may be used in support of such appeal," time for filing and serving the transcript shall not begin to run till the settled statement or bill of exceptions has been filed, pendency of proceeding to settle bill of exceptions or statement for appeal from order denying change of place of trial does not extend time for serving and filing the transcript on appeal from the judgment on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2732–2735; Dec. Dig. § 622.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Union Lumber Company against the Metropolis Construction Company. Judgment for plaintiff. Defendant appeals. Dismissed.

James W. Cochrane, for appellant. W. H. Carlin, for respondent.

CHIPMAN, P. J. Motion to dismiss the appeal from the judgment, "on the ground that no transcript on appeal in said action has ever been presented or filed in said appellate court and more than 40 days have elapsed since the perfecting of such appeal."

The action was commenced in the superior court of Yuba county. It appears from the certificate of the clerk of said court that the said court, on February 17, 1910, duly made and entered its judgment in said action in favor of plaintiff and against the defendant for the sum of $1,796.66, which said judgment stands unsatisfied; thereafter, on March 7, 1910, said defendant served upon plaintiff and filed in the clerk's office the notice of appeal from said judgment to this court, and on the same day filed an undertaking on said appeal; that said superior court on February 24, 1910, duly made and caused to be filed in the clerk's office of said court its findings and decision in said action, notice of which was on the same day duly served upon defendant; that no notice of intention to move for a new trial in said action has ever been filed in said office; that no stipulation or order granting any time for filing, preparing, or serving any bill of exceptions, statement of the case, or transcript in said action has ever been made, filed, or entered therein, and no bill of exceptions or statement on said appeal has ever been filed in said action in the office of said clerk, or at all; that no motion for a new trial has ever been made and no transcript on appeal has ever been certified by said clerk, or at all, nor has he been requested to certify to a correct or any transcript of the record on appeal, and no notice has ever been filed in said office by defendant and appellant in accordance with section 953a of the Code of Civil Procedure, or any notice in accordance with said section, or at all.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In a counter affidavit, counsel for defendant does not controvert any of the facts above set forth, but deposes that after the commencement of said action, "to wit, at the time of the appearance of said defendant in said action," defendant served on plaintiff its demand for a change of the place of trial, from Yuba county to the city and county of San Francisco, together with an affidavit of merits; that thereafter, to wit, on January 26, 1910, said motion was denied; that within 60 days thereafter defendant perfected its appeal from said order and prepared and served upon plaintiff its purported bill of exceptions to said order denying said motion, and on May 12, 1910, said bill was allowed and filed. It is further deposed, apparently to excuse the failure to file the transcript on appeal from the judgment, that it was the intention of counsel, upon leave being obtained from the court, to incorporate in the record of appeal from the order the record also constituting the transcript on appeal from the judgment. Defendant prays that the time within which to print, serve, and file transcript on appeal from the judgment be extended 15 days from June 6, 1910, and that the record on both appeals be included in one transcript, or, if such leave be not granted, that the appeal from the judgment be dismissed without prejudice.

Counsel for plaintiff has filed an affidavit in reply to defendant's affidavit, in which he denies that at the time of defendant's appearance defendant served upon plaintiff its demand for a change of the place of trial, and avers the fact to be that defendant did not serve and file its notice of said motion and affidavit of merits until after it had appeared in the action by demurrer and after said demurrer had been overruled.

Section 396, Code of Civil Procedure, requires the party desiring to move for a change of the place of trial, to file an affidavit of merits, and demand in writing that the place of trial be had in the proper county, "at the time he answers or demurs." If his motion or demand is made after demurrer filed and overruled, he fails to comply with the statute, and the demand should be denied. Rule 2 (78 Pac. vii) provides that the appellant in a civil action shall within 40 days after the appeal is perfected serve and file the printed transcript of the record. The rule sets forth certain facts which, if made to appear, will excuse noncompliance therewith. Here, however, appellant makes no showing that these facts exist, and respondent shows affirmatively, as provided in rule 6 (78 Pac. ix), that they do not exist. The bill of exceptions and statement of the case referred to in rule 2 (78 Pac. vii) is a bill or statement "which may be used in support of such appeal"—i. e., the appeal from the judgment—and does not refer to a bill of exceptions such as was prepared on motion to change the place of trial. Appellant should have perfected its appeal from the judgment and filed its transcript in time, and not having done so the pending appeal from the order denying its motion for change of place of trial cannot avail him as an answer to the present motion.

Rule 5 (78 Pac. viii) provides that, "if the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed upon motion, on notice given." The rule further provides that "if the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." Subdivision 5 of rule 2 (78 Pac. viii) provides for extending the time within which points and authorities must be filed, but no such provision is made as to the filing of the transcript of the record on appeal. Assuming, however, that the court, as seems to be implied in the case of McCabe v. Healey, 139 Cal. 30, 72 Pac. 359, upon sufficient showing, will relieve a party from his default in filing his points and authorities in time, will also relieve him from like default, on sufficient showing, in failing to file his transcript in time (a point not necessary to decide), there is here no showing whatever excusing defendant's failure. The judgment was rendered in February, 1910, and in March, defendant served its notice of appeal. There is no showing that a transcript of the record on appeal from the judgment, or any bill of exceptions, or statement in support of such appeal, is in course of preparation and no excuse is offered for defendant's failure to prepare such transcript.

The grounds on which the change of place of trial was moved do not appear and presumptively they were wholly insufficient and the motion properly denied. Furthermore, as we have seen, it appears from the affidavit in behalf of plaintiff that the demand for a change of the place of trial was not made until after the demurrer was filed and overruled, and it may be that this was one ground on which the trial court denied the motion.

The appeal from the judgment is dismissed.

We concur: HART, J.; BURNETT, J.

13 Cal. App. 588

NUTLEY v. METROPOLIS CONST. CO.

(Civ. 752.)

(Court of Appeal, Third District, California. June 13, 1910.)

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by William Nutley against the Metropolis Construction Company. Judgment for plaintiff. Defendant appeals. Dismissed.

James W. Cochrane, for appellant. W. H. Carlin, for respondent.

CHIPMAN, P. J. Plaintiff moves to dismiss the appeal in the above-entitled action on the ground that no transcript of the record on appeal from the judgment in said action has been filed and more than 40 days have elapsed since the perfection of such appeal. With the exception as to the amount of the judgment recovered by plaintiff, the facts are the same as in Union Lumber Company v. Metropolis Construction Company (No. 751) 110 Pac. 329, in which a similar motion was this day decided.

Conformably with the decision in that case, the appeal is dismissed.

We concur: HART, J.; BURNETT, J.

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13 Cal. App. 458

FAIRBANKS, MORSE & CO. v. GETCHELL.

(Civ. 780.)

(Court of Appeal, Second District, California. May 23, 1910.)

1. ATTACHMENT (§§ 77, 91*)—AFFIDAVIT—NECESSITY FOR—SIGNED BY WHOM.

To justify the issuance of a writ of attachment, an affidavit by or on behalf of the plaintiff must be received by the clerk, though it is not necessary that it be signed by the party making it.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 204–206, 233; Dec. Dig. §§ 77, 91.*]

2. AFFIDAVITS (§ 5*)—AUTHORITY OF ADMINISTERING OFFICER—NECESSITY FOR.

An affidavit is void if the party before whom it was sworn to had no authority to administer the oath.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 18–27; Dec. Dig. § 5.*]

3. NOTARIES (§ 4*)—JURISDICTION OF.

In the absence of statutory regulation, a notary cannot act as such outside of the county for which he was appointed.

[Ed. Note.—For other cases, see Notaries, Cent. Dig. §§ 12, 13; Dec. Dig. § 4.*]

4. NOTARIES (§ 4*)—JURISDICTION OF.

It is contemplated that the jurisdiction of a notary shall be confined to his own county by Pol. Code, § 791, providing that notaries may be appointed for the several counties, but limiting the number to cities of the first class to not exceed 80; and section 792 making six months' residence in the county a qualification for appointment; and section 794, subd. 7, requiring notaries to keep official seals upon which must be engraved the name of the county for which he is commissioned.

[Ed. Note.—For other cases, see Notaries, Cent. Dig. §§ 12, 13; Dec. Dig. § 4.*]

5. NOTARIES (§ 4*)—BY TELEPHONE.

Regardless of whether an affidavit may be made by telephone, yet where the affiant is in one county, and the notary is in another, the affidavit cannot be so made, as the notary would be taking an affidavit without his jurisdiction in the affiant's county.

[Ed. Note.—For other cases, see Notaries, Cent. Dig. §§ 12, 13; Dec. Dig. § 4.*]

6. ATTACHMENT (§ 122*)—AFFIDAVIT—AMENDMENT—STATUTE IN REGARD TO.

Code Civ. Proc. § 558, as amended by St. 1909, c. 153, providing that the affidavit upon which an attachment was issued, if irregular, may be amended so as to sustain the attachment, does not apply to a "void" affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323–337; Dec. Dig. § 122.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Fairbanks, Morse & Co. against C. E. Getchell. From an order denying defendant's motion to dismiss the attachment, he appeals. Reversed on rehearing.

Geo. Flournoy, for appellant. W. W. Kaye, for respondent.

SHAW, J. This is an appeal from an order denying defendant's motion to discharge an attachment.

On May 6, 1910, an opinion was filed herein whereby the ruling of the trial court in denying defendant's motion to discharge an attachment was reversed. In that opinion the court overlooked section 558, Code Civ. Proc., as it was amended in 1909 (St. 1909, p. 253), and in the absence of anything to the contrary being said by respondent, whose attorney it appears did not deem the case of sufficient importance to warrant him in filing points and authorities, or otherwise to offer any suggestions touching the points involved, it accepted appellant's contention based upon Winters v. Pearson, 72 Cal. 553, 14 Pac. 304, and Tibbet v. Tom Sue et al., 122 Cal. 208, 54 Pac. 741, to the effect that an affidavit for attachment is not subject to amendment in this state. Our attention having been directed to the inadvertence, an order was made on May 19th whereby the judgment heretofore rendered was set aside and vacated and a rehearing ordered for the purpose of correcting the erroneous statement contained in the former opinion. Defendant's motion for the discharge of the attachment was made upon the ground that the writ of attachment was improperly and irregularly issued. Section 556, Code Civ. Proc. The irregularity is said to have consisted of the alleged fact that the writ of attachment was issued without the affidavit required by the provisions of section 538, Code Civ. Proc.

As appears from the record, there was filed with the clerk on July 21, 1909, the date of the issuance of the writ of attachment, what purported to be an affidavit of plaintiff's agent. This document contained the title of the court and cause with the venue laid in the county of Kern, state of California, together with a statement of facts entitling plaintiff to the issuance of the writ. It was not subscribed by affiant, but had attached thereto the jurat of the notary as follows: "Sworn to before me this 21st day of July, 1909. W. W. Kaye, Notary Public." As shown by the affidavit and jurat, affiant appeared before the notary in Kern county and made oath to the affidavit. Kaye, however, when upon the witness stand, testified as follows: "I am the attorney for the plaintiff herein and am a notary public in and for the county of Kern. That is my signature which appears to the jurat on the affidavit for attachment filed in this court on July 21, 1909. Mr. Chas. A. Meyer, whose name appears in the body of said affidavit, was not in Bakersfield on that date. He lives in Los Angeles and was in Los Angeles on that date. I called Mr. Meyer up in Los Angeles on that date over the telephone, and he made oath to the matters contained in the affidavit. He related the facts contained in the affidavit and under oath stated to me that they were true. I am well acquainted with Mr. Meyer and recognized his voice over the telephone."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant contends that the affidavit was made in Los Angeles county, and that W. W. Kaye, the notary, having been appointed in and for the county of Kern, state of California, had no authority to act officially as such notary in the county of Los Angeles.

To justify the issuance of the writ there must be received by the clerk an affidavit by or on behalf of the plaintiff. It is not necessary that the affidavit be signed by the party making it. Ede v. Johnson, 15 Cal. 53; Pope v. Kirchner, 77 Cal. 152, 19 Pac. 264. Neither is it any defense to a prosecution for perjury thereon that the oath was taken or administered in an irregular manner. Pen. Code, § 121. Nevertheless the document which purports to be sworn to is not an affidavit unless the person before whom his assent to the solemn obligation is assumed had authority at the time to administer the oath. People v. Cohen, 118 Cal. 74, 50 Pac. 20. In the absence of statutory regulation providing therefor, the general rule is that a notary cannot act as such official outside of the county for which he is appointed. In re House Bill No. 166, 9 Colo. 628, 21 Pac. 473; 29 Cyc., page 1090; Byrd v. Cochran, 39 Neb. 109, 58 N. W. 127. We are unable to find any provision in the Codes of this state which could be construed as authorizing a notary of one county to administer an oath in a county other than that for what he is appointed. Section 791 of the Political Code provides that the Governor may appoint such number of notaries public for the several counties as he shall deem necessary for the public convenience, but limits the number which he may appoint in cities and counties of the first class to not exceeding eighty. If notaries of other counties could maintain offices and act officially in the city and county of San Francisco, the provision thus limiting such number would be nullified. To qualify one for such appointment he must have resided in the county for which his appointment is made for six months. Section 792. Furthermore, he is required to keep an official seal upon which, among other things, must be engraved the name of the county for which he is commissioned. Subdivision 7, section 794, Pol. Code. All these provisions are inconsistent with the view that the Legislature intended the jurisdiction of a notary to be coextensive with the state.

As appears from the record, the oath was administered by communication had between the notary and affiant over the telephone, and appellant contends that the act was void and of no effect for this reason. Such contention finds direct support in the case of Sullivan v. First National Bank, 37 Tex. Civ. App. 228, 83 S. W. 421. According to our view, however, it is unnecessary to determine this point. Assuming, but not deciding, that an oath may be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply to those cases only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned.

At the time he made the affidavit and assented to the obligations of the oath, Meyer, the affiant, was in the county of Los Angeles. His act signifying his assent to the obligation must be deemed to have been had and done in Los Angeles county, where he then was. If untrue, it could not be claimed that he committed an act in swearing to a false affidavit in the county of Kern upon which a prosecution for perjury could be predicated, for the reason that it clearly appears he was not in Kern county when the act was committed. The oath was administered by a notary commissioned for Kern county to an affiant conceded to have been at the time in Los Angeles county, and, the notary being vested with no authority to administer an oath in Los Angeles county, it necessarily follows that the act was a nullity, and the purported affidavit upon which the attachment was issued was void and of no effect.

At the hearing of the motion there was presented and filed what is termed an "amended affidavit," which is in proper form and sufficient in substance to justify the issuance of the writ of attachment. Section 558, Code Civ. Proc., as amended in 1909 (St. 1909, p. 253), provides that, notwithstanding the fact that the writ of attachment is improperly or irregularly issued, nevertheless it shall not be discharged "if at or before the hearing of such application the * * * affidavit * * * upon which such attachment was based shall be amended and made to conform to the provisions of this chapter." Prior to the enactment of this amendment, the affidavit for attachment could not be made the subject of an amendment under the laws of this state. Winters v. Pearson, 72 Cal. 553, 14 Pac. 304; Tibbet v. Tom Sue et al., 122 Cal. 208, 54 Pac. 741. Inasmuch, however, as the act of Kaye in administering the oath was a nullity and the purported affidavit void, it follows there was nothing to amend. The authorized amendment of the affidavit contemplates the existence of an affidavit. There could be no irregularity in that which had no existence. In the case of Cobbossee Nat. Bank v. Rich, 81 Me. 164, 16 Atl. 506, the court in discussing the distinction between that which is void and that which is irregular, says: "Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foundations and discovers that the proceedings have nothing to stand upon; while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law, the other to matters which are contrary to the practice authorized by the law. One relates more to the act, and the other more to the manner of it." In this case it is not the manner of performing the act, but the total absence of the act the performance of which was a necessary prerequisite to the issuance of the writ. Under this proviso the attaching party may by amendment supply that which, by reason of inadvertence or oversight, was omitted from the affidavit; but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof.

We think the court erred in its ruling, and the order denying defendant's motion to discharge the attachment is, therefore, reversed, with direction to the lower court that it make its order granting the same.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 627

PEOPLE v. SMITH. (Cr. 124.)

(Court of Appeal, Third District, California. June 18, 1910. Rehearing Denied by Supreme Court Aug. 11, 1910.)

1. Criminal Law (§ 564*) — Evidence — Venue.

In a prosecution for rape, a witness was asked, "This that you have testified to occurred in the county of Tehama and state of California, did it, Mr. Keeran?" And the answer was, "Yes, sir." There was no conflict in the evidence that the offense was committed at the home of Mrs. Ladd, which was in fact in the county of Tehama. *Held*, that the venue of the offense was established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1277; Dec. Dig. § 564.*]

2. Criminal Law (§ 412*)—Evidence—Declarations—Admissibility of.

In a prosecution for rape, evidence that defendant had made a statement that he had had one of the Ladd girls down on the bed, and could have had sexual intercourse with her, was not inadmissible as not showing which one of the girls was meant, as it was for the jury to decide on the evidence whether the statement referred to the one subsequently raped.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 412.*]

3. Criminal Law (§ 706*)—Conduct of Prosecuting Attorney—Questions.

In a prosecution for rape, the prosecuting attorney asked a witness if defendant had not made any statement in regard to his action with a 13 year old girl. The answer was, "Yes, he did." The court then asked the attorney if the girl that was raped was the one referred to. He answered, "No, sir." The evidence was excluded, but the district attorney explained that defendant had make the remark about a 13 year old girl without mentioning her name and did not say when it occurred. *Held*, that it must be assumed that the district attorney acted in good faith and believed the evidence referred to the girl that was outraged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

4. Criminal Law (§ 651*)—Personal Inspection of Premises by Jury — When Allowed.

Where, in a prosecution for rape, the premises where the offense was committed were clearly described by witnesses and by photographs, drawings, etc., the court did not abuse its discretion in refusing to direct that the jury personally inspect the premises.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1516; Dec. Dig. § 651.*]

5. Criminal Law (§ 815*) — Instructions — Conformity to Evidence.

A requested instruction in a prosecution for rape as to a conviction on the uncorroborated evidence of the prosecutrix was properly refused where there was some corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1986; Dec. Dig. § 815.*]

6. Criminal Law (§ 829*) — Instructions — Requests — Instructions Covered by Charge Given.

A requested instruction which is covered by other instructions given is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

7. Criminal Law (§ 761*) — Instructions — Assuming Facts.

In a prosecution for rape, the court properly refused to give an instruction as to the failure of the prosecutrix to make prompt and seasonable complaint, as it assumed that the delay was unreasonable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1754–1764; Dec. Dig. § 761.*]

8. Criminal Law (§ 807*)—Argumentative Instructions.

In a prosecution for rape, the court properly refused an instruction as to the policy of the law in relation to the conviction of innocent persons, as the court is required to state to the jury the law, and not the reasons for its enactment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1960; Dec. Dig. § 807.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Harvey E. Smith was convicted of rape, and he appeals. Affirmed.

James T. Matlock, Jr., for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. Defendant was convicted of the crime of rape in having sexual intercourse with a female who was under the age of consent and not the wife of said defendant.

1. There is no merit in the contention of appellant that the venue was not proved. The witness Keeran was asked this question: "This that you have testified to occurred in the county of Tehama and state of California, did it, Mr. Keeran?" and the answer was "Yes, sir." The witness had just detailed certain occurrences at the home of Mrs. Ladd, the mother of the prosecutrix, and there was no conflict in the evidence that the offense was committed at said home. The showing could not have been more direct or satisfactory as to the county in which the crime was perpetrated.

2. Appellant claims that the trial court erred in overruling his objection to certain testimony given by the said witness Keeran. He was asked this question: "Mr. Keeran, in reference to the two Misses Ladd, the young ladies, did the defendant ever make any statement to you about having one of them down on the bed?" Without any objection he answered the question, "Yes, sir." Then he was asked: "Will you please state to the jury what that conversation was?" An objection to this was overruled, and he answered: "He was speaking of the Ladd girls, and he said he had one of them down on the bed, the other night, and had felt of her, and she first fought and finally just gave way to him, and he felt of her, and could have had sexual intercourse with her if he had wanted to." The point of the objection is that the testimony referred to defendant's action with some other than the prosecutrix, but this, we think, was for the jury to determine. He was speaking of both of the girls, and said the conduct occurred with one of them, without mentioning her name. Manifestly, it might have referred to either, but in connection with the other evidence the jury were justified in concluding that he referred to lewd conduct with the prosecutrix. It may be said, also, that the answer to the question, which was not objected to, carried with it an inference as unfavorable as the subsequent question and answer.

Again, the witness was asked: "And on another occasion, during the time you were in that neighborhood and you were making your headquarters at Mrs. Ladd's, did the defendant ever make any statement to you in regard to his action with a 13 year old girl?" The objection to this question was overruled, and he answered: "Yes, he did." He was then directed to state the conversation. He was proceeding to do so when the court, interrupting, asked the district attorney, "Do you mean this girl?" and the district attorney answered, "No, sir." The court then sustained the objection and directed the jury to disregard what was said in relation to it. The district attorney, however, in further explanation, stated that the defendant made a remark about a 13 year old girl, but mentioned no name, and did not state when it occurred. We must assume that the district attorney acted in good faith, and believed the evidence was relevant and referred to the prosecutrix. It is often difficult to determine whether language used relates to the issue involved, and we cannot say that the question here is so plain that it must be held that the prosecuting officer, in violation of his oath of office, endeavored to deprive the defendant of a fair trial by offering testimony which he knew to be inadmissible. The cases cited by appellant on this point are quite different in their facts.

In People v. Stewart, 85 Cal. 175, 24 Pac. 722, evidence tending to show lewd, immoral, and indecent conduct on the part of the defendant with persons other than the prosecutrix was admitted over his objection, and the court very properly said: "The admission of the evidence was clearly reversible error."

People v. Elliott, 119 Cal. 593, 51 Pac. 955, is to the same effect, where evidence was admitted that the defendant had asked other girls than the prosecutrix to go to the house of defendant to have illicit intercourse with men.

In People v. Derbert, 138 Cal. 467, 71 Pac. 564, the Supreme Court agreed with the claim of appellant that "the persistent conduct of the district attorney in asking improper questions during the trial, and making improper insinuations was such error that the case should be reversed." In the course of the discussion, it is said: "The court promptly sustained objections to all these questions, but that did not cure the error. It clearly appears that the object of the district attorney was to leave the impression upon the mind of the jury that defendant had committed other crimes, and that he had changed his name. His questions were directly in face of the rulings of the court and certainly with the knowledge that the court would not permit them to be answered. The object was to ask the questions, and not to get the answers." No such imputation can be indulged here. While, in this class of cases, especially, the rights of the defendant should be scrupulously protected, we can find nothing in the conduct of the district attorney to demand a reversal of the judgment.

3. The court did not abuse its discretion in declining to direct the jury to be taken to the Ladd residence for an inspection of the premises where the offense is said to have been committed. The practice invoked by the

defendant should be adopted only in exceptional cases, as it usually increases the hazard of a mistrial. The premises were fully described by the witnesses; photographs and drawings of them were received in evidence, and the court was clearly right in the opinion that a personal inspection by the jury was entirely unnecessary.

4. No error was committed by the court in refusing the instruction in reference to a conviction upon the uncorroborated testimony of the prosecutrix, for the reason that there was some corroboration. Besides, it is argumentative, and the caution that it required of the jury was sufficiently covered by the instructions which were given.

5. The requested instruction as to the failure of the prosecutrix to make "a prompt and seasonable complaint" of the crime was an invasion of the province of the jury, in assuming that her delay in making complaint was unseasonable and inexcusable, and in the suggestion as to the weight and effect of certain evidence. It was therefore properly refused. Similarly, the action of the court was clearly right in refusing the instruction as to the policy of the law in relation to the conviction of innocent persons. The court is required to state to the jury the law, not the reasons for its enactment, or the nature of the public opinion which sanctions it.

It was not necessary to state that each individual juror was required to be convinced of the guilt of the defendant, as that was clearly implied in several instructions given by the court.

In fine, it may be said that every needful instruction was given to the jury to enable them to consider and determine intelligently the facts bearing upon the question of the guilt or innocence of the accused.

The defendant was fairly tried and the evidence supports the verdict. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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13 Cal. App. 518

In re GUINASSO'S ESTATE.

GUINASSO v. ARATA et al.

(Civ. 769.)

(Court of Appeal, First District, California. May 30, 1910.)

1. Wills (§ 302*) — Destruction — Restoration—Proof of Contents.

Under Code Civ. Proc. § 1339, providing that, where a will has been destroyed by public calamity during the lifetime of the testator without his knowledge, "at least two credible witnesses are necessary to prove its provisions," the testimony of one witness who had personal knowledge of its provisions, and the testimony of another witness who had gained her knowledge by having had it read to her by the first witness, was not sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 709; Dec. Dig. § 302.*]

2. Evidence (§ 186*) — Writings — Proof of Contents.

The contents of a writing cannot be proved by the testimony of a person who heard the writing read.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 662; Dec. Dig. § 186.*]

3. Stipulations (§ 14*)—Construction—Matters Covered.

Where a will had been destroyed, a stipulation by the contestants of the will that it was proved to have been duly executed by the deceased before two attesting witnesses, and that proof of such execution was duly made, did not preclude the objection to allowing the probate because of the lack of two witnesses to prove the contents of the will.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 14.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Proceedings for the probate of the will of Luigi Guinasso, deceased, contested by Maria Arata and Louis Guinasso. From an order admitting the will to probate, contestants appeal. Order reversed.

Sullivan & Sullivan and Theo. J. Roche, for appellants. Bourdette & Bacon, for respondent.

HALL, J. This is an appeal from an order admitting to probate the will of Luigi Guinasso, deceased. The petition for the probate of the alleged will was filed by John W. Bourdette, and sets forth that the will was destroyed by the great conflagration of April, 1906, which occurred in San Francisco, and also sets forth what purports to be the provisions of the will in hæc verba. It is also alleged that the testator at the time of his death believed the will to be in existence, and had no notice or knowledge of its destruction. Appellants are heirs at law of decedent, and in due time filed a contest of the will. The court made findings in favor of the proponent as to all issues raised by the pleadings, and it is the sufficiency of the evidence to support these findings that is attacked by appellants. In their opening brief three points were made by appellants: First, that the evidence did not support the finding as to the due execution of the alleged will; second, that the evidence did not support the finding that decedent had no notice or knowledge of the destruction of the will, and that he believed it to be in existence at the time of his death; and third, that the evidence is insufficient to support the finding of the court as to the provisions of the will. Subsequently, by stipulation filed in this court, appellants waived the first point.

We have examined the evidence as to the second point, and do not think that appellants' contention can be maintained; but, as we think the third point is well taken, we have not deemed it necessary or profitable to review the evidence under the second point.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

As before stated, the will was offered as a will destroyed by public calamity. Section 1339, Code Civ. Proc., provides that: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently, or by public calamity, destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."

According to the record before us, only two witnesses testified as to the contents of the destroyed will—J. Bourdette and respondent Nellie Guinasso. J. Bourdette drew the will, and of course had knowledge of its contents. Upon the destruction of the will his parol testimony was competent to prove its provisions. But the record shows that the only knowledge that Nellie Guinasso had of the contents of the will was from hearing what purported to be the will or a copy thereof read by Mr. Bourdette. She does not claim to have herself read the will, but only that it was read to her by Mr. Bourdette. She testified: "Mr. Bourdette held the will in his hand and read it to me. I am not able to swear whether it was the original or a copy." Does such testimony comply with the law that the provisions of a destroyed will must be clearly and distinctly proved by at least two credible witnesses?

It is contended by appellants that the law requires that two witnesses must be produced, each one of whom gives primary evidence, or evidence from personal knowledge as to the contents of the will, and that a destroyed will cannot be established by one witness testifying to its contents from personal knowledge, and another testifying to its contents from statements made to him by the witness who had personal knowledge of its contents. This contention seems to be sound. If Mr. Bourdette, the first witness, had testified that he did read the will to the second witness, which he did not, and that it was correctly read to her, it is apparent that the whole proof would finally depend upon the credibility of Mr. Bourdette. The Legislature never contemplated, when it enacted the requirement that the provisions of a destroyed will must be clearly and distinctly proved by at least two credible witnesses, that one such witness might in effect multiply himself into any number of witnesses by reading a will or stating its contents to other persons.

The contents of a writing cannot be proved by the testimony of a person who heard the writing read. Propst v. Mathis, 115 N. C. 526, 20 S. E. 710; Nichols v. Kingdom Iron Ore Co., 56 N. Y. 618; Mutual Life Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294.

Respondent, in answer to the contention of appellants upon this point, has contented herself with urging that appellants are precluded from making this point by the stipulation filed in this court. This stipulation has no bearing upon the sufficiency of the evidence to prove the provisions of the will, but only relates to the proof upon the issue as to its due execution. It is clearly a stipulation only "that the will of said deceased was proved to have been duly executed by him before two attesting witnesses, and that proof of such execution was duly made in" the trial court, and that the "first point made by appellant in his points and authorities on file herein" is waived. Proof of the provisions of a destroyed will is quite a different matter from proof of its due execution before two attesting witnesses.

The provisions of the destroyed will were not clearly and distinctly proved by at least two credible witnesses, and for this reason the finding as to the provisions of the will is not supported by the evidence.

The order admitting the will to probate is reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

13 Cal. App. 389

SWANSON v. WILSEN et al. (Civ. 709.)

(Court of Appeal, Third District, California. May 12, 1910.)

1. COURTS (§ 212*)—DISTRICT COURT OF APPEAL—JURISDICTION.

In an action by a partner for his share in a certain amount received for engineering work, where the case involved no accounting among the copartners and no equitable relief was asked, the Court of Appeals had jurisdiction upon direct appeal, under Const. art. 6, § 4.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

2. EVIDENCE (§ 129*) — ADMISSIBILITY—SIMILAR FACTS AND TRANSACTIONS.

Where, in a suit to recover a partner's share in proceeds from certain construction work, defendants claimed that, by reason of an oral agreement, the partners who quit work on the job before its completion should receive only day's wages, and that defendant should therefore recover only that amount, evidence that one of the other partners quit and received only day's wages as compensation under the agreement was admissible to prove such oral agreement.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 129.*]

3. PARTNERSHIP (§ 86*)—ORAL AGREEMENT AS TO PARTNERS' SHARES—CIV. CODE, § 2403—APPLICATION OF.

Where, after forming a partnership, an oral agreement was made as to the rights and shares of the partners, Civ. Code, § 2403, providing that, "in the absence of any agreement on the subject, the shares of partners in the profit and loss of the business are equal," would not apply.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 86.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by A. Swanson against John Wilsen and others, partners as John Wilsen & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

H. D. Gregory, for appellant. Geo. Foster Jones, for respondents.

CHIPMAN, P. J. The Utah Construction Company was made a party defendant, and was sought to be enjoined from paying over certain money to the other defendants. The company paid the money into court, and was no longer interested in the suit, and as to it the action was treated as dismissed. The equitable element of the case being thus eliminated, the remaining issues were within the jurisdiction of this court to which the appeal was taken. The amount of money involved and the definite amount thereof to which plaintiff laid claim appears in the complaint and these amounts are not denied to be correct, the issue presented by the answer being, that plaintiff is entitled only to a certain part, to wit, $275.15, of the sum claimed by plaintiff. Had the case involved an accounting among the copartners and the settlement of the copartnership business, thus requiring the aid of the equitable powers of the court, we would have been without jurisdiction upon direct appeal. Const. art. 6, § 4.

Plaintiff's action is to recover the sum of $1,441.44, as assignee of one John Olsen, as the latter's share of the earnings of an alleged copartnership consisting of defendants, the said Olsen and one Antone Carlson—seven in all. These seven men entered into a written agreement describing themselves therein as "a partnership doing business under the firm name of John Wilsen & Co., the party of the first part," with the Utah Construction Company, party of the second part, bearing date December 1, 1907. By this agreement they—first parties—agreed to do "all the clearing, grubbing, grading, tunneling, masonry, culverts, ditches, creek channels, and such other work connected therewith and rendered necessary thereby as may be required by the engineer in charge of the work," between certain indicated points, "on the line of the said Western Pacific Railroad in the County of Plumas"; the work was to "be commenced at once and shall be entirely completed so as not to delay track laying," and "within the time herein specified." The specifications of the work were attached to this contract, but do not appear in the record. The time fixed for the completion of the work does not appear in the contract, but doubtless was stated in the specifications. It appeared that defendants completed the work "to the satisfaction of the engineer" July 5, 1909. The amount then due from the construction company was $14,384.48. By agreement of the parties all but $2,697.44 was paid to these workmen, and that sum was by like agreement paid into court subject to its decision in this case, of which plaintiff claimed to be entitled to $1,441.44. The court found that the agreement referred to above was entered into about December 1st, but was not reduced to writing and signed until December 21, 1907; that "defendants, John Wilsen & Co., entered into an agreement among themselves, under and by virtue of which, it was mutually agreed, understood, and consented to by all the persons comprising the partnership, that in case any member of said gang or association should quit work during the period of such construction and leave and abandon the same prior to the completion thereof, that the said party so quitting and abandoning the work prior to the completion of the contract, and leaving the gang or association should receive no profits, but only the ordinary going wages received by men employed in work of like character on said construction; less any amounts which had been advanced to said party so quitting work, for supplies or on account of personal expenses during the time he was actually working with said gang or association"; that, "in accordance with said agreement among the said partners, the said Antone Carlson, one of said partners, performed work and labor for 65 days and 5 hours thereon, and left said gang or association, and received wages at the rate of three dollars per day, less his expenses"; that "said John Olsen, also a member of said partnership, worked 231 days only, and on or about the 15th day of August, 1908, ceased to work, abandoned said contract, and did not again return to said work; that the Utah Construction Company advanced to said John Olsen the sum of $417.85 and charged the same to the copartnership of John Wilsen & Co., leaving a balance due the said Olsen of $275.15"; that defendant John Wilsen worked 448 days, Nels Newman 471 days, C. Heiner 458 days, Chris Nelsen 443 days and Andrew Foer 362 days, all of whom last named "worked until the completion of the contract." As conclusion of law the court found that plaintiff was entitled to receive $275.15 and gave judgment accordingly. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

Plaintiff states in his brief that the principal error complained of is the finding as to the agreement made subsequently to the written agreement, i. e., the finding relating to the agreement among themselves as to how the members of the association were to be treated who quit the work before its completion. The claim is that the evidence does not support this finding.

The contention of appellant is that, as a partnership was alleged and shown and no subsequent agreement proven, his rights must be determined by section 2403 of the Civil Code, which reads: "In the absence of any agreement on the subject, the shares of partners in the profit and loss of the business are equal."

There was evidence tending to show that the seven men who entered into the engagement with the Utah Construction Company did so upon an equal footing, each to share equally the profits resulting from the work they undertook to do, nothing having at the start been said as to how a partner would share or be paid in case he quit the job. This question had no practical importance at the beginning as all were supposed to continue working to the completion of their contract. Later this question became a practical one when Antone Carlson quit work after having worked 65 days, and there was evidence that it was then agreed among the remaining members, including plaintiff, that should one quit the work he should be paid $3 per day for his work, and it was the understanding that thenceforward, when one of the number quit work and did not return, he should be paid at the same rate as Carlson was paid and no more. Plaintiff's assignor, Olsen, quit when the work was less than half completed, too sick to work. His illness was of no considerable duration. He was at the camp several times in apparent good health after quitting, but he never thereafter resumed or offered to resume work. His claim now is that he should have shared in the total earnings of the partnership in the proportion which the number of days he worked bore to the whole number of days' work performed by all of the members. The learned trial judge gave him judgment for his days' work at $3 per day, less advances made to him. This, we think, was justified by the evidence.

In the agreement entered into with the construction company, where the laborers were described as a partnership under the name of John Wilsen & Co., nothing appeared as to the terms of the partnership. Undoubtedly it was competent to show what the understanding of the members was as to how they were to share the profits, and this understanding was within their own control and it was not necessary that it should be in writing and could be determined at any time. The evidence as to how Carlson was paid was admitted as tending to show the agreement to have been as claimed by defendants, and, as Olsen was then a member of the association, it was admissible for that purpose, and tended to corroborate the testimony of defendants that the rule adopted in Carlson's case was made the understanding which was to govern should others quit the work. The section of the Code relied upon by appellant does not apply, for it is intended to reach cases in the absence of any agreement relating to the shares of partners in the profit and loss of the business. There was nothing unreasonable or inequitable in the agreement found by the court; on the contrary, it was but just to those who stood by their contract with the construction company to the finish and took the risks of loss in the business that they alone should share whatever profits might result from their fidelity to their obligations.

There was much evidence that the custom among these "section gangs," as they were called, was in accordance with the agreement found by the court, but on plaintiff's motion all evidence relating to custom was stricken from the record and was not considered. The findings were grounded upon the testimony of the members of the partnership association, other than that of Olsen, and was, we think, as to the rights of any who quit work, ample to support the view taken by the trial court.

Appellant's brief is almost entirely devoted to a discussion of the evidence, as to which the most that may be said in his favor is that it is conflicting. It would serve no useful purpose and would needlessly prolong this opinion to undertake an analysis of the testimony in the case.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

13 Cal. App. 539

PEOPLE v. WESTERN MEAT CO. (Cr. 104, 112.)

(Court of Appeal, Third District, California. June 1, 1910.)

1. Criminal Law (§ 1158*)—Appeal—Order on Affidavits—Review.

Where an order dismissing an information on affidavits that accused had not been legally committed by a magistrate was appealed from, the appellate court is bound by the same rule that controls where oral testimony is presented for review, and if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true and the facts stated therein considered established.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.*]

2. Attorney and Client (§ 72*)—Appearance by Attorney—Authority.

In a prosecution against a corporation for alleged violation of the statute prohibiting conspiracy in restraint of trade, affidavits held to warrant a finding that accused had authorized no one to appear in its behalf, and that no one had authority to represent it in proceedings before a committing magistrate.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 72.*]

3. Attorney and Client (§ 72*)—Appearance by Attorney—Authority.

While it is presumed that an attorney appearing and acting for a party to a cause has authority to do so, and the burden rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence, such appearance is not conclusive and the party for whom the attorney appeared may thereafter show that the attorney appeared without authority.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 72.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

An information was filed against the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Western Meat Company and from an order setting it aside, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., J. Chas. Jones, and Eugene S. Wachhorst, Dist. Atty., for the People. L. T. Hatfield and Jesse W. Lilienthal, for respondent.

BURNETT, J. The appeal is by the people from an order of the superior court of Sacramento county setting aside the information on the ground "that before the filing thereof the defendant had not been legally committed by a magistrate." Section 995, Pen. Code.

The particular infirmity in the proceedings before the magistrate which was urged at the hearing of the motion was set forth by respondent as follows: "That said defendant was never summoned to answer any charge in any court in accordance with the requirements of section 1390 or of sections 1391 to 1396, both inclusive, of the Penal Code of California," and "that said defendant never appeared, either in person or by counsel, before the committing magistrate or any magistrate to answer the charge set forth in the information filed in this proceeding or any other charge." In brief, the reason for urging the dismissal was that defendant had no notice to appear, and that it actually did not appear, either personally or by counsel, at the examination; and hence the committing magistrate had no authority to hold it to answer.

Said section 1390 provides that "upon an information or presentment against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons." Said section 1391 provides the form of the summons; section 1392, when and how it shall be served; and section 1393 is as follows: "At the appointed time in the summons, the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable." Other provisions place a corporation, as far as the subsequent steps are concerned, on the same footing as an individual under similar circumstances.

It is admitted that no summons at all was issued, and that no process whatever was served upon the defendant corporation. It is not disputed that if the corporation did not appear, either by its proper officer or by attorney, the court below was justified in setting aside the information. There is no contention that the corporation made an appearance at said examination in any manner except by its attorney. Indeed, the only controversy here is as to whether such an appearance was made, and it is largely a question of fact. The evidence submitted consisted of certain records and affidavits, a summary of which may be necessary for an intelligent disposition of the appeal.

From the records introduced by respondent it appears that the complaint in the justice court charged the Western Meat Company, the Sacramento Butchers' Protective Association, and one J. O'Keefe, jointly, with an offense in restraint of trade, defined in the statute of 1907 commonly known as the Cartwright Act. A warrant of arrest was issued by the justice directed to a peace officer and reciting that a complaint had been filed charging that the crime of conspiracy against trade had been committed and accusing J. O'Keefe thereof and directing said officer to arrest him and bring him before the magistrate. The docket of the justice shows the following entries, among others: "Jan. 25. Warrant of arrest returned and filed, indorsed, served on J. O'Keefe by bringing him in court, Jan. 25. One hundred dollars was deposited by defendant as cash bail. Feby. 3. Demurrer to complaint filed. Feby. 4. Demurrer argued by L. T. Hatfield, attorney for defendant. April 8. This case coming on regularly for hearing this day the following proceedings were had; the people being represented by deputies district attorney F. F. Atkinson, Esq., and J. W. S. Butler, Esq.; the defendant being present with counsel, L. T. Hatfield, Esq. and J. B. Devine, Esq.," etc. The said demurrer purported to be signed "Jesse W. Lilienthal and L. T. Hatfield, attorneys for defendant J. O'Keefe."

The affidavits of L. T. Hatfield and James B. Devine set forth that they were present at all times during the said preliminary examination of the defendant J. O'Keefe, that neither of them appeared for nor was either authorized to appear as counsel for the defendant Western Meat Company; that at the said preliminary examination they repeatedly stated to the court and to the counsel for the prosecution that they appeared solely for the defendant O'Keefe and did not represent any of the other defendants named in the complaint, and that said Western Meat Company was not summoned nor notified to appear at said examination and never appeared thereat at any time, either in person or by any of its officers, employés, or stockholders, or by counsel, and the said company was never arraigned by said magistrate or brought before him for examination. The affidavit of John O'Keefe was to the effect that he was not authorized to appear for said company, that he never employed counsel and never stated to any person that he appeared or was authorized to appear, and as a matter of fact he never did appear or act for said corporation in this proceeding. The affidavit of Leroy Hough, the vice president and general manager of the company, recited that said company was never served with any summons or other process of law in the proceeding; that said company never at any time or in any manner authorized any person to appear for or on its behalf in said justice court, or in any court until the 6th day of July, 1908, four days after a plea of "not guilty" had been entered in behalf of said corporation in the superior court. That on said day, affiant and the members of the board of directors of said corporation received notice that it had been arraigned on the 2d day of July, 1908, and a plea of "not guilty" entered therein, and thereupon said directors by a resolution duly adopted, authorized and empowered attorneys to protect the interests of the corporation; that during the preliminary examination of said O'Keefe affiant was present and testified therein, but it was simply in obedience to a subpœna and not otherwise; that affiant was the only person authorized to employ counsel during the pendency of these proceedings and that the said O'Keefe never had any authority to appear for or on behalf of said corporation.

In opposition to the motion, the affidavits of the committing magistrate, the assistant district attorney, and of the district attorney were received in evidence. In the first, it is denied that counsel for O'Keefe repeatedly stated that he did not appear for respondent, and it is averred that affiant has no recollection of any such statement and during the entire course of said examination he was of the opinion that Messrs. Hatfield and Devine of Sacramento, and Mr. Lilienthal of San Francisco, represented all of the defendants named in the complaint and that he proceeded with the examination upon that theory; that during said examination the said L. T. Hatfield stated: "We want it distinctly understood that we are not appearing for any defendant except Mr. O'Keefe, both the Western Meat Company and Mr. O'Keefe. If there are any other defendants we would like to know it." The affidavit of the district attorney discloses certain statements made by Mr. Devine on an application for a change of venue in the superior court of said Sacramento county in which he referred to himself and Mr. Hatfield as the attorneys of record for the defendants at the preliminary examination, and also the transcript of certain questions asked by Mr. Hatfield of certain witnesses called by him at the preliminary examination, in reference to the connection of the said Western Meat Company with the offense charged in the complaint. The affidavit of Mr. Atkinson, the assistant district attorney, sets forth quite fully the proceedings before the committing magistrate and the superior court, detailing circumstances from which the inference might be drawn that the attorneys for Mr. O'Keefe were acting for respondent herein. But, attaching full significance to the showing made by appellant, we have simply a conflict in the evidence as to whether the Western Meat Company was actually represented by counsel at said preliminary examination. There can be no kind of doubt as to the conclusion from the said affidavits offered on the part of said company that it had authorized no one to appear in its behalf, and as a matter of law no one had any authority to represent it in said proceedings. The rule is well established, as stated in Doak v. Bruson, 152 Cal. 18, 91 Pac. 1001, that "in the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." See, also, Henderson v. Cohen, 10 Cal. App. 580, 102 Pac. 826.

As the court below had the legal right to conclude that the said company was represented at the preliminary examination by no one authorized to appear as its attorney or agent, the only question remaining is whether an attorney, by his appearance for a defendant at a preliminary examination, can prevent an inquiry into his actual authority as such attorney. It seems to be the contention of the Attorney General that the declarations and conduct of Messrs. Hatfield and Devine were binding upon respondent and precluded it from showing to the contrary any want of authority. In other words, a corporation is made a defendant in a criminal case. No summons is issued, and no notice is given to said corporation of the pendency of the proceedings. A preliminary examination is held, it may be without even the knowledge of the officers of said corporation, but an attorney, without authority, announces himself as the representative of the defendant. Can it be said that under such circumstances the defendant is denied the right to show that it has not been actually represented by counsel? The law is not subject to any such reproach. This would be in violation of section 13, art. 1, of the Constitution, providing that "in criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel."

The rule, founded in reason and sanctioned by the authorities, is that it is presumed that an attorney appearing and acting for a party to a cause has authority to do so and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence. Am. & Eng. Ency. of Law, vol. 3, p. 375.

A case in point is Merced County v. Hicks, 67 Cal. 108, 7 Pac. 179. There was no service of summons upon any of the defendants but a demurrer was filed by Hicks and signed at his sole request by an attorney without any authority from respondents. The demurrer upon its face purported to be for all of the defendants, but the court said: "We think there was no appearance by the respondents. 'A defendant appears in an action when he answers, demurs, or gives written notice of appearance for him.' Code Civ. Proc. § 1014. But a defendant cannot be said to demur unless he does so in person or by an attorney authorized to represent him."

The cases cited by appellant sustain the position of respondent herein. For instance, in State v. Passaic County Society, 54 N. J. Law, 260, 23 Atl. 680, it is said: "In this case the record shows that Robert I. Hopper, one of the practicing attorneys of this court, appeared and filed a demurrer to the indictment. If he had appeared, knowing that he had no authority to do so, it would have been in contempt of the trial court. His appearance was presumably lawful. Otherwise the trial court should, in all cases where a corporation appears by attorney, require him to establish his right to do so by competent evidence. Such has never been the practice. The burden is on the corporation to show that the appearance was unauthorized. As the record stands, it sufficiently appears that the defendant was in court to answer to the indictment."

Upon the affidavits and testimony thus far considered, we can entertain no doubt that the trial court was justified in its conclusion that the corporation satisfied the requirement of the rule imposing upon it the burden of proof that it was not represented at said preliminary examination, and the order must be sustained. It is only just, however, to say that at the hearing of the motion Mr. Hatfield filed a counter affidavit in which he denied having stated in the justice court that he appeared for respondent, and he disclaimed any purpose or attempt to make it appear that he was authorized to represent, and he averred that he did not, in fact, represent the Western Meat Company at said proceeding. Indeed, a reasonable inference from the entire showing made and which, no doubt, was entertained by the trial court, is, that the attorneys and the justice all acted in good faith, but a mistake was made by the latter in assuming that respondent was represented by counsel.

The counter affidavit to which we have referred was inadvertently omitted from the transcript of the testimony as first certified by the trial judge, and by him it was afterwards allowed as an amendment to said transcript. The appeal was then pending in this court and the contention is made that the court below was without jurisdiction to amend the transcript. Section 1247c of the Penal Code, as added by the Legislature of 1909, provides for a further transcription of the record upon suggestion to the appellate court that such action is necessary. The said section contemplates that the order shall be made by the appellate court and the additional transcription follow. The course pursued here is somewhat irregular, as, after the amendment has been made, we are asked to sanction it, but it is not claimed that said affidavit was not used on the hearing and no prejudice has resulted from the irregularity. While said amendment is not necessary for a determination of the cause, we think it should be made a part of the record, and it is so ordered.

The order setting aside the information is also affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(7 Cal. Unrep. 376)

In re STUDENTS OF HASTINGS COLLEGE OF LAW.

(Court of Appeal, First District, California. June 1, 1910.)

1. ATTORNEY AND CLIENT (§ 7*)—ADMISSION OF ATTORNEYS—APPLICATION — COLLATERAL QUESTIONS.

Whether Hastings College of Law in the University of California created by St. 1877–78, c. 351, as a matter of law has affiliated with the university, as provided by such act, and whether the faculty of the university has granted diplomas to persons applying for admission to the bar thereon, cannot be tried collaterally on such application.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 7.*]

2. ATTORNEY AND CLIENT (§ 7*)—ADMISSION —DUTY TO LICENSE—GRADUATES OF HASTINGS COLLEGE.

Under St. 1877–78, c. 351, providing that the diploma granted students of Hastings College of the Law in the University of California shall entitle the student to a license to practice in all the courts of the state, subject to the right of the Chief Justice of the state to order an examination as in ordinary cases of applicants without such diploma, it is the duty of the Supreme Court, on application of the students of such college, to license students holding such diplomas to practice as attorneys and counselors in all courts of the state.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 7.*]

In the matter of the application of students of the Hastings College of the Law for admission to practice. Granted.

Thomas I. Bergin, for Directors of College. Edward R. Taylor, for students.

PER CURIAM. Application has been made, on motion of Hon. Edward R. Taylor, dean of Hastings College of the Law, for an order admitting the following named persons to practice as attorneys and counselors at law in all the courts of this state, to wit: Stephen Cornelius Asbill, Gustave Louis Baraty, Edward Ignatius Barry, Absolom Francis Bray, Jr., Harry Alexander Davie, Harry

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Geballe, Gerald Hansen, Peter John Ibos, James Frederick Johnson, James Kelleher, Harold Louis Levin, Frank Bartholmew Lorigan, Greg Shobe McEvers, Frank Mitchell, Jr., George Franklin Owens, Albert Picard, Andrew Robert Shottky, Will Stephen Solari, Harry Ignatius Stafford, Adolph Tiscornia, Theodore Wittschen, Marcus David Wolff, Frederick Leslie Woodburn.

Under the act to create "Hastings College of the Law in the University of California" (St. 1877–78, p. 533), it is provided that the said college shall affiliate with the university of the state, and shall be the law department of the state university. The act provides: "Sec. 3. The faculty of the university shall grant diplomas to the students of the college, and the president shall sign and issue the diplomas. * * * Sec. 6. The diploma of the students shall entitle the student to whom it is issued to a license to practice in all the courts of this state, subject to the right of the Chief Justice of the state to order an examination as in ordinary cases of applicants without such diploma."

Each of the above-named persons has a diploma signed by the president of the university. We must presume that official duty has been regularly performed, and that the faculty of the university has granted the diplomas in pursuance of the law. We must also presume that the said Hastings College of the Law has affiliated with the university of the state; in fact, the Legislature, by its many appropriations, and by its appropriations for suitable buildings for the law department of said college, has time and time again recognized the Hastings College of the Law as a department of the university. The very title of the act is "To create Hastings College of the Law in the University of California." The questions as to whether or not the said college has, as matter of law, affiliated with the university, and as to whether or not the faculty of the university has granted the diplomas which the said persons hold, cannot be tried collaterally on this application.

It is our duty to grant a license to each of said persons entitling him to practice as an attorney and counselor at law in all courts of this state, and it is so ordered.

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13 Cal. App. 551

PEOPLE v. EDWARDS. (Cr. 146.)

(Court of Appeal, Second District, California. June 4, 1910.)

1. CRIMINAL LAW (§ 427*)—EVIDENCE—SUBSEQUENT EVENTS.

Defendant and male companion, while driving in the country, overtook two girls who got into the buggy. When they arrived at a bayou defendant's male companion and one of the girls got out of the buggy and went some distance therefrom, whereupon prosecutrix charged that defendant had intercourse with her in the buggy; that thereafter the male companion and the other girl returned and the four drove on for nearly half a mile at which point prosecutrix and the male companion got out of the buggy, proceeded a short distance, where another rape was committed by defendant's male companion on prosecutrix. *Held* that, in the absence of proof of conspiracy, the rape committed by defendant's companion on prosecutrix constituted a separate substantive event, and was inadmissible as against defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012–1017; Dec. Dig. § 427.*]

2. CRIMINAL LAW (§ 368*)—EVIDENCE—"RES GESTÆ."

Since res gestæ is matter incidental to a main fact and explanatory thereof, made up of acts and words so closely connected with a main fact as to really constitute a part thereof and without knowledge of which the main fact might not be properly understood, proof of a separate rape alleged to have been committed on prosecutrix by defendant's male companion some time after the offense alleged to have been committed by defendant was complete and at a point some distance therefrom, having no connection therewith, was inadmissible as res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 815, 821; Dec. Dig. § 368.*

For other definitions, see Words and Phrases, vol. 7, pp. 6130–6136; vol. 8, p. 7787.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Webb Edwards was convicted of rape, and he appeals. Reversed and remanded.

H. T. Miller, J. R. Dorsey, and Thomas Scott, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant was convicted of the crime of rape committed by reason of having sexual intercourse with a female under the age of 16 years, she at the time not being his wife. From a judgment pronounced upon the verdict, and from an order denying a new trial, defendant appeals.

Numerous errors are assigned as grounds for reversal, but we are of opinion that the action of the trial court in admitting, over defendant's objection, evidence of the commission of another rape upon the prosecuting witness by another party on the same day, at a remote place, was erroneous and so prejudicial as to seriously affect defendant's rights. The record discloses that the defendant and another young man started to drive out into the country and overtook two young girls who were walking along the road; that these girls got into the buggy with the young men, the prosecuting witness sitting on the lap of defendant and the other girl on the lap of his companion; that during the drive out into the country defendant took improper liberties with the prosecuting witness; that after they arrived at a point near what is known as Elk Bayou defendant's male companion and the girl who had previously been sitting on his lap got out of the buggy and went some distance therefrom; that thereupon defendant had sexual intercourse with the prosecuting witness while both parties were in the buggy; that thereafter the male companion and the other girl returned, joined the parties in the buggy, which was then driven a distance of nearly half a mile to a point on what is called Woodville road, at which point the girl who had theretofore been sitting on the lap of defendant left the buggy and the male companion also got out of the buggy and the two proceeded a short distance therefrom, where another rape was committed by defendant's male companion upon the prosecuting witness.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The record discloses that but a very small part thereof relates to incidents and transactions connected with the substantive offense with which defendant stood charged; that the major portion of the record is taken up with an account of the rape committed by the male companion of defendant upon the prosecuting witness. Defendant objected to all of the testimony with reference to this offense of the male companion upon the ground that the same was immaterial, incompetent, and irrelevant, which objection the court overruled, and permitted the introduction of all the disgusting details connected with the rape of the prosecuting witness by the male companion of defendant. The information charged the defendant alone with the offense. There was no evidence offered, nor was the prosecution conducted, upon the theory that there was any conspiracy or collusion between defendant and his male companion, and even had such condition been shown, all of the criminal acts of the male companion were shown to have been perpetrated long after the offense was committed with which defendant stood charged. It is established law that "the prosecution cannot prove the commission by defendant of other offenses for the purpose of increasing the likelihood that he committed the particular offense with which he is charged"; the exception to this rule being that it may be made to appear in order to show intent. In People v. Lane, 100 Cal. 387, 34 Pac. 859, the following rule laid down by the Supreme Court of Illinois is quoted and approved: "But the general rule is against receiving evidence of another offense, and no authority can be found to justify its admission, unless it clearly appears that such evidence tends in some way to prove the accused guilty of the crime for which he is on trial." And further along in the same opinion there is quoted with approval this language of the Supreme Court of Pennsylvania: "If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." In People v. Williams, 133 Cal. 168, 65 Pac. 324, Mr. Justice Temple, in speaking for the court in a case involving a similar offense, says: "In this case, as well as in any other, the prosecution must charge a specific offense, and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the one specific offense for the alleged commission of which defendant is on trial." These and many other decisions of like import all relate to the proof of substantive offenses by the defendant, but in no case to which our attention has been called has any court justified the admission of a distinct offense by another party, except in instances where the acts and declarations of conspirators are sought to be shown, but acts and declarations even of a conspirator are not admissible after the commission of the crime. We are unable to see how it can be claimed that the acts and conduct of a third party, involving an independent and substantive crime committed after the offense charged against defendant was completed, and at a remote place therefrom, have a logical or necessary connection with the offense charged against defendant. There is no pretense that the defendant was guilty of any criminal act after he left the point near Elk Bayou. If the evidence discloses his guilt it was for the crime there committed, and the admission of the evidence in relation to the conduct of his companion, for which he is not shown to have been in any sense responsible, violates, in our opinion, all the well-established rules.

The Attorney General insists that these acts of the companion were part of the res gestæ, and, therefore, admissible. While the use of the term "res gestæ" has been criticised by eminent authority, it has grown into use as signifying circumstances and declarations which grow out of a main fact, and which are contemporaneous with it and serve to illustrate its character. As said by the Supreme Court of Kansas in Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942: "Res gestæ is matter incidental to a main fact and explanatory of it. It is made up of acts and words which are so closely connected with a main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood." It is not possible for us to conceive how these acts of the male companion can be regarded as a necessary incident of the criminal act charged against the defendant. We think the action of the court in declaring before the jury, as it did by its implied declaration, that this testimony was competent and material, could have no other effect upon the minds of the jury than to lead them to the conclusion that a rape committed by the companion under the circumstances of this case tended to prove the substantive offense charged against the defendant. The conviction rests almost entirely upon the testimony of the prosecuting witness. The corroborating evidence was not of such a character as to afford much aid to the jury. The defendant was shown to have been a young man of irreproachable character, who denied all of the acts charged, and these things may not be ignored in considering the probable prejudicial effect of the testimony improperly admitted.

We are of opinion that for the error above referred to the judgment and order should be reversed, and that the other errors assigned are not of such a character as to require of necessity a review as affecting the subsequent trial.

Judgment and order reversed and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

13 Cal. App. 594

ATWOOD et al. v. LITTLE BONANZA QUICKSILVER CO. et al. (Civ. 807.)

(Court of Appeal, Second District, California. June 14, 1910.)

1. Attachment (§ 62*) — On Promissory Notes—Must Be Payable in This State.

The right to an attachment in any event depends upon the contract being for the direct payment of money, and, to support an attachment, the contract itself must contain some provision indicating that such money was payable in this state.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 166; Dec. Dig. § 62.*]

2. Evidence (§ 441*) — Parol Evidence — Notes—Place of Payment.

Where notes made by a foreign corporation failed to show any place of payment, they were payable in the state of the domicile of the maker under Civ. Code, § 3100, providing that a negotiable instrument which names no place of payment is payable at the residence or place of business of the maker, or wherever he may be found, and hence parol evidence was inadmissible to show an agreement whereby they could be paid in this state, in order to sustain an attachment thereon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2044; Dec. Dig. § 441.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action on attachment by R. A. Atwood and others against the Little Bonanza Quicksilver Company and others. From an order refusing to grant a motion to dissolve the attachment, defendants appeal. Reversed and remanded.

Wm. Shipsey, for appellants. Lamy & Putnam, for respondents.

ALLEN, P. J. The action was upon certain negotiable instruments on their face executed by the corporation at Boston, Mass., without definite place of payment therein stated. At the commencement of the action, plaintiffs, by an affidavit filed, alleged that the notes were payable within this state, and other facts requisite in order to procure a writ of attachment. No statements, however, were therein contained as to the residence of defendant corporation. The writ was issued and a motion made to dissolve the same, upon the ground that the instruments were made in another state and were not payable in this state. Upon the hearing of such motion, affidavits were presented by the defendants to the effect that defendant corporation was a foreign corporation, with its principal place of business in Massachusetts; that the members of the board of directors were all residents of said state; that the notes were there executed, copies of which notes were set out in the affidavits. Plaintiffs by certain affidvaits filed sought to show that, notwithstanding the omission to specify the place of payment, it was understood and agreed when said notes were delivered that the same were payable either in Massachusetts or California; that payment thereof was to be made from the proceeds of certain mines being operated by defendant corporation in San Luis Obispo county, this state; that after the execution of the notes defendant corporation filed copies of its articles of association in this state and appointed a person upon whom process might be served, all in conformity with the laws of this state; that other actions had been commenced after the execution of these notes and judgment had thereon against defendant corporation in this state. The court below denied the motion to dissolve, from which order defendants appeal.

It is insisted by respondents that the order of the court denying the attachment rests upon an implied finding that the notes were payable in this state, and there being a conflict in the evidence in that regard, an appellate court will not disturb the same. This would be the true rule were a conflict in the evidence apparent. As the record is presented, however, the question of conflict only arises upon the theory that the evidence offered of a contemporaneous oral agreement was proper for consideration and admissible. It is true that section 3100, Civ. Code, provides: "A negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found." Were it an open question we should be inclined to the opinion that such section was intended to modify a rule declared in many jurisdictions, to the effect that, "where no place of payment is expressed in a note, the place of payment is understood to be where the maker resides"; while in other jurisdictions the rule was, "as between the original parties, however, all debts are payable everywhere, unless some special provision to the contrary is made, and the rule is that debts have no situs but accompany the creditor everywhere." Story on Bills, § 159; Slacum v. Pomery, 6 Cranch, 221, 3 L. Ed. 205. But we are confronted with the construction of such section as applied to attachment proceedings in Tuller v. Arnold, 93 Cal. 168, 28 Pac. 864, where it is said: "The contract, having been made in Illinois, was presumptively to be performed there, and an attachment could not be taken out here, even although it is true in a general sense that the money was payable wherever the defendants could be found. To authorize the issuance of an attachment, the money must have been made payable in this state by the contract itself"—citing authorities. The right to an attachment in any event depends upon the contract being for the direct payment of money, "and it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state." Drake v. De Witt, 1 Cal. App. 618, 82 Pac. 982; citing, in support, Dulton v. Shelton, 3 Cal. 208; Eck v. Hoffman, 55 Cal. 502. Accepting this as the rule, and the terms of the note being admitted, it follows that no evidence was competent which undertook to change or modify the language of the instrument. Whatever may have been the understanding of the parties as to the place of payment, they are concluded by the terms of their written contract and the legal presumptions attaching thereto, whenever they invoke the attachment laws of this state. No conflict arising, therefore, from competent evidence, we are constrained to hold that as a question of law the writ of attachment should have been dissolved, and that the court erred in denying such motion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Order reversed and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

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13 Cal. App. 555

PEOPLE v. HARRISON. (Cr. 145.)

(Court of Appeal, Second District, California. June 4, 1910.)

1. Jury (§ 105*)—Trial by Jury—Qualification of Jurors—Bias.

There is no difference in the application of the rule that accused is entitled to an inalienable right of trial by a jury of unbiased and unprejudiced jurors, where the prejudice extends against the defendant individually for some particular cause personal in its nature, or where it exists on account of the offense with which he stands charged.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 480, 481; Dec. Dig. § 105.*]

2. Jury (§ 133*)—Qualification of Jurors—Actual Bias—Facts.

On a challenge of jurors for actual bias, the trial court is bound to determine the facts.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 595–596; Dec. Dig. § 133.*]

3. Criminal Law (§ 1152*)—Jury—Disqualification of Jurors—Review.

In determining a challenge of a juror for actual bias, large discretion is vested in the trial court, and its ruling will be reviewed only in exceptional cases where the evidence on the juror's voir dire examination presents a question of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3056; Dec. Dig. § 1152.*]

4. Jury (§ 105*)—Qualification of Jurors—Actual Bias.

Where a juror in a prosecution for rape testified on his voir dire that his condition of mind was such that he could not fairly and impartially try the case because he had such a prejudice against any one charged with such offense that he could not sit impartially and determine the matter with the same degree of calmness as he could where other offenses were charged; that it would require considerable evidence to overcome his prejudice; and that there would be a certain amount of sympathy for prosecutrix and her family—he was disqualified, as a matter of law, for actual bias, and did not qualify himself by a further statement on cross-examination that he could give defendant the benefit of all reasonable doubt, such statement being mere opinion as to his ability to set aside an admitted prejudice.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 480, 481; Dec. Dig. § 105.*]

5. Jury (§ 105*)—Qualifications of Jurors—Statutes.

Pen. Code, § 1076, providing that a juror may qualify himself by stating that he can and will try the cause impartially, notwithstanding an opinion previously formed, had no application, where a juror in a prosecution for rape testified that he had such a prejudice against a person charged with such offense that he could not sit impartially and determine the matter without prejudice, and that it would take considerable evidence to remove the prejudice he entertained.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 480, 481; Dec. Dig. § 105.*]

6. Criminal Law (§ 1166½*)—Disqualifcations of Jurors—Peremptory Challenge—Use—Prejudice.

Where accused was required to use a peremptory challenge to excuse a juror after the court had erroneously overruled a challenge for actual bias, and he was compelled to exhaust his peremptory challenges before the jury was complete, the ruling was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3117; Dec. Dig. § 1166½.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Edward Harrison was convicted of rape, and he appeals. Reversed and remanded.

H. T. Miller, J. R. Dorsey, and Thomas Scott, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant was convicted of the crime of rape committed by reason of having sexual intercourse with a female under the age of 16 years, she at the time not being his wife. From a judgment pronounced upon the verdict, and from an order denying a new trial, defendant appeals.

The Attorney General insists upon a dismissal of the appeal for failure upon the part of defendant to announce in open court his appeal from said judgment and order. The additional and supplemental record filed in this case by leave of court discloses that such notice was actually given in open court at the proper time.

Appellant in an extended brief specifies and presents numerous alleged errors upon the part of the trial court. A careful examination of the record does not warrant us in determining that any prejudicial error appears therein, other than the following:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

One Kinkler was called as a juror and was examined in open court as to his qualifications. Upon such examination he stated that he was the father of five girls; that it would take quite a weight of evidence to overcome his prejudice against a defendant simply because he is charged with the crime of rape; that he would enter upon the trial of such a case with a certain amount of feeling against the defendant; that it would require quite an amount of evidence to remove that feeling; that such feeling would be a kind of prejudice and it would require evidence to remove that; that there would be a certain amount of sympathy go to the family; that there would have to be conclusive evidence that the defendant was innocent; that while his sympathy might not operate to the extent that he would convict a man of rape on less satisfactory evidence than he would convict him of some other crime, the juror was afraid it would be a little that way, to be honest; that he had such a prejudice against one who was charged with the crime of rape that, to an extent, it might lead him to do him an injustice; that he would always give the benefit of the doubt the other way—to the family; that the sympathy he might feel, for instance, for the small girl who it is claimed was the victim, might affect his judgment and might bias him in favor of the prosecution. And when asked by the court: "You think that would be so in any case of that character?" his answer was, "In a certain extent, it would, Judge; honest, I believe it would." And when interrogated as to whether he could approach the decision of a question where rape was involved with the same degree of calmness which he would exercise under similar circumstances where other crimes were involved, answered: "I am afraid not; I am afraid I would be a poor juror on a case of this kind." Thereupon, the court cross-examined the juror, and after a full and complete explanation of the rights of a defendant and the duty of a juror to listen to and follow the instructions of the court, and the presumptions always resting in favor of a defendant, the juror answered that he felt he could give him the benefit of all reasonable doubt. The defendant challenged this juror for cause under subdivision 2 of section 1073 of the Penal Code, which challenge was denied.

It appears from the record that after this challenge was denied, defendant as to Kinkler exercised his ninth peremptory challenge, and later exercised his tenth and last challenge as to another juror. Thereafter, jurors Frame and Snodgrass were sworn to try the case, two other jurors were drawn from the box and sworn on their voir dire, and one thereof, W. H. Bird, was subsequently sworn as a juror to try the cause; and the record contains the following statement: "The defendant, before the jury was completed to try the case, made and was allowed ten peremptory challenges, and requested no more."

The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury guaranteed by the Constitution." Lombardi v. California St. Ry. Co., 124 Cal. 313, 57 Pac. 68. We do not recognize any difference in the application of the rule where the prejudice exists against a defendant individually for some particular cause, personal in its nature, or where a like prejudice exists on account of the offense with which he stands charged. The challenge being for actual bias, the trial court was called upon to determine the facts. "Under such circumstances, a large discretion is vested in the trial court, and its ruling is only reviewed by this court in exceptional cases; for it is only when the evidence upon the voir dire examination of the juror presents to this court a question of law that an exception to the disallowance of a challenge for actual bias may be reviewed." People v. Flannelly, 128 Cal. 86, 60 Pac. 671. It will be observed that the juror Kinkler frankly admitted that his condition of mind was such that he could not fairly and impartially try the cause. He conceded frankly that he had such bias and prejudice against any one charged with this offense that he could not sit impartially and determine the matter with the same degree of calmness which he could exercise in cases where other offenses were charged. There is, to our mind, no conflict in the evidence upon the voir dire examination as to the matter of actual prejudice and bias, unless his subsequent opinion upon cross-examination, that he could give the benefit of all reasonable doubt to the defendant, could be so regarded. We regard this cross-examination in the sense of an opinion as to his own ability to set aside an admitted prejudice. The rule permitting a juror to qualify by stating that he can and will try the cause impartially, notwithstanding an opinion previously formed (section 1076, Pen. Code), has no application here. There being, then, in our judgment no conflict in the evidence presented upon the trial of the challenge for cause, the matter is resolved into a question of law, and is strikingly similar to that considered in Quill v. Southern Pacific Co., 140 Cal. 270, 73 Pac. 991. Nor do we regard the case of Graybill v. De Young, 146 Cal. 422, 80 Pac. 619, as establishing a different doctrine; for in the last-mentioned case, as said by the court in the majority opinion, "the answers of the juror tended to show that he would be bound by the evidence," and in that respect it is distinguishable from the case of Quill v. Southern Pacific Co., supra, as well as from the case under consideration. We are, therefore of opinion that, as a matter of law, the court erred in disallowing the challenge to the juror Kinkler, and that such matter is reviewable upon this appeal. This, then, leads us to a consideration of the effect of such disallowed challenge upon the rights of the defendant in respect of his peremptory challenges. We regard People v. Helm, 152 Cal. 534, 93 Pac. 99, as determinative of this question. The fact that defendant was required to exercise one of his peremptory challenges in order to remove Kinkler from the panel was, in effect, restricting his peremptory challenges to nine in number. As said in the case last cited: "It makes no difference in this respect that no challenges for cause were interposed by defendant to any jurors called to the box after the exhaustion of his peremptory challenges had been forced by the improper rulings of the court upon his challenges for cause. It may often happen that a juror most obnoxious to a defendant may successfully pass examination upon his voir dire. That examination may disclose no ground for the interposition of a challenge for cause. Yet there may be some reason known to the defendant which would make it most prejudicial to him that the juror should be retained. Even more, the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant; so that again we say that any rulings of a court which compel a defendant to exhaust his peremptory challenges and force him to accept jurors after his challenges have been so exhausted, become the proper subject of review." As said by the Supreme Court of Ohio in the case of Hartnett v. State, 42 Ohio St. 578: "Where, as in this case, the accused does exhaust his peremptory challenges before the jury is impaneled, * * * it cannot be said 'no prejudice resulted to defendant from such erroneous rulings of the court.'" This case cites with approval People v. Weil, 40 Cal. 268, in which case it is held that the practical result of the erroneous disallowance of defendant's challenge for cause was to contract the number of peremptory challenges to which he was entitled and may have been seriously prejudicial to the defendant. This seems to be recognized in other jurisdictions and may be said to be settled law.

We are of opinion that this error of the court in denying defendant's challenge for cause had the effect to deprive defendant of his full right to exercise ten peremptory challenges, and is so prejudicial as to warrant a reversal of the judgment and order.

Judgment and order denying a new trial reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

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13 Cal. App. 589

FAIR v. HOME GAS & ELECTRIC CO.

(Civ. 798.)

(Court of Appeal, Second District, California. June 14, 1910.)

1. Pleading (§ 63*)—Statutory Provisions—"Gas."

Even if the word "gas" in St. 1905, c. 435, § 629, requiring a gas company on application to furnish gas, and authorizing recovery of damages for its failure to do so, means gas for lighting purposes, it is enough for a complaint founded thereon to use simply the word "gas," as it will be given therein the same meaning it has in the statute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 133; Dec. Dig. § 63.*

For other definitions, see Words and Phrases, vol. 4, pp. 3044, 3045.]

2. Gas (§ 13*)—Refusal to Supply Consumer—Action for Damages—Complaint.

The complaint based on St. 1905, c. 435, § 629, requiring a gas company on application of the owner or occupant of a building not more than 100 feet from one of its mains to supply gas therefor, and authorizing recovery of damages for its failure for 10 days to do so, which alleges that from June 26th to July 28th plaintiff was the occupant and inhabitant of a certain building and premises, which "are and were throughout said period" distant not more than 100 feet from one of defendant's mains, that on June 26th defendant connected the building and premises with one of its mains, and supplied gas thereto till July 28th, when it discontinued the supply, and that on July 29th plaintiff demanded in writing of it that it supply him with gas therefor, sufficiently avers, in the absence of anything other than a general demurrer, that at the time of the demand the building and premises were within 100 feet of one of defendant's mains.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 13.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Peter Fair against the Home Gas & Electric Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Halsey W. Allen and Campbell & Moore, for appellant. E. C. Campbell, for respondent.

ALLEN, P. J. The complaint alleges the incorporation of defendant and that it is engaged in the business of supplying heating and illuminating gas to the inhabitants of the city of Redlands in San Bernardino county; that between June 26, 1908, and July 28, 1908, plaintiff was the occupant and inhabitant of a certain building and premises in the city of Redlands, which building and premises are and were throughout said period distant not more than 100 feet from one of defendant's gas mains; that on the date first named defendant connected said building and premises with one of its mains, and until July 28th supplied gas to plaintiff for said building and premises; that upon said last-named date, without plaintiff's consent, defendant discontinued the supply of gas to said building, shutting off the same therefrom, without making any demand whatever on plaintiff for the payment of any sum on account of gas theretofore used; that on July 29, August 14, and August 24, 1908, plaintiff made demand in writing of defendant that it supply him with gas for said building and premises; that from July 28th until the filing of the complaint no gas was supplied to said building or premises; that on July 28th and 29th, at the time plaintiff's written demand upon defendant to supply him with gas was made, plaintiff was not in arrears for the payment of gas supplied; that defendant's sole purpose in removing the meter and shutting off the supply of gas was to annoy and injure plaintiff; that defendant demanded of plaintiff a cash deposit or bond of indemnity against loss as a condition of again installing the meter in said premises and supplying gas; that this was an arbitrary discrimination against plaintiff; that no other consumers were required to make a deposit of $10; and that such exaction was to spite, harass, and annoy plaintiff; that from July 28th until the time of the filing of the complaint herein plaintiff resided in said building and premises, and during that time has been without any heating or illuminating gas; that on October 28, 1908, plaintiff demanded of defendant the payment of $50 and $5 per day from August 9, 1908, said sums being damages fixed by law for defendant's failure to supply him with gas; and he asked judgment accordingly.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant denies all the allegations of the complaint other than as to the demand of plaintiff to supply him with gas as averred. Upon the hearing, the court found all the allegations of the complaint to be true, except as to certain allegations which have no significance upon this appeal. The court also found, in conformity with the answer, that another corporation had at all the times mentioned gas mains within 100 feet of said premises and dwelling house of plaintiff, found that at all times service pipes belonging to defendant were connected with defendant's gas mains for supplying plaintiff with gas, and are still located upon said premises. Judgment was rendered in favor of plaintiff for $625, with interest at 7 per cent. per annum from the date of such judgment. This appeal is from the judgment alone.

Appellant's primary contention is that the complaint is insufficient, in that there is no allegation that the application to defendant was for gas for lighting purposes, and no averment that plaintiff ever made application in writing to defendant to furnish him with gas for lighting purposes, nor any averment that defendant ever refused or neglected to supply gas for lighting purposes. This action is one based upon a statute, the enacting clause of which is as follows: "An act to repeal Title XV of Part IV of Division First of the Civil Code, and to substitute therefor in said code a new title XV, relating to corporations formed for the purpose of furnishing light for public use." St. 1905, p. 592. The statute provides (section 629): "Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter." Conceding for the purposes of this decision that the language in the body of the statute, when it refers to gas, means gas for lighting purposes, nevertheless, the complaint in the action is in the language of the statute. A similar question was presented to the Supreme Court of Illinois in the case of Gebhart v. Adams, 23 Ill. 397, 76 Am. Dec. 702, wherein it is held that: "It is a correct rule in declaring upon a statute, to describe the cause of action, whatever it may be, in the words of the statute. Even in criminal cases this is allowed. * * * The court cannot put one construction upon words in a statute, and deny them the same construction when the same words are used in a declaration or plea. The pleader is not bound, in declaring upon a statute, to set forth all or any of the words the court may have used in construing the statute, for when they have placed their construction upon it, and say that it means a particular thing, the words of the statute must be construed to mean the same thing in a declaration on that statute. This is a self-evident proposition." Accepting this rule—and the reasoning upon which it is based is most convincing—the statute under consideration and the complaint based thereon must receive the same construction, and the word "gas," when used in either, shall be held to have a like meaning and a like application. It follows, then, that the averments in the complaint found by the court to be true must be held sufficient under the statute.

We do not think the criticism directed to the allegations of the complaint, because of the alleged omission to aver definitely the location of the house and premises at the time when the demand for gas was made and thereafter, is so serious as to warrant a reversal of the judgment. It is alleged that from June 26 to July 28, 1908, plaintiff was the occupant and inhabitant of the building and premises known as 536 Chestnut avenue, "which said building and premises are and were throughout said period distant not more than one hundred feet from one of defendant's mains." It is further averred "that from June 26, 1908, until the present time plaintiff has resided in said building and premises." The answer admits that at all times mentioned in the complaint service pipes belonging to defendant connected with said gas mains at plaintiff's said premises and residence have been and still are located on said premises. We think a fair construction of the complaint is to say that it avers that the house and premises were at the date of the filing thereof within the required distance, and were so situated during the limited period mentioned. Aside from any distinction which may be said to exist between the effect to be given subdivision 32, § 1963, Code Civ. Proc., in relation to presumptions arising from certain things proven and the presumptions which will follow the allegations of the pleading, the imperfection, if any, in plaintiff's allegation as to the status in the interim is aided by the answer, which, fairly construed, tends to allege a continuance of the status during all the times mentioned in the complaint. The demurrer was general. No uncertainty was claimed as to such complaint, and a consideration of its allegations after judgment leads us to regard it as a sufficient basis for the judgment.

As to the demand, there is no denial thereof in the answer, and the defendant was plainly informed that it was required to perform a duty to which the demand referred. In addition to this, it affirmatively appears by the answer that the refusal to furnish gas was not based upon the insufficiency or uncertainty of the demand, but the reason therefor was plaintiff's refusal to pay an arbitrary and unwarranted claim for $10 deposit, which defendant sought to exact and which it had no right to do. By its answer defendant admitted that conditions were such that it was willing, upon payment of the deposit, to furnish plaintiff with the gas required.

We are of opinion that the complaint alleged and the court found sufficient to entitle plaintiff to recover under the statute, and that the amount of the judgment under the statute was correctly computed.

Judgment affirmed.

We concur: SHAW, J.; TAGGART, J.

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13 Cal. App. 454

MILES v. JUSTICE'S COURT OF PASADENA TP., LOS ANGELES COUNTY. (Civ. 853.)

(Court of Appeal, Second District, California. May 20, 1910.)

1. CRIMINAL LAW (§ 101*)—JUSTICE'S COURT—TRANSFER OF CAUSE—AFFIDAVIT OF BIAS.

Under Pen. Code, § 1431, providing that, when it appears from the affidavit of defendant that he has reason to and does believe that he cannot have an impartial trial before the justice because of the prejudice of the justice, the cause must be transferred to another justice, the filing of the affidavit does not deprive the justice of jurisdiction to pass on the application and on an unfavorable determination to proceed with the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 204; Dec. Dig. § 101.*]

2. CERTIORARI (§ 1*) — GROUNDS FOR ISSUANCE.

A writ of review can only be granted when an inferior tribunal exercising judicial functions has exceeded its jurisdiction and there is no appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. CRIMINAL LAW (§ 1011*)—SUMMARY TRIAL—REVIEW.

Since the filing of an affidavit of prejudice in a criminal case in a justice's court under Pen. Code, § 1431, does not ipso facto deprive the justice of jurisdiction to pass on the application for a transfer, the propriety of his action in denying the application and proceeding with the trial, even if erroneous, is not reviewable by writ of review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. § 1011.*]

T. J. Miles was convicted for the violation of an ordinance in the justice's court, and appealed to the superior court, which affirmed the judgment, and he now applies for a writ of review. Writ denied.

Randall & Gaines, for petitioner.

PER CURIAM. It is alleged in the petitioner's affidavit that he was charged with the violation of an ordinance of Los Angeles county, claimed to have been committed in Los Nietos township in said county; that defendant was arrested and taken before a justice of the peace in and for Pasadena township, and his cause set down for trial; that petitioner filed an affidavit and motion for a change of venue on the ground that the justice of the peace was biased and prejudiced and interested against him, and he could not have a fair and impartial trial before such justice; that expecting said motion to be granted he did not prepare for trial at the time set, which matter being brought to the attention of the justice he refused, notwithstanding the acquiescence on the part of the prosecuting officers, to continue the trial on account of the absence of the witnesses; that objection was made to proceeding further with the trial because it was claimed that the justice had lost jurisdiction by reason of the affidavit, which objection the justice overruled. It is alleged further that upon the trial he was convicted without the introduction of the evidence necessary in order to establish the offense, and that the court erred in giving certain instructions to the jury; that at the conclusion of the trial the jury found petitioner guilty; that from the judgment pronounced upon such verdict the petitioner appealed to the superior court of Los Angeles county; that upon the hearing of such appeal the judgment was by the superior court affirmed; and this writ is sought to review and annul the judgment of said justice.

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The theory of petitioner is that the same effect should be given to section 1431 of the Penal Code as is given to section 833 of the Code of Civil Procedure, namely, that upon the filing of an affidavit showing bias and prejudice the justice must transfer the cause, and that he is without jurisdiction further to act. In the case of Lowrey v. Hogue, 85 Cal. 602, 24 Pac. 995, a distinction is drawn by our Supreme Court as between the two sections, and in which it is held that in a criminal action upon the facts stated in the affidavit the court is called upon to determine whether the reasons given support the conclusion, and for any abuse of discretion shown in relation thereto the defendant has a speedy and adequate remedy by an appeal to the superior court. In Ex parte Wright, 119 Cal. 401, 51 Pac. 639, a construction of section 1431 of the Penal Code is given, in which it is said the refusal of the justice to change the place of trial may have been error, and, if so, the prisoner has an ample remedy by appeal, but the justice did not exceed his jurisdiction in proceeding to trial after overruling the motion for a change of venue. This writ of review can only be granted when an inferior tribunal exercising judicial functions has exceeded its jurisdiction and there is no appeal. From the action of the court, either in passing upon the motion for a change of venue, or in determining the sufficiency of the evidence to warrant a conviction, or in charging the jury as to the law of the case, the justice was acting within his jurisdiction, and for errors committed in its exercise this writ will not lie.

Writ denied.

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13 Cal. App. 456

BAUME v. MORSE. (Civ. 820.)

(Court of Appeal, Second District, California. May 23, 1910.)

1. FRAUDS, STATUTE OF (§ 106*)—CONTRACT FOR SALE OF LAND—SUFFICIENCY OF WRITING.

A writing as follows: "Received of Samuel Baume forty dollars deposit on 5 acres in Compton. Good till the first of Nov. 1908," signed by the vendor, is not enforceable as a contract for the sale of land, because not naming the purchase price and embracing a description not sufficiently definite.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 210, 211; Dec. Dig. § 106.*]

2. REFORMATION OF INSTRUMENTS (§ 47*)—APPLICATION OF STATUTES.

Civ. Code. § 3402, providing that a contract may be first revised and then specifically enforced does not apply to an action on a contract for sale of land, insufficient under the statute of frauds.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 197; Dec. Dig. § 47.*]

3. EVIDENCE (§ 442*)—PAROL EVIDENCE—ADDING TO WRITTEN CONTRACT.

Under Code Civ. Proc. § 1856, providing that when an agreement is reduced to writing, no other evidence of the terms thereof can be shown, with immaterial exceptions, no new terms can be introduced by parol into a written contract for sale of land, insufficient under the statute of frauds.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1899; Dec. Dig. § 442.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Samuel Baume against M. E. Morse. From a judgment of nonsuit and an order denying a new trial, plaintiff appeals. Affirmed.

Will D. Gould, for appellant. Willis & Robinson, for respondent.

TAGGART, J. Action to enforce specific performance of contract to convey real estate. The answer admitted an agreement to convey, but alleged that the purchase price was another and different sum from that alleged in the complaint, and also that the contract was oral. A nonsuit was granted at the close of plaintiff's case and judgment entered thereon; and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The only instrument in writing which was pleaded or introduced in evidence to support plaintiff's cause of action was as follows:

"Los Angeles, Cal., Oct. 6, 1908.

"Received of Samuel Baume forty dollars deposit on 5 acres in Compton. Good till the first of Nov. 1908.

"$40. Mrs. M. E. Morse."

It is urged as grounds for a reversal of the judgment that the trial court erred in not accepting this writing as a sufficient note or memorandum in writing to satisfy the provisions of section 1973 of the Code of Civil Procedure, and to meet the requirements of subdivision 6 of section 3390 of the Civil Code, as a certain statement of the precise act to be done.

The essentials to an enforceable contract to sell real estate are, that it, or a memorandum or note of its terms, shall be in writing; that such writing shall declare with certainty the party who sells, the party who buys, the price to be paid, and a description of the property sold by which it can be known or identified. Breckinridge v. Crocker, 78 Cal. 535, 21 Pac. 179; Craig v. Zelian, 137 Cal. 106, 69 Pac. 853. Measured by these essentials, we find the receipt for the $40 deposit, here introduced, lacking in the two respects last mentioned. No purchase price is named therein, and the description given is not sufficiently definite to justify a court of equity in enforcing the conveyance of any property. The offer to supply the other alleged terms of the contract by parol was properly denied by the trial court. There was no cause of action for revision stated in the complaint, and section 3402 of the Civil Code, cited by appellant, has no application to this case. When an agreement is reduced to writing the writing is to be considered as containing all the terms of the contract, and no other evidence of the terms of the agreement will be admitted. Section 1856, Code Civ. Proc. No new terms can be introduced into the contract by parol. Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Bradford Inv. Co. v. Joost, 117 Cal. 204, 48 Pac. 1083; Bd. of Education v. Grant, 118 Cal. 44, 50 Pac. 5. The judgment of nonsuit was properly granted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Judgment and order appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 537

BROWN v. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN OF CALIFORNIA. (Civ. 796.)

(Court of Appeal, First District, California. June 1, 1910.)

1. APPEAL AND ERROR (§ 907*)—JUDGMENT ROLL—EVIDENCE—FINDINGS—PRESUMPTION.

Where an appeal is on the judgment roll, and the transcript fails to show a motion for a new trial, and the evidence is not brought up, the appellate court is bound to assume that the evidence was sufficient to support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2911; Dec. Dig. § 907.*]

2. INSURANCE (§ 819*)—MUTUAL BENEFIT—DEATH—EVIDENCE—ABSENCE.

Where, in an action on a benefit certificate, plaintiff relied on absence for more than seven years to raise a presumption of death, she was bound to show, in addition to such absence, diligent effort to locate insured, and that she had made inquiries in all places where he might reasonably be expected to be found, if alive, and had exhausted every source of information without avail.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 819.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Kate V. Brown against the Grand Lodge of Ancient Order of United Workmen of California. Judgment for plaintiff, and defendant appeals. Affirmed.

D. J. Hirshberg, for appellant. Charles A. Shurtleff and Robert B. Gaylord, for respondent.

KERRIGAN, J. This is an action based upon a benefit certificate issued by the defendant to the husband of the plaintiff, by the terms of which, upon the husband's death, the defendant agreed to pay to the plaintiff the sum of $2,000.

The plaintiff's husband, Willis F. Brown, disappeared in October, 1900, and had not been heard from for more than seven years when this action was brought. In the trial court judgment went for the plaintiff, and this appeal, according to the notice thereof, is from the judgment and from an order denying a motion for a new trial.

The appeal from the judgment is based on the sole ground that the evidence does not support the findings. The only record on appeal, however, is the judgment roll, i.e., the complaint, answer, findings, and judgment. No evidence has been brought up, and the transcript also fails to show that any motion for a new trial was ever made. In this condition of the record we are bound to assume that the evidence was sufficient to support the findings. And upon examination of the findings it is apparent that they support the judgment.

Giving full force to the authorities cited to sustain appellant's position, that in addition to the absence of an individual for seven years it must also appear that a diligent effort has been made to locate the absentee, still we cannot perceive how this aids appellant, for the court found that plaintiff had made inquiries in all places where her husband might reasonably be expected to be found if alive, and that she had also exhausted every source of information in her efforts to locate him, but all without avail.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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13 Cal. App. 511

PEOPLE v. BALLARD. (Cr. 245.)

(Court of Appeal, First District, California. May 30, 1910.)

1. CRIMINAL LAW (§ 1192*)—APPEAL—JURISDICTION AFTER REMAND—NEW TRIAL.

Where an appeal was taken from the judgment of conviction and the order denying a new trial in a criminal proceeding, and the appellate court reversed the judgment, but failed to expressly pass on the denial of a new trial, defendant not having moved in the appellate court for an order directing his discharge, and no discharge or dismissal having been ordered, the trial court was entitled to proceed with a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1192.*]

2. CRIMINAL LAW (§ 1043*)—APPEAL—OBJECTIONS BELOW—EVIDENCE.

The objection in a criminal proceeding to certain evidence as immaterial, irrelevant, incompetent and hearsay did not present the objection subsequently made in the appellate court that the evidence admitted was the testimony of a witness in a preliminary examination, who had not been sworn.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1043.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Frank Ballard was convicted in a criminal proceeding, and he appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Thos. F. Greeley, for appellant. U. S. Webb, Atty. Gen., and Maxwell McNutt, Asst. Dist. Atty., for the People.

HALL, J. This is an appeal from a judgment against defendant, and the order denying defendant's motion for a new trial. Defendant upon a previous trial was convicted, and upon appeal from the judgment and order denying his motion for a new trial, this court reversed the judgment, but failed to expressly or in terms dispose of the appeal from the order denying the motion for a new trial. Neither did this court upon the former appeal expressly order a new trial nor direct the discharge from custody of the defendant. Pen. Code, § 1262; People v. Ballard, 1 Cal. App. 222, 81 Pac. 1040. Upon the calling of the case for trial after the going down of the remittitur, defendant objected to the trial proceeding, upon the ground that the court had no jurisdiction to proceed, no new trial having been ordered by the appellate court. This objection was overruled and the trial proceeded. Defendant now contends that because this court failed to order a new trial upon reversing the former judgment the trial court should have dismissed the action.

We think the point has been disposed of adversely to defendant's contention by the decision of the Supreme Court, to which he applied for a discharge from custody upon habeas corpus. Ex parte Ballard, 149 Cal. 114, 84 Pac. 833. The court pointed out that where, as in this case, the appellate court reverses a judgment without either ordering a new trial or directing the discharge of the defendant, such action is evidently the result of inadvertence and of a temporary forgetfulness of the provisions of section 1262, Pen. Code, and that in such case the remedy of the defendant would be a motion in such court for an order directing such discharge. If such motion had been made this court could have made a proper order disposing of the case. As it appears that the judgment upon the first appeal was reversed for a cause that required the granting of the motion for a new trial, this court could, and doubtless would, if its attention had been called to the fact that it had failed to dispose of the appeal from the order denying the motion for a new trial, have made an order reversing such order. This in effect would have been the ordering of a new trial. People v. Hardisson, 61 Cal. 378. The judgment of conviction having been reversed, and this court not having ordered the discharge of the defendant or a dismissal of the action, the trial court had jurisdiction to proceed with a new trial.

It is also contended that the court erred in overruling the objection of defendant to the reading in evidence the deposition of an absent witness taken on the preliminary examination of the defendant. It is not claimed upon this appeal, as it was upon the former appeal, that it had not been sufficiently shown that the witness could not be found. The record before us shows that the testimony of the absent witness was read from a transcript of such testimony taken before the police court, and of course then present in court. It is now urged that it does not appear that the witness who gave the testimony was sworn. No such objection was made before the trial court. The objection simply was that the testimony was "immaterial, irrelevant, incompetent, and hearsay." If in fact the transcript from which the district attorney read did not show that the witness gave the testimony under oath, and if the real point of the objection was that the witness was not sworn, it was the duty of counsel to specifically make the objection upon that ground. By the general objection that the evidence was "incompetent and hearsay," the court was not informed of the point now urged in this court. If it had been, doubtless the record would clearly show whether or not such witness was sworn at the preliminary examination. The record does not show that he gave his testimony without objection from defendant, who was there represented by the same counsel who represents him now, and that the witness was cross-examined by such counsel. Under such circumstances we do not think that the objection now urged was presented by the objection actually made to the trial court.

No other point is made for a reversal, and the judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 399

Ex parte COOK. (Cr. 135.)

(Court of Appeal, Third District, California. May 14, 1910.)

1. ESCAPE (§ 5½*)—STATUTE IN REGARD TO—POWER OF LEGISLATURE.

The invalidity of Pen. Code, § 105, making it a crime "to escape" from prison, does not affect the validity of section 106, making it a crime to "attempt to escape," as the Legislature has the power to make the "attempt" a crime, and the "escape" not a crime.

[Ed. Note.—For other cases, see Escape, Dec. Dig. § 5½.*]

2. ESCAPE (§ 13*)—ATTEMPT—FAILURE TO PRESCRIBE PENALTY—DEFECT CURED BY ANOTHER STATUTE.

The fact that Pen. Code, § 106, providing that it is a felony to attempt to escape from prison, fails to prescribe a penalty does not prevent a conviction thereunder, as the omission is supplied by section 18, providing that except where a different punishment is prescribed, every felony is punishable by imprisonment in the state prison not exceeding five years.

[Ed. Note.—For other cases, see Escape, Dec. Dig. § 13.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. INDICTMENT AND INFORMATION (§ 190*) — OFFENSES INCLUDED IN CHARGE—ATTEMPTS —ESCAPE—"ESCAPING."

An indictment for "escaping" from prison, made a felony by Pen. Code, § 105, will support a plea of guilty of an "attempt to escape," made a felony by section 106; the former necessarily including the latter.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 596-603; Dec. Dig. § 190.*]

4. INDICTMENT AND INFORMATION (§ 196*)— PLEA—WAIVER OF DEFECTS IN INDICTMENT.

The defendant's plea of guilty of an attempt to escape from prison was a waiver of whatever defects there may have been in the statement of that offense.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 196.*]

In the matter of the application of Carroll Cook for a writ of habeas corpus on behalf of Charles Murray. Application for the writ denied.

A. S. Newburgh and Carroll Cook, for petitioner. U. S. Webb, Atty. Gen., and J. Chas. Jones, for the People.

HART, J. The contention of the petitioner is that Murray is now restrained of his liberty by the warden of the state prison at Folsom upon a commitment issued under a void judgment; that such restraint is therefore illegal, and that the prisoner is entitled to be released therefrom through the writ of habeas corpus.

It appears that, while undergoing a sentence of imprisonment for the term of 10 years in the state prison at Folsom, and before the expiration of said term, Murray, on the 17th day of May, 1904, escaped from said prison; that, subsequently, he was apprehended, and that thereafter the grand jury of Sacramento county returned to the superior court of said county an indictment purporting to charge him with the crime of escaping from state prison, as defined by section 105 of the Penal Code. Upon his arraignment upon this indictment, Murray entered a plea of not guilty. Subsequently, however, on December 8, 1904, he withdrew said plea to said indictment and entered a plea, under the allegations of the same indictment, of guilty of the crime of attempting to escape. Thereupon the court sentenced the prisoner to a term of three years in the state prison at Folsom, the term of imprisonment therefor to commence "from the time such convict would otherwise have been discharged from said prison." Section 106, Pen. Code.

If allowed under his first sentence the credits to which, upon certain conditions, he would be entitled under the terms of section 1588 of the Penal Code (Deering's Ed. 1909), Murray would now be entitled to his discharge but for the sentence or judgment of imprisonment pronounced and entered against him on his plea of guilty of the crime of attempting to escape from said prison.

The claim of the petitioner on behalf of the prisoner is that the indictment failed to state a public offense, because of the alleged invalidity of section 105 of the Penal Code, under which said indictment was framed, and that therefore "all proceedings thereafter had were void as being beyond the jurisdiction of the court." The argument upon this point is that if the provisions of section 105 of the Penal Code are in violation of the state and federal Constitutions, as is the contention, then the indictment, being based upon said section, necessarily failed to state any offense of whatsoever nature. In other words, the claim is that if the indictment does not charge the crime of "escaping from the state prison," it cannot charge the crime of "attempting to escape from state prison," for, so the argument goes, an attempt to commit an act which, when consummated, is not a crime, cannot itself be a crime.

Section 105 of the Penal Code reads as follows: "Every prisoner confined in the state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." The indictment challenged here is substantially in the language of the foregoing section, and there is no claim that, if said section is not out of harmony with certain provisions of the state and federal Constitutions, the allegations of said indictment do not properly set forth a public offense.

The validity of the section of the Code under which the indictment was framed is attacked upon the ground that the punishment therein prescribed is such as that it operates with manifestly unjust and unwarranted inequality upon prisoners adjudged guilty of escaping from prison, and that, consequently, the section is in direct conflict with the terms of the fourteenth amendment of the Constitution of the United States, guaranteeing to all the equal protection of the law, and with certain provisions of the state Constitution, among which is the provision that all laws of a general nature shall have a uniform operation, etc.

This position, while new in this state, has been sustained in other jurisdictions upon what I conceive to be unanswerable reasoning. State v. Lewin, 53 Kan. 679, 37 Pac. 168; In re Mallon, 16 Idaho, 737, 102 Pac. 374, 22 L. R. A. (N. S.) 1123; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Hayes

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578. But, conceding that section 105 of the Penal Code is invalid for the reasons suggested, we are nevertheless of the opinion that the indictment stated the offense defined by section 106 of the Penal Code, which provides: "Every person confined in the state prison for a term less than for life, who attempts to escape from such prison, is guilty of a felony, and, on conviction thereof, the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison."

It is thus to be seen that the Legislature, by the terms of the foregoing section, has declared as a distinct offense, entirely apart from and in no manner or degree or to any extent whatsoever dependent for its force or vitality on the provisions of section 105, the act of attempting to escape from such prison. In other words, section 106 receives no vital force from the provisions of section 105. No one will for a moment question or doubt the power and the right of the Legislature to denounce the act of attempting to escape from a prison as a crime, regardless of whether it makes the act of actually escaping from such prison a crime. The Legislature has declared that any prisoner confined in a state prison for a term less than for life who *attempts* to escape from such prison is guilty of a felony, and if the Legislature has for any reason failed to declare it a crime for such prisoner to effect his escape from such prison, this mere omission cannot of itself in any measure or in any sense render the act of attempting to escape any the less a crime. Of course, if the Legislature had not made the act of attempting to escape from a state prison itself a specific and distinct crime, then the position of counsel for the prisoner would be unimpeachable, assuming that section 105 is void. But, as seen, the crime of attempting to escape is as distinct from the crime of escaping as grand larceny is from robbery, although, as is true as to the two last-named offenses, the first two necessarily possess, in some respects, the same elements.

It follows from views thus far ventured that there can be no merit in the suggestion that, if section 105 is void, there can be no penalty imposed in the case of the violation of section 106. The penalty prescribed by the last-mentioned section is entirely different from that which section 105 pretends to authorize. Section 106 declares the act therein described to be a felony, but does not expressly prescribe the penalty for the commission thereof. No difficulty, however, results from this omission, since the Penal Code elsewhere (section 18) provides that "except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years," and thus a penalty for the act denounced by section 106 is as clearly and definitely fixed and prescribed as if the language of section 18 had been expressly referred to by section 106. The Legislature, in other words, has itself made section 18 a part of section 106, so far as the penalty is concerned.

The remaining question is, Did the indictment state the crime defined by section 106 of the Penal Code, and to which the prisoner entered a plea of guilty? As before stated, the allegations of the indictment are substantially in the language of section 105 of the Penal Code and attempted to charge the prisoner with the crime of escaping from a state prison. Necessarily the crime of attempting to escape from the state prison is included within the act of escaping from said prison, for, manifestly, one could not escape without first making the *attempt* to escape, and if, as counsel undertake to maintain, there be no such crime as "escaping from a state prison," the charge that the prisoner attempted to escape is, of necessity, included, if not within any crime alleged, within the language by which the alleged crime of "escaping," etc., is set forth in the indictment.

We do not intend to be understood as saying that if the only offense sought to be charged against the prisoner was that of an attempt to escape from a prison, the indictment would not have been compelled to yield to the claims of a demurrer; but there was no demurrer, and therefore whatever defects might characterize the statement of the offense to which the prisoner pleaded guilty were waived by said plea. His plea, in other words, amounted to an admission that the offense of which he thus confessed his guilt was within the language of the indictment. As is said in Re Myrtle, 2 Cal. App. 383, 84 Pac. 335, the indictment, taken with the plea of the prisoner, establishes a case of attempt to escape from a prison as completely as if it had in fact been specifically alleged in the indictment that the prisoner had made an attempt to escape. As we have stated, an attempt to escape is necessarily charged by the statement that the prisoner did escape, and thus the court, after the plea of guilty, was clothed with full power and jurisdiction to pronounce and cause to be entered the judgment upon which the prisoner is suffering the restraint of which he here complains.

We doubt not that the court had jurisdiction to accept the plea of the prisoner and thereupon to pronounce the challenged judgment.

The writ will therefore be discharged, and the prisoner remanded to the warden of the state prison.

We concur: CHIPMAN, P. J.; BURNETT, J.

13 Cal. App. 507

LYNAM v. VORWERK. (Civ. 743.)

(Court of Appeal, First District, California. May 30, 1910.)

1. HUSBAND AND WIFE (§ 262*)—PROPERTY ACQUIRED AFTER MARRIAGE—"COMMUNITY PROPERTY"—PRESUMPTION.

The fact that a husband and wife are in possession of money after their marriage raises a presumption that it was acquired after marriage and constitutes "community property" under Civ. Code, § 164, declaring that all property acquired after marriage by either husband or wife is community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*

For other definitions, see Words and Phrases, vol. 2, pp. 1343, 1344; vol. 8, p. 7608.]

2. HUSBAND AND WIFE (§ 249*)—COMMUNITY PROPERTY—JOINT DEPOSIT—"JOINT INTEREST."

Where a husband and wife deposited money in a savings bank in their joint names and accepted in lieu thereof a passbook and writing reciting that the money should be paid on demand of either producing the book, the deposit was community property, and not owned by them as joint tenants, under Civ. Code, § 683, defining a "joint interest" as one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared to be a joint tenancy or when granted or devised to executors or trustees as joint tenants.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 249.*

For other definitions, see Words and Phrases, vol. 4, p. 3815.]

3. HUSBAND AND WIFE (§ 249*)—COMMUNITY PROPERTY—DEPOSIT—JOINT OBLIGATION.

Civ. Code, § 1431, provides that a right created in favor of several persons is presumed to be joint and not several, except in certain special cases. *Held*, that such section was inapplicable to an instrument, signed by a husband and wife at the time of making a deposit in a savings bank, directing the bank to pay the deposit to whichever of them should demand the same and produce the book, since such writing did not create a right in favor of the husband and wife for the money, but was mere authority to the bank as to paying the deposit on surrender of the passbook.

[Ed. Note.—For other cases, see Husband and Wife. Dec. Dig. § 249.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Emma L. Lynam, as administrator with the will annexed of the estate of Gottlieb Damkroeger, against Ernest Vorwerk, as executor of the estate of Karolina Damkroeger, deceased. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Diebert & Stiefvater, for appellant. Carl E. Lindsay, for respondent.

COOPER, P. J. This is an appeal from the judgment in favor of plaintiff for $1,646.20, with interest, and from the order denying defendant's motion for a new trial. The plaintiff is the administratrix of the estate of Gottlieb Damkroeger, deceased, and the defendant is the executor of the will of Karolina Damkroeger, deceased. The facts of the case are undisputed, and raise a question of law as to the title to the money for which judgment was given. On September 29, 1899, Gottlieb and Karolina Damkroeger were, and for several years prior thereto had been, husband and wife, and had money on deposit with the German Savings & Loan Society in their joint names. In connection with the said deposit account there appears the following: "7850. San Francisco, September 29, 1899. The German Savings and Loan Society, pay all or any sum or sums that are now or may hereafter be deposited with you by us, and entered in passbook number 124,097, to whichever of us, the undersigned, shall demand and receipt for the same and produce said book. Karolina Damkroeger. Gottlieb Damkroeger." It was admitted that the writing contained the correct signatures of both husband and wife. There was no evidence other than as herein stated as to the source from which the money came, or as to its being the common, joint, or separate property of either husband or wife. Gottlieb, the husband, died in April, 1903, leaving Karolina surviving him. After her husband's death Karolina withdrew the deposit. She qualified as administratrix of the estate of her deceased husband, but never accounted for the moneys so withdrawn by her as any part of the assets of his estate. In January, 1907, she died, and this action was afterwards brought against the executor of her last will and testament.

The plaintiff relied upon the provisions of section 164 of the Civil Code, which declares that all property acquired after marriage by either husband or wife (except that acquired by gift, bequest, devise, or descent (section 163, Civ. Code) is "community property." The section expressly provides that all property acquired by either husband or wife after marriage is community property. The property (money) was in the possession of the husband and wife long after their marriage, and was by them jointly deposited in the bank. Does the fact that the husband and wife are in possession of money after their marriage raise a presumption that it was acquired after such marriage? In our opinion it does. The relation of husband and wife as to their property is somewhat in the nature of a partnership, where there is usually partnership property and the separate property of the copartners. If the copartners should jointly go to a bank and deposit money in their joint names, it seems, in the absence of other evidence, that the most reasonable inference would be that the money was the joint money of such copartners, and that, being in their possession as such copartners, it would be presumed to have been acquired by the copartnership. In fact,

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usually and in most cases where money, or property is in the possession of the husband or wife or both after marriage, it has been acquired after marriage. This is a matter of common knowledge. Of course such possession raises only a presumption, which may be overcome by evidence as to the facts; but in the absence of such evidence the presumption is sufficient. It has been held that the possession of money by either or both husband and wife after marriage, in the absence of other evidence, raises a presumption that it is community property. In Fennell v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361, it was so held. The court there said: "All of the money found in the bank and received by the said administrator was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption therefore was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant. This presumption can be overcome by evidence of a clear, certain, and convincing character establishing the contrary, and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof, the presumption as to the community character was absolute and conclusive." To the same effect, see Denigan v. Hibernia Sav. & Loan Society, 127 Cal. 137, 59 Pac. 389; Denigan v. San Francisco Sav. Union, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35; Rowe v. Hibernia Sav. & Loan Society, 134 Cal. 403, 66 Pac. 569; Freese v. Hibernia Sav. & Loan Society, 139 Cal. 392, 73 Pac. 172.

The appellant contends that the writing given to the bank had the effect to create a joint tenancy in the husband and wife, with the right of survivorship. In our opinion such contention is not plausible. It is provided in Civ. Code, § 683: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." The writing given to the German Savings & Loan Society was merely an authority to the bank to pay the amount entered in the passbook to either of the parties in whose name the deposit was made. The title to the money was not created by a will or transfer, nor was it granted to executors or trustees as joint tenants. Neither does section 1431 of the Civil Code aid appellant. The writing given to the bank did not create a right in favor of the husband and wife to the money. As before stated, it was a mere authority to the bank as to paying the deposit on surrender of the passbook. See Denigan v. San Francisco Sav. Union, supra.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

13 Cal. App. 448

BECK v. SCHMIDT. (Civ. 812.)

(Court of Appeal, Second District, California. May 18, 1910.)

1. Work and Labor (§ 14*)—Effect of Express Contract—Breach—Right of Action.

Where, after work was begun and materials furnished under a contract, the other party failed to make the payments agreed, the contractors who had not failed to comply with the contract on their part could refuse to proceed, and their assignees could sue for the reasonable value of the work theretofore done and materials furnished.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. § 14.*]

2. Appeal and Error (§ 695*)—Record—Absence of Evidence.

In the absence of the contract in question and of any evidence as to its provisions in the record on appeal, no objection can be urged that findings that defendant had not complied with its terms were not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

3. Appeal and Error (§ 1071*)—Harmless Error—Findings.

In an action for work done and material furnished under a contract terminated by plaintiff for defendant's alleged breach thereof, error, if any, in a finding that provisions as to payment in the original written contract had been modified by parol, was harmless where the court found that defendant had failed to comply with the written contract, and that the other party thereto and his assignees did comply with it up to the time that they ceased work thereunder because of defendant's breach.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

4. Pleading (§ 9*)—Contracts—Conclusion of Law—"Due and Owing."

In an action for the value of work done and materials furnished under a contract terminated by plaintiff for defendant's alleged breach thereof, the complaint in direct terms alleging nonpayment of the sum sued for was not insufficient because not alleging that such sum was "due and owing," such words constituting a mere legal conclusion from the use of which, at most, and then only in the absence of a demurrer, the fact of nonpayment might be implied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by George W. Beck against Fred Schmidt. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Davis, Kemp & Post, for appellant. Jones & Weller and Frank G. Finlayson, for respondent.

SHAW, J. Action by plaintiff as the assignee of Franklin & Drain, constituting a copartnership, to recover upon quantum meruit for labor done and materials furnished at defendant's instance and request in grading and improving a certain tract of land owned by defendant. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

It is alleged in the complaint that the reasonable value of the work done and materials furnished was the sum of $51,095.74, upon which defendant paid $31,954.30 and no more, leaving a balance unpaid of $19,141.44, for which plaintiff asks judgment. In defense of the cause of action, defendant by his answer avers that the work was done and the materials furnished pursuant to a written contract made between defendant and said copartnership of Franklin & Drain, by the terms and provisions of which it was agreed that said work was to be performed as a whole, but at prices therein stipulated for each class of work, and the whole completed by December 15, 1906. Defendant further avers that neither the contract price nor the reasonable value of the labor done and materials furnished is in excess of $40,000, upon which he had paid $31,954.30, and denies that any balance remains due and unpaid by defendant for and on account of said work. It is further alleged that by said contract it was agreed that 25 per cent. of the value of the labor performed and materials furnished in doing the work should be reserved and not paid until 35 days after the expiration of the time for completion and acceptance of the whole of said work; that neither said contractors nor any one for them have performed the whole work agreed to be done and performed, and that to complete the same will require an expenditure by defendant of $5,000 over and above the contract price; that by reason of said failure to perform the contract in accordance with its terms defendant has been damaged in the sum of $25,000.

The court made findings as to the reasonable value of the work done and materials furnished, the amount paid thereon, and the balance remaining due and unpaid. In response to the affirmative allegations of the answer, the court found that Franklin & Drain, plaintiff's assignors, entered into a contract with defendant for the improvement of the tract of land, and pursuant to the terms and provisions thereof entered upon the performance of the work. It also found that by an oral agreement between the parties the contract was thereafter modified, in that the time for completion of the work was extended and provision made for making the payments other than as stipulated in the contract; that defendant neither complied with the terms of the written contract nor with the modification thereof; that plaintiff and his assignors did not refuse to complete the construction of the work mentioned in the contract or fail to comply with the terms thereof on their part, but did, on September 28, 1907, by reason of defendant's neglect and failure to make the payments pursuant to the terms and provisions of the contract, consider and treat the same terminated and refused to proceed further in the prosecution of the work thereunder. These facts, if true, clearly justified the contractors in refusing to proceed further with the performance of the work and entitled their assignee to maintain an action for the reasonable value of the work theretofore done and materials furnished. San Francisco Bridge Co. v. Dumbarton, etc., Co., 119 Cal. 272, 51 Pac. 335; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Porter v. Arrowhead Reservoir Co., 100 Cal. 501, 35 Pac. 146.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant contends, however, that certain of these findings are not supported by the evidence. It is insisted that there is no evidence tending to prove a modification of the contract, and likewise a want of any evidence tending to prove that defendant failed to comply with the provisions of the contract, either as originally made or as claimed to have been modified. The contract was introduced in evidence, and the court made acquainted with its terms and conditions. It is not, however, incorporated in the bill of exceptions, or otherwise brought up in the record; nor is there any evidence touching the terms and provisions thereof. There is evidence as to what the parties did, but the record is wholly silent as to what they were required to do under the terms and provisions of the contract. It is therefore impossible for us to say that the evidence was insufficient to show a breach of the contract on the part of defendant, or to support the finding that plaintiff and his assignors fully complied with the contract on their part.

The record discloses evidence to the effect that after the work had been prosecuted for some months, during which time the payments, so far as made, appear to have been in accordance with estimates furnished monthly by an engineer, it was agreed to dispense with these estimates and defendant was to make weekly payments sufficient to meet the payrolls of the men employed by the contractors, and at the end of each month make payments in amount sufficient to meet other necessary expenses incurred in the performance of the work and furnishing the materials therefor. It also tends to prove that defendant in making the payments was in arrears practically from the commencement of the work. On September 16, 1907, plaintiff served notice upon defendant to the effect that, owing to his neglect and failure to pay the several amounts as they became due, it would be impossible to further prosecute the work, and, unless payment was made, he would abandon the work. Notwithstanding this notice, defendant refused to make a payment of $120 required to meet the payroll on September 28, 1907, whereupon plaintiff ceased work.

The court finds that the time for completion of the work as fixed in the contract was extended by the oral agreement. The contract is not before us, and the time fixed therein may have been at a date subsequent to the ceasing of work by plaintiff. There is some evidence tending to prove that the time was extended. Franklin testifies: "There was an absolute promise made by Mr. Schmidt that we were to be granted all the necessary time to complete that work." We cannot say that the expression "that work" did not refer to the whole work to be done under the contract, instead of additional work required in the sloping of embankments. Considering the conditions under which the work was done, it seems to have been prosecuted with reasonable diligence. There is also evidence tending to show that defendant was in arrears in making payments during the period covered by the months of June, July, and August. In the absence of the written contract or any evidence as to its terms and provisions, we cannot say that the findings complained of are not supported by the evidence.

Furthermore, conceding the finding as to the modification of the contract to be unsupported by the evidence, nevertheless, it became harmless in view of the fact that the court found that defendant failed to comply with the written contract, and that plaintiff and his assignors did comply with it on their part up to September 28th, when, owing to the breach of contract by defendant, they ceased work thereunder. As to the finding in this regard, no objection can be urged that it is not supported by the evidence, for the reason, as hereinbefore stated, the contract was before the trial court and it is not embodied in the record on appeal.

What is here said sufficiently disposes of the contention that defendant's motion for nonsuit should have been granted. There was no error in denying the motion.

A number of assignments of error are predicated upon rulings of the court made in excluding answers to questions put by defendant. The evidence sought to be elicited by these questions all pertained to damages alleged to have resulted from the contractors' failure to complete the work within the time specified in the contract. There is nothing in the record, however, from which it can be determined that the court erred in making such rulings.

Appellant contends that the amended complaint failed to state a cause of action by reason of the fact that it is not alleged that the amount sued for is "due and owing." In view of the fact that the complaint formally and in direct terms alleged nonpayment, no good purpose could be subserved by inserting words constituting a mere legal conclusion, and from the use of which, at most, and then only in the absence of a demurrer, the fact of nonpayment might be implied. Penrose v. Winter, 135 Cal. 289, 67 Pac. 772.

The record discloses no prejudicial error, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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13 Cal. App. 618

MARTIN et al. v. CONDREY. (Civ. 643.)

(Court of Appeal, Third District, California. June 17, 1910.)

SPECIFIC PERFORMANCE (§ 114*)—PLEADING—REQUISITES.

Adequacy of consideration and justness and reasonableness of the contract which Civ. Code, § 3391, makes prerequisite to specific performance, must be pleaded as well as proven; and hence a complaint to specifically perform a contract to convey is insufficient where it fails to plead such essentials.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–372; Dec. Dig. § 114.*]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Suit by James B. Martin and others against G. E. Condrey. From a judgment for plaintiffs, defendant appeals. Reversed.

Taylor & Tebbe, for appellant. Gillis & Gillis, for respondents.

HART, J. This is a suit in equity for the reformation and specific performance of a certain contract entered into between one E. Tubbs and the defendant for the conveyance to the former by the latter of certain real property situated in the town of Yreka, Siskiyou county. The court overruled a general and special demurrer interposed to the amended complaint. The defendant declined to answer, and thereupon a judgment reforming said contract and decreeing its specific performance as so reformed was entered against said defendant. This appeal is from said judgment.

The averments of the complaint fail to disclose any ground which would authorize or justify a decree compelling the specific performance of the contract involved in this controversy, and the demurrer should therefore have been sustained.

The offer by the defendant to sell said property to said Tubbs is in writing, dated "March 26, 1908," and is addressed to "Mr. E. Tubbs," and signed by the defendant. Therein the defendant offered to sell to Tubbs "all of my property in Yreka for $1,500, or the land without the building for $1,090.00 or the north half of said land for $550.00, terms cash within 24 hours or $50.00 to-day and balance on or before April 5th, 1908." Defendant further stipulated to "give you a good and sufficient deed at any time the money is put up within said time. I further agree to move off the house within 60 days should you take the whole of said land." It may here be remarked that said contract was on the 30th day of March, 1908, for a certain consideration, assigned and transferred by said Tubbs to the plaintiffs herein.

The complaint alleges that the contract between Tubbs and the defendant consisted of the written offer to sell to which we have referred and the acceptance of said offer "which was orally made by said E. Tubbs, at said Yreka City, county of Siskiyou, state of California, within the time stipulated by said offer for such acceptance, and accompanied by the proper tender of Gold Coin of the United States of America, to wit, fifty (50) dollars"; that "at or about the same time said E. Tubbs demanded of said G. E. Condrey a conveyance of the said property without the house"; that defendant has not made nor executed "any conveyance of the said property without the house to said E. Tubbs, nor to his heirs or assigns, nor to said plaintiffs herein"; that "said plaintiffs are still ready and willing to pay the purchase money of the said property to the said defendant." There is not a single averment in the complaint showing or even pretending to show that the consideration for which the defendant offered to sell the property involved in the contract concerned here is adequate or commensurate with the value of said property, or that the contract is, as to the defendant, fair and just.

Section 3391 of the Civil Code provides that "specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) if it is not, as to him, just and reasonable. * * *" And it is the settled rule in courts of equity that facts showing the adequacy of the consideration and, as to the party against whom specific performance is sought, the justness and reasonableness of the contract, must not only be proved but averred.

In Agard v. Valencia, 39 Cal. 292, it is said "that, in a suit for a specific performance, it must be affirmatively shown that the contract is fair and just, and that it will not be inequitable to enforce it. The court (of equity) will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to his remedy at law. It is incumbent on the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would be inequitable to enforce it." "There are," says the Supreme Court, in the case of Stiles v. Cain, 134 Cal. 171, 66 Pac. 232, "contracts which are perfectly valid, and which a court of equity would not set aside for fraud, mistake, or for any unfairness, but which, nevertheless, are so unfair that specific performance will not be decreed. This has always been the rule with courts of equity. They will not aid in the enforcement of a harsh and unjust contract, even though it be valid. The case cited (Bruck v. Tucker, 42 Cal. 346) also holds that the party seeking the relief must show, both by averment and proof, that the contract is, as to the defendant, fair and just. That the evidence must show such a case cannot be doubted, and this case distinctly holds that what must be proven on that subject must also be averred. This does not mean that it must be alleged in hæc verba that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract is such as will satisfy the conscience of the chancellor, in the respects mentioned, must appear from a proper statement of the facts." See, also, Nicholson v. Tarpey, 70 Cal. 609, 12 Pac. 778; Morrill v. Everson, 77 Cal. 114, 19 Pac. 190; Windsor v. Miner, 124 Cal. 492, 57 Pac. 386; Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; White v. Sage, 149 Cal. 613, 87 Pac. 193; Herzog v. Atchison, Topeka, etc., R. R., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428. As stated, the allegations of the complaint here do not meet the essentials of the rule as it is expounded by the foregoing authorities, and therefore fall far short of justifying the relief of specific performance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is pointed out under the special demurrer that the complaint is defective in that its statement of the facts pleaded is uncertain in several particulars, but obviously it is not necessary to consider the points thus urged in view of our conclusion that the complaint fails to state a cause of action for specific performance.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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13 Cal. App. 611

PEOPLE v. DOYLE. (Cr. 114.)

(Court of Appeal, Third District, California. June 17, 1910.)

1. WORDS AND PHRASES—"STACKS," "COCKS," AND "SHOCKS" OF HAY.

A "stack" of hay is a large pile gathered after the hay has been seasoned, as distinguished from a "cock" or "shock" which is a small pile into which the hay is gathered after being mowed, and thus permitted to remain until seasoned.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6492; vol. 7, p. 6620.]

2. STATUTES (§ 241*) — PENAL STATUTES — SCOPE.

Generally, where any particular article is mentioned in a penal statute as the subject of an offense, only such property as is usually designated by that term can be regarded as embraced.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

3. STATUTES (§ 241*)—CONSTRUCTION—JUDICIAL POWER.

Under the express terms of Code Civ. Proc. § 1858, the Supreme Court cannot read into a penal statute language not incorporated therein by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

4. ARSON (§ 25*)—VARIANCE.

Evidence that accused attempted to burn "cocks" or "shocks" of hay does not sustain a conviction under Pen. Code, § 600, prescribing a penalty for burning "stacks" of hay.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 52–54; Dec. Dig. § 25.*]

5. ARSON (§ 41*)—INSTRUCTIONS.

Under Pen. Code, § 600, prescribing punishment for burning stacks of hay, an instruction that defendant was guilty of attempted arson if he attempted to burn stacks, regardless of their size, while proper as an abstract statement of law, was erroneous, where the evidence showed an attempt to burn cocks or shocks of hay.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 77–80; Dec. Dig. § 41.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Thomas Doyle was convicted of attempted arson, and he appeals. Reversed.

Frank H. Farrar, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The information under which the defendant was prosecuted and convicted charges him with the crime of maliciously attempting to burn "certain stacks of hay, of the value of twenty-five dollars and over, the property of one W. A. Rucker," etc. The crime which the defendant is thus charged with having attempted to commit is defined by section 600 of the Penal Code, which section, in so far as it concerns this investigation, reads as follows: "Every person who wilfully and maliciously burns * * * any stack of hay or grain or straw of any kind, or any pile of baled hay or straw, * * * of the value of twenty-five dollars or over, not the property of such person, is punishable by imprisonment in the state prison for not less than one year, nor more than ten years."

The appeal is from the judgment and the order denying defendant's motion for a new trial, and the principal contention made by the appellant here is that the evidence does not sustain or correspond with the allegations of the information. From the evidence it appears that one W. A. Rucker had under lease in the year 1909 a small tract of land in the city of Merced, and on which, in the month of May of that year, he cut and raked into "cocks" about 30 tons of hay. These "cocks" were scattered about over the land, and were situated a very few feet from each other.

The evidence shows that between the hours of 8 and 9 o'clock on the evening of June 5, 1909, Rucker discovered a portion of the hay on fire; that he hastened to the field and extinguished the fire; that later on that same night another cock of hay was set on fire; and that he again went to the field, and, armed with a shotgun, concealed himself behind a pile or cock of hay situated a distance of a few feet from the spot where the second fire occurred, his purpose being to discover, if possible, the person who evidently was trying to destroy all the hay in his field. A short time thereafter the defendant appeared in the field. He walked up to a cock of hay, stooped over it, and at about this time Rucker, so he testified, "saw a lighted match or a blaze or something that he had right between his body and the hay." Rucker then stepped up to the defendant, placed him under arrest, and turned him over to the custody of the sheriff. The defendant, it appears, resided with his sister whose home and premises adjoined the land on which the fire occurred.

The proven circumstances were sufficient to justify the finding of the jury that the defendant set the fire to the hay with the purpose of destroying it. But the important question presented here is, as already stated in a little different language, does the evidence disclose that the act of the defendant, although malicious, constituted an attempt to violate the provision of section 600 of the Penal Code declaring the malicious burning of "any stack of hay" of the value of $25 or more to be a felony? It is plainly evident that, in order to answer the foregoing question in the affirmative, it must be satisfactorily shown that the Legislature intended to include and embrace within the meaning of the phrase, "any stack of hay," as said phrase is employed in the Code section, the piles of loose hay ordinarily and commonly designated as "cocks" or "shocks" of hay. There is, as is generally known, a marked and well-understood distinction between a "stack" and a "cock" or "shock" of hay. Customarily, shortly after hay is mowed or cut, it is raked into small piles or cocks, and is thus allowed to remain until it becomes thoroughly dry or "seasoned," after which it is generally picked up and put into larger piles called "stacks." Webster, in his dictionary, thus defines a "stack": "A large pile of hay, grain, straw and the like, usually of a nearly conical form, but sometimes rectangular or oblong, contracted at the top to a point or ridge and sometimes covered with a thatch." The same author defines a "cock" of hay to be "a small conical pile of hay." It will thus be observed that there is a wide distinction between a "stack" of hay and a "cock" of hay—a distinction equally as marked and obvious as is the difference between certain buildings, as, for example, a hotel and a private residence, or as is the difference between animals of the same species, as, for illustration, a horse and a mule. It may be laid down as a general rule that where any particular article of property is mentioned in a penal statute as the subject of an offense, only such property as is usually designated by such term can be regarded as having been intended by the Legislature to be embraced within its provisions.

In a very early case in Ohio (Denbow v. State, etc., 18 Ohio, 11) the defendant was indicted and convicted under a statute making it penal "to set fire to, or burn, stacks of wheat." Nothing was said in said statute about "shocks" of wheat. Reversing the judgment of conviction, the Supreme Court of that state had this to say: "When things of the same kind have different names, arising from difference in size, number, age, situation, or any other circumstance, only such as are expressly mentioned by the terms generally appropriated to them can be held to have been contemplated by the Legislature. The charge in this case was for burning stacks of wheat. The proof was the burning of shocks of wheat. Now, if the terms, 'shock' of wheat, and 'stack' of wheat, are equivalent, then the proof will sustain the indictment; but the only witness who testifies, states that he considers them different. And in common parlance the two terms have a totally distinct and different signification. The 'shock' is the term applied to the small collection and arrangement of a few sheaves together, in the field, in such manner as to protect them against the weather for a few days, until the farmer has time to gather them into his barn, or place them in the conical pile called a stack." It is very certain that, to sustain the judgment and order here, it would be necessary to read into the section of the Code involved here language which the Legislature has not inserted therein. This we cannot do without a manifest abuse of the power of courts in the construction of legislative enactments. Section 1858, Code Civ. Proc.

Why the Legislature did not include the act of maliciously burning "shocks" or "cocks" of hay within the penalty prescribed by section 600 of the Penal Code is a matter which need not be inquired into here. In the determination of the question decisive of the case here, it is enough to know that the Legislature did not do so, and that it is for that department of the government to say what wrongful acts shall incur the penalties of a felony, and what acts declared unlawful shall incur those of a misdemeanor. The defendant could have been prosecuted either under the provisions of section 594 of the Penal Code or for attempting to commit the crime therein defined as a misdemeanor, and, if it were important to ascertain the reason moving the Legislature to omit to denounce the act of burning "cocks" or "shocks" of hay as a felony, it may be found in the fact that, in the judgment of the lawmakers, crystallized and expressed in said section 594, punishment as a misdemeanor was sufficient for such an act. In any event, under the foregoing views, the evidence does not sustain nor agree with the allegations of the information, and the given instructions upon the vital point, having been framed to coincide with and support an erroneous theory, were themselves necessarily erroneous and prejudicial.

For example, the following instruction which was read to the jury expresses the theory upon which the cause was presented by the people and tried by the court: "If you find from the evidence and beyond a reasonable doubt that the defendant, as charged in the information, did attempt to burn certain stacks of hay of over the value of $25, then you will find the defendant guilty, *regardless of the size of the individual stacks of hay, no matter whether they were large or small.*" (Italics ours.) The foregoing instruction, while faultless as an abstract statement of the law, was not applicable to the facts developed by the evidence, and was plainly calculated to mislead the jury. It is undoubtedly true that it would be immaterial whether a "stack" of hay is a large or small "stack" if it is a "stack" within the meaning of that term as it is used in the statute and as it is herein shown to mean and such stack was of the value of $25 or more. In other words, a pile of hay may constitute a "stack" within the commonly understood signification of that word as applied to piles of loose hay, notwithstanding the fact that it may be smaller in size or contain a less quantity of hay than other stacks of hay, for we do not understand that stacks of hay, in order to be such, need be of uniform size or contain a certain precise quantity of hay.

The evidence in the case at bar, however, discloses, as we have shown, that the field in which the alleged attempt to burn was made contained "cocks" or "shocks" of hay—that is, there were small piles of loose hay scattered about over the field, each of which did not contain a quantity of hay of a value exceeding a dollar. In short, it is not disputed that the piles of hay in the field at the time of the attempted burning charged here were nothing more than mere "cocks" of hay and arose, if at all, to the proportions of "stacks" simply because they were erroneously so characterized in the information and the instructions of the court. The truth is that there was not in the entire field a pile of hay approximately the size of a "stack," as we understand that term. Therefore the prejudicial effect of the quoted and other instructions becomes clearly apparent when it is considered that the court, in thus addressing the jury upon the law by the light of which they were to examine the evidence and so reach a conclusion upon the question of the guilt or innocence of the defendant, in substantial effect treated the "cocks" of hay proved as small stacks of hay and as "stacks" coming within the contemplation and intent of the statute. In other words, the court virtually told the jury that any pile of hay, regardless of its size, constituted a "stack" of hay, and, applying this instruction to the evidence, there was, manifestly, no other alternative for the jury but to find the defendant guilty, assuming, of course, that the fact that the defendant attempted to burn a "cock" or perhaps a number of "cocks" of hay was proved to their satisfaction.

Of course, it necessarily follows that the court's refusal to give the instructions requested by the defendant defining "stacks" and "cocks" of hay and the distinction between the two, as explained in Webster's dictionary, and as commonly understood, and declaring that, unless the jury found the piles of hay attempted to be burned to be "stacks" as so defined, the defendant would be entitled to an acquittal, constituted prejudicial error. The fact is, under the proofs, the court should have advised the jury to acquit.

For the reasons stated in the foregoing, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

13 Cal. App. 600

SCHIFFMAN v. PEERLESS MOTOR CAR CO. (Civ. 810.)

(Court of Appeal, Second District, California. June 15, 1910.)

1. CONTRACTS (§ 322*)—AGENCY CONTRACT—BREACH—FINDINGS—EVIDENCE.

In an action for breach of an automobile agency contract, evidence *held* to justify a finding that defendant violated its agreement with plaintiff not to sell certain automobiles within the territory allotted to plaintiff, in that sales of automobiles and parts were made in plaintiff's territory through another agency in Ohio.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.*]

2. DAMAGES (§ 120*) — AGENCY CONTRACT — BREACH.

In an action for breach of an automobile contract by defendant's invasion of plaintiff's territory, plaintiff's measure of damages was compensation for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom, so far as they were clearly ascertainable in both their nature and origin as provided by Civ. Code, §§ 3300, 3301.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

3. DAMAGES (§ 40*)—BREACH OF CONTRACT—PROFITS.

In an action for breach of an automobile agency contract by defendant's invading plaintiff's territory, profits of which plaintiff was deprived by such invasion consisting of sales of machines and parts through other agents were not objectionable as speculative or uncertain.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72–88; Dec. Dig. § 40.*]

4. PRINCIPAL AND AGENT (§ 76*) — AGENCY CONTRACT—BREACH—ESTOPPEL.

Where defendant broke its agency contract with plaintiff by selling automobiles in parts of plaintiff's exclusive territory, defendant was estopped to deny in an action for breach of such contract that plaintiff would have made such sales but for defendant's violation of the contract.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 76.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by A. F. Schiffman against the Peerless Motor Car Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Arthur L. Hawes, A. D. Laughlin, Percy R. Wilson, and E. W. Freeman, for appellant. Lynn Helm, E. S. Williams, and Shankland & Chandler, for respondent.

TAGGART, J. Action to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals therefrom and from an order denying its motion for a new trial.

Plaintiff and defendant entered into an agreement on January 28, 1905, which recites that defendant is engaged in the manufacture of motor cars and parts which it desires to market to the best advantage, and that plaintiff proposes to engage in the sale of defendant's product and agrees to purchase a certain number of its motor cars, to be resold within a certain fixed territory named (seven counties of Southern California). Plaintiff agreed not to sell or solicit orders for any cars outside of the territory named at any time prior to November 1, 1905, and defendant agreed not to solicit any orders or sell any cars within said territory within that time, but to refer all inquiries from persons residing within that territory to the plaintiff. The plaintiff was to maintain proper quarters in a suitable location in Los Angeles for the storage of stock and the repair of cars and carry a reasonable quantity of supplies and spare parts for the repair and maintenance of motor cars manufactured by defendant, and the latter was to supply printed matter advertising its cars, mentioning the name of plaintiff as engaged in the sale of such cars within the territory named. Provisions were also made for local advertising by plaintiff and the expense of exhibiting at local fairs, etc. Plaintiff was to purchase three motor cars at a fixed price and model for delivery in February, 1905, being allowed 20 per cent. discount from the list price, which was f. o. b. Cleveland, Ohio; and it was agreed that defendant should sell to plaintiff motor cars, parts and supplies, manufactured or handled by it, on the same terms during the existence of the contract. Deliveries to be deemed complete on board cars at Cleveland.

The court finds that the plaintiff supplied and maintained the quarters required, and did not refuse, neglect, or fail to prosecute the sale of defendant's motor cars, but complied in all respects with the terms of the contract, and was at all times during its existence ready, able, and willing to perform it in all respects; but that defendant solicited orders and made sales of cars and parts thereof within the territory described during the term for which such contract was to continue, and that the plaintiff has suffered damages by reason of the particular breaches of contract, specifically found, in the sum of $4,145, less a set-off of $150, for which balance judgment is given.

Appellant in its attack upon the judgment relies principally upon the contention that under the contract the plaintiff was merely a purchaser of the three cars which the defendant required that he buy as an earnest of his intentions to assume the sale of its cars in the territory described. That such was not the intention or understanding of the parties is clearly disclosed, not only by the instrument itself, but the contemporaneous and subsequent construction placed upon it by them in their correspondence. The "agency of Schiffman" is frequently mentioned and assumed, and in one letter, under date of February 22, 1905, signed by defendant per its "Sales Manager," appears the following: "We are pleased to have the agency in the name of Mr. Schiffman."

Equally without support is the contention that the contract of employment by plaintiff of Messrs. J. M. Pawley and H. L. Olive constituted them partners in the agency. In the letter above quoted from, these men are mentioned as being in the employ of plaintiff, and in letters under date of February 7th and March 8th, written by plaintiff to defendant, the relation between the parties is made plain.

The evidence abundantly justifies the finding that defendant violated its agreement not to sell Peerless machines within the territory allotted to plaintiff, and also the finding that machines were sold to seven different persons, and that some $500 worth of parts of machines were also sold therein by other parties for defendant during the existence of the contract. The arrangement by which these sales were made through another agency in Toledo, Ohio, was clearly brought home to the defendant. It is also shown by the evidence that during the time these machines were being so sold the plaintiff, in compliance with the contract, continued to maintain an agency in the city of Los Angeles in the name of the defendant, paying the expenses thereof out of his own pocket, and that defendant represented to him that it was unable to supply machines to meet the orders sent to it by the plaintiff. There can be no question that this was a violation of the contract.

The measure of damages for such a breach of obligation is found in the general rule declared in section 3300 of the Civil Code, to wit, that amount which will compensate the plaintiff for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. In applying this section, it is, of course, subject to the limitation that no damages can be recovered which are not clearly ascertainable in both their nature and origin (section 3301). The profits which plaintiff here complains that he was deprived of are those which he would have made from the sale of these machines had the defendant either refused to invade the exclusive territory granted to him or have referred the inquiries of the purchasers to him, as it agreed to do in the contract. There is nothing speculative or uncertain as to the amount of profits of which plaintiff was thus deprived, and their loss is so closely connected with the breach of the obligation by defendant that it is difficult to see any ground upon which it can be said that plaintiff's injury is too remote either in nature or origin. We are of opinion that these profits are such as plaintiff is entitled to recover under the authorities in this state. Sanford v. East Riverside, 101 Cal. 275, 35 Pac. 865; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. 1020. When profits and advantages are expressly stipulated for in the contract, and are the real purpose and direct and immediate fruit of a contract, they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements. Shoemaker v. Acker, 116 Cal. 245, 48 Pac. 62. In such a case it cannot be said that the profits are collateral or remote. Another element entering into the consideration of such a question is that of the estoppel of defendant to deny that plaintiff would have made sale of these machines but for its violation of the contract. It does not lie in its mouth to say, "You could not have sold these machines if I had filled your orders and had not devised a method whereby your employés could make these sales through another agency."

We are not informed by counsel for either party upon what theory the balance of $3,995, for which judgment was given, was reached, and the record contains nothing from which this court can determine the prices paid for the cars sold by defendant, or determine the amount of freight which plaintiff would have paid on these cars had they been delivered to him f. o. b. at Cleveland, and he required to pay the freight. We cannot assume the trial court did not charge the freight to plaintiff, nor could the judgment be modified upon this theory, if appellant's contention in this regard is correct.

The numerous errors of law specified are not presented any further than they incidentally arise in discussing the foregoing propositions; therefore, they are not separately considered.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 609

FINNALL v. MERRIMAN. (Civ. 814.)

(Court of Appeal, Second District, California. June 17, 1910.)

1. New Trial (§ 131*)—Motion—Statement of Case.

When notice is given of a motion for a new trial on a statement of the case, the moving party is bound to propose such a statement, and have it settled, signed, and certified by the trial judge before it can be filed with the clerk.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263–269; Dec. Dig. § 131.*]

2. Appeal and Error (§ 539*)—Statement of Case—Substitutes.

A stipulation in the transcript that the same contains a correct copy of the record, including the instructions given and refused and the statement on motion for a new trial, cannot take the place of a properly authenticated statement by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2464; Dec. Dig. § 539.*]

3. Appeal and Error (§ 701*)—Review—Instructions—Absence of Evidence.

The giving and refusal of instructions cannot be reviewed in the absence of the evidence given at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933–2935; Dec. Dig. § 701.*]

4. Appeal and Error (§ 501*) — Review — Record—Exceptions.

The giving and refusal of instructions cannot be reviewed where the record does not show proper exceptions taken at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300–2305; Dec. Dig. § 501.*]

5. Appeal and Error (§ 928*)—Instructions —Review—Presumptions.

Where a bill of exceptions only shows instructions given and refused and exceptions thereto, all intendments will be indulged in favor of the rulings objected to, in the absence of evidence in the record, if they would have been proper under any view of the evidence properly admissible under the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749–3754; Dec. Dig. § 928.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by J. E. Finnall against J. W. B.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Merriman. Judgment for defendant, and plaintiff appeals. Affirmed.

W. L. Williams and Hammack, Noyes & Hammack, for appellant. Purington & Adair, for respondent.

ALLEN, P. J. The action was brought upon a promissory note executed by the defendant to plaintiff's assignor. The answer set up facts showing there was no consideration therefor; that the note was executed to one Rogers, plaintiff's assignor, who was agent for a life insurance company, under an agreement that, if defendant's application for a policy of insurance was declined, the note was to be returned; that defendant's application was rejected and no policy ever issued; that Rogers represented to defendant that he would make application to another company for a like policy, and that if upon receipt of said policy the defendant, after an examination of the same, was dissatisfied therewith, the privilege would be given him to return such policy without any liability for the payment of the premium, or of the note theretofore executed; that a second company did issue a policy; that defendant, within the stipulated time examined the same, was dissatisfied therewith and returned the policy to the company; that Rogers, in violation of his agreement, transferred the note to plaintiff. It was alleged that plaintiff did not purchase or acquire the note in the ordinary course of business; that he had knowledge at the time of said purchase of facts and circumstances concerning the making of the note; and that the price paid therefor by plaintiff was grossly inadequate to the amount expressed on the face of the note, sufficient to arouse the suspicions of an ordinarily prudent man and put him on inquiry as to the consideration of said note; denied that plaintiff was the bona fide holder of the note for value. The case was tried by a jury, which returned a verdict for defendant. Judgment was rendered upon such verdict June 24, 1908. Thereafter, on July 14, 1908, plaintiff moved for a new trial, specifying in said motion that the same would be made upon a statement of the case. When this motion for a new trial was denied, if, in fact, it was denied, is not made to appear. The appeal is from the order denying a new trial.

The transcript contains no statement settled or signed by the judge. Rule 3 of the court (78 Pac. viii) is violated by the omission to give the name of the judge whose decision it is sought to review. "When notice is given of a motion for a new trial, to be made on a statement of the case, it is the duty of the moving party to propose such a statement, and have it settled, signed, and certified by the judge. The statement must be authenticated in that way before it can be filed with the clerk of the court. * * * But the signature and certificate of the judge are indispensable. Without them there is no statutory statement on which the motion may be heard. An unauthenticated paper in the transcript, purporting to be a statement, is no part of the record on appeal, and must be disregarded." Adams v. Dohrmann, 63 Cal. 418. There is in the transcript a stipulation that the same contains a correct copy of the record, including the instructions given and refused by the court, as well as the statement on motion for a new trial, but this cannot have the effect to properly present such statement to the court as a basis for a review of the evidence therein contained. Conceding, for the purposes of this case, that this stipulation presents the instructions given and refused, we cannot say, in the absence of any evidence presented upon the trial, that the giving or refusal of such instructions constituted reversible error. Nor is there anything before us indicating that the giving or refusing of such instructions was properly excepted to at the time. It is said in Frost v. Grizzly Bluff C. Co., 102 Cal. 526, 36 Pac. 929, that, where a bill of exceptions merely shows instructions given and refused and the exceptions thereto, the judgment will rarely be reversed; all intendments being in favor of sustaining it. If such instructions were proper under any view of the evidence properly admissible under the issues, the action of the court must be sustained.

We find no reversible error in the record, and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

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13 Cal. App. 597

BARBER ASPHALT PAVING CO. v. SANTA BARBARA ICE CO.

(Civ. 779.)

(Court of Appeal, Second District, California. June 15, 1910.)

1. TRIAL (§ 398*)—INCONSISTENT FINDINGS.

Where a complaint contained two counts, one alleging that between certain dates named plaintiff furnished 188 boxes of asphalt mixture and laid the same on streets of Santa Barbara at defendant's request, that defendant promised to pay plaintiff therefor $2.25 per box, amounting to $423 in all, and the second count alleging that between the same dates such material was furnished, and that the same and the labor of laying it was reasonably worth $2.25 a box, amounting to $423 in all, findings of a promise to pay and also of the reasonable value of the goods and labor were not so inconsistent as to warrant a reversal of a judgment for plaintiff.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 398.*]

2. TRIAL (§ 398*)—FINDINGS—CONFLICT.

Where there is one finding sufficient to support the judgment and the others are not in conflict, they may be treated as surplusage.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. SALES (§ 347*) — ACTION FOR PRICE — DEFENSES.

Where a buyer promised to pay an agreed sum for asphalt furnished and laid, it could not avoid liability in absence of fraud or misrepresentation because the asphalt in its crude state was not worth the sum agreed to be paid therefor, but was only of such value with the labor added necessary to place it in position.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 347.*]

4. APPEAL AND ERROR (§ 1010*)—REVIEW—EVIDENCE.

Where there is some evidence in the record to warrant the court's findings, they cannot be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Barber Asphalt Paving Company against the Santa Barbara Ice Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Day & Day, for appellant. W. P. Butcher and C. A. Storke, for respondent.

ALLEN, P. J. The record presented upon this appeal is somewhat confusing. It appears therefrom that on February 17, 1909, the plaintiff filed its complaint containing two counts, the first thereof alleging that between certain dates named plaintiff furnished 188 boxes of asphalt mixture and laid the same on the streets of Santa Barbara at defendant's instance and request; that defendant promised to pay plaintiff therefor the sum of $2.25 per box, amounting to $423 in all. In the second count it is alleged that between the same dates such material was furnished and that the same, and the labor of laying the same on the streets, was reasonably worth $2.25 per box, amounting to $423 in all. To this complaint a demurrer was interposed. It seems that on March 15th the demurrer was sustained by the court, and in the same order defendant was given 10 days to answer. A minute entry, however, appears in the record to the effect that, upon the same date of the rendering of the decision upon the demurrer, plaintiff was permitted to amend its complaint by inserting the words, "to the defendant," in an appropriate place, so that the complaint read that between the dates named the plaintiff furnished to the defendant the articles; and the same correction appears in the second count.

We think it may be said it appears from the record that this amendment was permitted and made after the order was made sustaining the demurrer, and that thereafter the complaint as amended was before the court. No demurrer was interposed to the complaint as amended, and an answer was duly filed, which was a denial that the goods and merchandise were furnished to defendant, and denies a promise to pay therefor. Thereafter an attempt was made to file another amendment to the complaint, the sufficiency of which as a count in debt is open to question. The cause proceeded to trial, however, upon the issues as presented, and the court found that plaintiff did furnish and lay on the streets at defendant's instance and request the goods and merchandise, and defendant promised to pay for the same the sum of $2.25 a box; further, that between the dates named plaintiff furnished, at defendant's instance and request, the articles; and that the articles furnished and the labor of laying the same were reasonably worth $2.25 a box; further, that the matters set out in the third cause of action were true. Judgment was rendered in favor of plaintiff for the sum of $423 and costs. Motion for new trial was filed, which was denied, and from the judgment and order denying a new trial defendant appeals.

We think the first and second counts as amended each state a cause of action. It is obvious that these counts each relate to the same matter, and are an attempt to declare upon a liability growing out of the same transaction for the identical goods sold. The findings are to the effect that the goods and merchandise were laid on the streets at the request of defendant, and that defendant promised to pay the sum of $423 therefor, and also that the articles furnished and the work and labor thereof were reasonably worth $423. We do not regard the finding of a promise to pay and the finding of the reasonable value of the goods to be so inconsistent as to warrant a reversal. Neither would the finding on the attempted count in debt justify a reversal, assuming it to be not in proper form. The finding of a promise to pay is sufficient to support the judgment, regardless of the finding as to the value, and the finding that the materials and the labor of laying the same were reasonably worth the amount which the defendant originally promised to pay for the materials alone is not in conflict with the first finding. Neither is the third finding in conflict with the first or second. There being one finding sufficient to support the judgment, and the others not being in conflict may be treated as surplusage. If one promises and agrees to pay a fixed sum for articles furnished him by another, he cannot avoid liability, in the absence of fraud or misrepresentation, because it may appear that the articles were not worth in a crude state the sum agreed to be paid, but were only of such value with the labor of placing them in position. In addition to this, there is no denial of the value of the materials furnished. The only issues presented were as to the actual furnishing and the promise to pay, as to both of which matters the court found against appellant.

Appellant insists, further, that the evidence is not sufficient to support the findings. An examination of the record, however, discloses that there was some evidence which warranted the court in finding that the goods were furnished at the request of defendant under a promise to pay therefor a fixed sum, and we cannot, therefore, interfere with the findings of the court in that regard.

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*For other cases see same topic and section NUMBER in Dec Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

13 Cal. App. 644

PETERSON v. McDONALD. (Civ. 695.)

(Court of Appeal, Third District, California. June 20, 1910.)

1. DEEDS (§ 143*)—PROVISIONS—EFFECT.

A provision in a deed "reserving" to grantors the right to use water from a well on payment of a monthly rental constituted a mere personal contract to sell the water; not being a reservation which runs with the land.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 143.*]

2. INJUNCTION (§ 60*)—WHEN IMPROPER REMEDY—PERSONAL SERVICES.

Under Civ. Code, § 3390, prohibiting injunction as a remedy to compel performance of personal services, it does not lie to restrain obstruction of flow of water which defendant has agreed to furnish plaintiff under a private contract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117–119; Dec. Dig. § 60.*]

3. INJUNCTION (§ 59*)—WHEN REMEDY LIES—BREACH OF CONTRACT.

Injunction will not lie to prevent the breach of a contract which would not be specifically enforced.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114–116; Dec. Dig. § 59.*]

4. COURTS (§ 120*) — JURISDICTION — AMOUNT INVOLVED.

A suit to enjoin a breach of contract cannot be retained by the superior court as an action for damages where only $25 damages are involved.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 120.*]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by P. G. Peterson against Annabell McDonald. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry L. Ford and Adam Thompson, for appellant. J. H. G. Weaver, for respondent.

HART, J. The trial court sustained a demurrer to the third amended complaint without leave to amend, and rendered and caused to be entered judgment against plaintiff and in favor of defendant for her costs. The demurrer was both general and special, the latter challenging the court's jurisdiction of the "subject-matter of said action, or of the subject of said action." The appeal is from the judgment so rendered and entered. The action grows out of a transfer of a certain piece of real property situated in the city of Eureka, Humboldt county, by the plaintiff to the defendant.

The complaint alleges that the plaintiff on the 31st day of March, 1905, was the owner in fee of a piece or lot of land in said city of Eureka, the same being 120 feet in length and an equal number of feet in width; that situated on said land were two dwelling houses; that on said day he conveyed to the defendant a portion of said land, the land so conveyed being 60 feet in width by 120 feet in length, and upon which one of said dwelling houses was situated; that plaintiff retained the remaining portion of said land (58 feet by 120 feet in dimensions), on which the other dwelling house was situated, and where, with his family, he intended to and did reside after the date of the transfer of a portion of said land to defendant, and that on the land so retained by him there also resided, during some of the time mentioned in the complaint, certain tenants or parties to whom he had leased said premises. It is further alleged that on the portion of the land sold to defendant there were and had been for a long time prior to the date of the sale and execution of the conveyance of said land to defendant, "a water well, a structure containing a water tank, and a windmill and pump connected therewith, used for the purpose of filling said tank with water from said well, which said water is particularly clear, pure, and healthful and containing superior qualities for cooking, washing, and drinking; that water from said tank was at all said times used to supply both said dwelling houses and premises upon which they were situated with water, and said strip 58 feet wide off of the north part of said land (the part retained by plaintiff) was and is supplied with water from said tank by a service pipe running from said land comprising the strip 62 feet off the south part of said land; * * *" that said portion of said land retained and owned by plaintiff "never has had at any time of the times herein mentioned, nor has it now, a well thereon or provided with any other means of obtaining water thereon, or supplying water for said dwelling house thereon except as above set forth." It is averred that, as a part of the consideration for the sale and conveyance to the defendant of the land on which said well is situated, the plaintiff expressly reserved in the deed of conveyance the right to use for domestic purposes, and to that end have carried to his land by means of a pipe connected therewith water pumped from said well; that by virtue of the terms of said reservation water pumped into the tank situated near said well and on the said premises of defendant "has been used in said dwelling house of plaintiff when required, and he has paid for all water used by him for said dwelling house up to March 1st, 1906"; that on said last mentioned date "she, said defendant, without cause or excuse, against the will of plaintiff, shut off the water from flowing in said pipe from said tank to his said dwelling house, and ever since has and now prevents the flow of water from her said tank to his said dwelling house, and plaintiff is informed and believes and alleges that defendant has threatened to keep said water shut off permanently from said dwelling house and not to allow the use of it again therein." It is further alleged that the plaintiff on March 2, 1906, and on March 3, 1906, tendered to defendant the sum of 50 cents as payment in advance for the use of said water for said month of March; said amount being the sum stipulated in the said reservation for which the plaintiff was to have the use of said water. Plaintiff alleges that he "has been put to great cost, all to his great damage, in the sum of $25," by reason of defendant's conduct in turning the water from the pipe leading to his premises, and further declares that pecuniary compensation alone would not constitute an adequate remedy in view of the rights to which he claims to be entitled under the terms of the reservation contained in the deed executed by him to defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The relief demanded by the plaintiff in the prayer of the complaint is, first, for a preliminary, mandatory injunction requiring defendant to remove any obstruction to the flow of water from the tank into the pipe leading to plaintiff's dwelling house; and, secondly, for a permanent injunction compelling defendant to perpetually refrain from obstructing plaintiff's use of said water, and for the damages alleged.

The deed from plaintiff to the defendant is made a part of the complaint, and the reservation therein contained, and on which this controversy hinges, reads as follows: "Reserving, however, to the parties of the first part, the right to use the water from above mentioned property for their dwelling house adjoining said property on the north, provided that said parties of the first part shall pay to the said party of the second part the sum of fifty cents per month as rent for said water so long as said first parties continue to use the same." The demurrer was properly sustained on both the grounds upon which it was urged. Manifestly the alleged "reservation" contained in the deed amounts only to a personal contract by the terms of which the defendant agreed to sell and furnish the plaintiff with water for use for domestic purposes, and is not, in our opinion, a contract that would be specifically enforced. There is no claim, and obviously none could be successfully maintained, that, so far as the use of the water is concerned, the "reservation" is a covenant running with the land. There is nothing in its language which even remotely indicates that it was intended to bind the land. The plaintiff granted to the defendant the fee without restrictions, qualifications, conditions, or exceptions; and, as stated, the alleged reservation constitutes only a personal agreement between the parties which could just as well have been evidenced by some writing de hors and independent of the deed.

The allegations of the complaint, as well as the prayer, called for a restoration of the flow of the water from the tank into the pipe, thence to plaintiff's premises, and for a decree permanently enjoining defendant from obstructing the flow of said water through said pipe. Thus necessarily the defendant would not only be required to perpetually maintain the well and the pump and the other apparatus used for pumping the water, but would be compelled to keep the same in such order as to cause water from the well to be pumped into the tank, and thus supply the plaintiff, so far as the plant maintained intact could do so, with water necessary for his purposes as contemplated by the "reservation." The effect of the decree, if framed in accordance with the tenor of the averments and prayer of the complaint, would, in other words, be to compel the performance of personal services which cannot be done. Section 3390, Civ. Code. If, for example, the pumping machinery should be destroyed or in any manner become impaired so that it could not pump water into the tank, the defendant would be required to rehabilitate or repair the machinery so that she could furnish plaintiff with water or otherwise incur the penalty consequent upon a violation of the injunction. Of course, it is well understood that injunction will not lie to prevent the breach of a contract which would not be specifically enforced.

Plaintiff had available to him adequate compensatory relief. It may be that the complaint sufficiently states a cause of action for damages for a breach of the contract to stand against the attack of a general demurrer, and if so, and had the damages claimed and alleged been such in amount as to give the superior court jurisdiction of the action, the demurrer should and would perhaps have been overruled. But the sum in which the plaintiff alleges that he has suffered damage by the act of the defendant does not obviously amount to enough to invest said court with jurisdiction of the action.

Judgment affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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13 Cal. App. 654

PEOPLE v. LOOMER. (Cr. 158.)

(Court of Appeal, Second District, California. June 21, 1910.)

1. JURY (§ 70*) — IMPANELMENT — JURORS DRAWN FOR DIFFERENT DEPARTMENTS OF THE SAME COURT.

Where the superior court of a county was divided into several departments, and on a trial of accused in one of the departments after five men had been selected from the panel of jurors for that department the clerk drew from the trial jury box of that department four additional names of veniremen, which exhausted the jury summoned to serve in that department, the court was authorized by Code Civ. Proc. § 248, to order the attendance of the trial jury panel summoned for service in another department, and from it complete the jury.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 70.*]

2. JURY (§ 137*)—IMPANELMENT—PEREMPTORY CHALLENGES.

Accused was entitled to have a full jury box before being compelled to exercise his peremptory challenges.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 619-623; Dec. Dig. § 137.*]

3. HOMICIDE (§ 276*)—SELF-DEFENSE — QUESTION FOR JURY.

In a prosecution for murder, whether the killing was in self-defense *held* for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.*]

4. CRIMINAL LAW (§ 1170*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Where accused and his physician testified fully concerning accused's physical deformity, in that one leg was considerably shorter than the other, and the limb was smaller in circumference, and this evidence was not contradicted, accused was not prejudiced by the denial of his motion to exhibit his body to the jury to show such deformity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 825*)—TRIAL—INSTRUCTIONS—DUTY TO REQUEST.

Where accused claimed that he killed deceased because of hostile acts on deceased's part against defendant and his father, and that he had reason to believe that a dangerous attack was about to be made on his father as well as himself, an instruction that previous threats or acts of hostility of deceased towards defendant, however violent, were not of themselves sufficient to justify defendant in slaying deceased, but that he must have acted under an honest belief that it was necessary at the time to take deceased's life in order to save his own or himself from great bodily injury, etc., was not erroneous as eliminating defendant's rights with reference to protecting his father; the burden being on accused, if he desired a broader instruction covering such subject, to request it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

6. CRIMINAL LAW (§ 829*)—TRIAL—DUTY OF JURORS—INSTRUCTION.

The court should have charged that if any juror, after having considered all the evidence and having consulted with his fellow jurors, should entertain a reasonable doubt of the guilt of accused as charged in the information, he should not consent to a verdict of guilty, and that each juror should act on his own individual judgment from the facts of the case, etc., but a failure to do so was not prejudicial to accused where the jury was fully instructed as to what constituted a reasonable doubt, and that in case of a reasonable doubt accused was entitled to an acquittal, and as to the burden being on the prosecutor to rebut the presumption of innocence beyond a reasonable doubt, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Fred Loomer was convicted of murder in the second degree, and he appeals. Affirmed.

Henry H. Roser, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. By information the defendant was charged with the crime of murder. Upon trial therefor he was convicted of murder in the second degree, and by judgment of the court sentenced to 20 years' imprisonment. He appeals from the judgment and an order denying his motion for a new trial.

The case was tried in department 12 of the superior court of Los Angeles county. It appears that, after five men had been selected from the panel of jurors summoned to serve in this department and sworn to act as jurors in the trial of the case, the clerk then drew from the trial jury box of department 12 four additional names of veniremen, which exhausted the panel of jurors summoned to serve in said department. Thereupon the court made an order requiring the attendance in department 12 of the trial jury panel summoned for service in department 11 of the court, and from this panel the clerk proceeded to draw the names of three jurors, who, together with the four last drawn from the jury box of department 12, were duly sworn to answer questions touching their qualifications as jurors in the case. This proceeding seems to have been in strict accord with the provisions of section 248, Code Civ. Proc., which provides as to counties having two or more judges of the superior court that, "when a panel of jurors is in attendance for service before one or more of the judges, whether impaneled for common use or not, the whole or any number of jurors from such panel may be required to attend and serve in the trial of cases, or to complete a panel, or jury, before any other of the judges." The jury was incomplete, there being only 9 men in the jury box and the panel of department 12 was exhausted. Defendant was entitled to have the box full before exercising his peremptory challenges. Clearly the action of the court was without error.

Appellant claims the evidence adduced at the trial was insufficient to justify the verdict of the jury, in that it shows that in self-defense defendant was justified in killing deceased. The circumstances surrounding the killing were as follows: Defendant and his father were tenants of certain lands adjoining which deceased was as a tenant of the same owner farming a tract of land. A controversy between the parties arose over their respective rights to a piece of land, the right to farm which was claimed by both defendant's father and deceased. The latter, it seems, had put in a crop of corn on the portion of the property involved in the dispute, and defendant's father claimed to be entitled to one-third of the crop as rental. This was denied by deceased. At the time of the killing of deceased he was engaged with a corn knife or sickle cutting corn which stood in stalk, when defendant, accompanied by his father, went to the place where deceased was so engaged, and, according to defendant's evidence, an altercation ensued in which all three took part. Appellant's defense was based upon justifiable homicide; his contention being that deceased did or was about to attack him and his father with the corn knife with which he was engaged in work, and, believing that both he and his father were in imminent danger of great bodily harm at the hands of the deceased from such attack, he in self-defense drew a revolver which he had upon his person and shot deceased, with the result that death ensued almost immediately thereafter. As usual in such cases, the evidence is conflicting. No good purpose could be subserved by repeating it here. Suffice it to say that the testimony adduced on the part of the people tends in some degree to prove the guilt of defendant. While the jury might properly have reached a different conclusion, nevertheless, under the circumstances here presented, it is not within the province of this court to disturb the verdict upon the ground that the evidence is insufficient to support it. People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There was no error in the ruling of the court denying defendant's motion to exhibit his unclad body to the jury for the purpose of showing that he was physically deformed, in that one leg was considerably shorter than the other and the limb much smaller in circumference. So far as such facts were material, he had the benefit of his own and his physician's full and uncontradicted testimony touching the matter. At most, such an exhibition would have afforded merely cumulative evidence of facts concerning which there was no dispute. In no event were the substantial rights of defendant prejudiced by the ruling.

The defendant requested the court to give instructions covering upwards of 30 pages of the transcript, nearly all of which were refused. Appellant insists that such refusal as to a number of the instructions constituted error. We have carefully examined each and every one of the alleged erroneous rulings, and, with two exceptions hereafter considered, find that appellant's contention in this regard merits no discussion other than to say that where such requested instructions correctly stated the law we find them, in substance, embodied in the instructions given, which, taken as a whole, are not only full and complete, but well calculated to protect and guard the defendant in securing a fair and impartial consideration of his rights at the hands of the jury.

It is claimed the court erred in instructing the jury that "previous threats or acts of hostility of the deceased toward the defendant, however violent they may have been, are not of themselves sufficient to justify the defendant in slaying the deceased. To excuse him, or justify him, he must have acted under an honest belief that it was necessary at the time to take the life of the deceased, in order to save his own, or himself from great bodily injury, and it must appear that there was reasonable cause to excite this apprehension on his part," as well as in the giving of other instructions predicated upon the hostile acts of deceased towards defendant without any reference being made therein to his father. His contention is that "the language of all these instructions should have been made to apply to the father as well, and that threats or menaces made by deceased against the father or defendant were of avail to defendant, if at the time of the killing his parent was actually assailed, or defendant had sufficient evidence to convince a reasonable person, at that time, that his parent was in imminent danger of great bodily injury, or of losing his life." There was some evidence tending to prove threats and acts of hostility on the part of deceased toward the father of defendant, who accompanied him, and that in shooting deceased defendant did so in defense of his father whom he had reason to believe was about to be attacked by deceased. Conceding that under the evidence an instruction in effect as now suggested by appellant would have been proper, nevertheless, it was his duty to have requested it, if he deemed the evidence sufficient to warrant the same. The instruction above quoted as given was, under the evidence, a proper one. The court at defendant's request gave an instruction upon justifiable homicide in the language of section 197, Pen. Code. Defendant did not ask further elaboration of the provision of said section, nor the additional instructions which he now suggests should have been given. It was his duty to request them, if he deemed them necessary or proper. Not having done so, his complaint that the court failed to so instruct cannot now be entertained. In the case of People v. Matthai, 135 Cal. 446, 67 Pac. 696, the court in discussing a like question says: "The court charged upon justifiable homicide in the language of the Code. If the defendant desired an elaboration of the principles there expressed, he should have proposed his instructions to that end." To the same effect is People v. McLean, 84 Cal. 482, 24 Pac. 32; People v. Weber, 149 Cal. 346, 86 Pac. 671.

Defendant requested the court to give an instruction to the jury as follows: "In criminal cases the law requires the concurrence of 12 minds in the conclusion of guilt. Before a verdict of guilty can be legally rendered, each member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant. Therefore, if any one of the jurors, after having considered all of the evidence and having consulted with his fellow jurors, should entertain a reasonable doubt of the guilt of the defendant, as charged in the information, he should not, under his oath, consent to a verdict of 'guilty.' Each juror should act upon his own individual judgment upon the facts of the case, and he is in duty bound not to surrender his own convictions, if he entertains a reasonable doubt as to the guilt of the defendant, merely because the other jurors entertain no doubt as to his guilt." With reference to a similar instruction, the Supreme Court, speaking through Chief Justice Beatty in the case of People v. Dole, 122 Cal. 495, 55 Pac. 585, 68 Am. St. Rep. 50, says: "This is a correct statement of the duty of a juror, and should have been given. If any juror needed an instruction upon this point, it was harmful to refuse it. If no juror needed the instruction, it would have been harmless to give it." In a concurring opinion in the case of People v. Howard, 143 Cal. 323, 76 Pac. 1118, the Chief Justice repeats the above quoted language.

The instruction, for the reasons stated in the Dole Case, was a proper one, and should have been given. Conceding, however, that the court erred in refusing to give it, we are nevertheless of the opinion that under the circumstances of this case the error was one which did not prejudice the substantial rights of defendant, and, therefore, under the provisions of section 1258, Pen. Code, it should be disregarded. The jury were fully instructed as to what constituted a reasonable doubt, and that in case of a reasonable doubt as to defendant's guilt he was entitled to acquittal; "that the law raises the presumption of innocence, which attends the defendant throughout his trial, and which goes with the jury into the jury room"; that it was the duty of the jury to "consider the testimony in the light of that presumption of innocence, and that presumption must prevail to acquit the defendant, unless the state has by sufficient evidence established the guilt of the defendant to a moral certainty and beyond a reasonable doubt"; that it was the duty of the prosecution to prove beyond a reasonable doubt the truth of every material allegation in the information; that "nothing is to be presumed or taken by implication against the defendant"; that "the law presumes him to be innocent of the crime with which he is charged"; "that this case is to be determined from the evidence adduced at the trial, and from the instructions of the court, and no outside influence or statement of alleged facts, whether agreeing with the facts proved at the trial or not, is proper matter for the jury's consideration, and any such must be entirely laid aside by you in your consideration of this case." And again: "The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty." There were other instructions of like import, all calculated to impress upon each juror to whom such instructions were addressed the duty which devolved upon him, that in reaching a verdict he should be guided by the evidence and instructions of the court. In addition to this, it appears that the jury upon bringing in its verdict was polled, and each individual juror asked if the verdict rendered was his verdict, to which each member of the jury responded in the affirmative. Section 604, Code Civ. Proc., provides that "an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ———, the plaintiff, and ———, defendant, and a true verdict render according to the evidence." We cannot assume that any member of the jury rendered his verdict in violation of such oath and the instructions of the court. As said by Justice Shaw in his concurring opinion in People v. Perry, 144 Cal. 756, 78 Pac. 287: "An exception which involves nothing more important than the failure of the court to protect the defendant against the very remote contingency that some juror may so misunderstand or disregard his oath and the other instructions, or the equally remote contingency that such a juror would be prevented from so doing by an instruction such as that here involved, does not, in my opinion, affect the substantial rights of the defendant."

We find no prejudicial error in the record, and the judgment and order are, therefore, affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

13 Cal. App. 678

PEOPLE v. GORDON. (Cr. 244.)

(Court of Appeal, First District, California. June 27, 1910.)

1. Indictment and Information (§ 140*)—Presumptions—Preliminary Proceedings.

On motion to quash, an information is presumed to have been founded on the commitment as made by the examining magistrate, in the absence of a contrary showing.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 140.*]

2. Forgery (§ 26*)—Information—Sufficiency.

An information for forging a sight draft, which was set out, at a specified time and place, charging that there was no such person as the drawer "then and there in existence," was sufficient; the quoted words not being indefinite.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 61; Dec. Dig. § 26.*]

3. Jury (§ 131*)—Impaneling—Acquaintance with Third Persons.

In a criminal trial involving a prior conviction, it was not error to allow the prosecutor to ask prospective jurors whether they knew a former penitentiary warden, and an attaché of the county clerk's office.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 131.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. JURY (§ 131*) — COMPETENCY — NEWSPAPER REPORTS.

In a prosecution involving a prior conviction, examination bringing out that a juror remembered reading something about a convict getting acquainted with the warden's wife is insufficient to show that accused was the convict referred to and did not make the examination erroneous.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 131.*]

5. FORGERY (§ 37*)—EVIDENCE—FORGED INSTRUMENT.

In a trial for forging a sight draft, the draft was admissible without showing that it had been placed in a bank for collection.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 37.*]

6. FORGERY (§ 13*)—DRAFTS—NECESSITY FOR ATTEMPTING COLLECTION.

To convict of forging a draft, it was not necessary to have the draft sent through a bank for collection.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 48; Dec. Dig. § 13.*]

7. CRIMINAL LAW (§ 491*)—EVIDENCE—COMPARISON OF HANDWRITING.

In a trial for forging a draft purporting to have been signed by H. C. W. for the purpose of comparison and showing its physical appearance, it was not error to admit a letter purporting to have been written by W. C. W., an acquaintance of accused, canceling an order for a set of books given witness, on which order accused received a commission from witness for introducing W., where witness testified that he compared the signatures on the letter and the order, and that they appeared to be the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1080; Dec. Dig. § 491.*]

8. FORGERY (§ 44*)—PROOF REQUIRED.

To convict of forging a draft signed by a fictitious person, it was not necessary to prove that there was no such person in existence at the time the writing was signed; it being sufficient to show to a common certainty that there was no such person in the vicinity of and connected with the particular acts charged in the place and county where jurisdiction accrued.

[Ed. Note.—For other cases, see Forgery, Dec. Dig. § 44.*]

9. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR —MISTAKES IN INITIALS.

A mistake in the initials of a person in an instruction or other part of the record is not reversible error, where it is not misleading.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

Appeal from Superior Court, City and County of San Francisco; M. T. Dooling, Judge.

W. F. Gordon was convicted of forgery, and he appeals from the judgment and from an order refusing a new trial. Affirmed.

Burton J. Wyman, for appellant. Attorney General Webb and F. L. Berry, Asst. Dist. Atty., for the People.

COOPER, P. J. The defendant was found guilty of uttering and passing a fictitious instrument in writing for the payment of money and sentenced to a term of three years in the state prison. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The information states that the defendant is accused of feloniously uttering and passing on the 20th day of May, 1909, at the city and county of San Francisco, a fictitious instrument in writing for the payment of money, with intent to defraud one Aaron Jacobs, which fictitious instrument in writing is stated to have been "then and there in the words and figures following, to wit: 'San Francisco, Cal. May 20th, 1909. $25.00. At sight pay to the order of W. F. Gordon twenty-five no/100 dollars value received, and charge the same to account of H. C. Watson. To Geo. W. Harrington, No. 212 Fifth street, San Diego, Cal. H. C. Watson. No protest. Tear this off before presenting.' Indorsed as follows: 'W. F. Gordon.'" The information further charges a prior conviction of a felony, to wit, embezzlement, by a judgment of the superior court given and made on or about the 31st day of December, 1900. Defendant made a motion to set aside the information upon the grounds that prior to the filing thereof the defendant had not been legally committed by a magistrate for the prior offense charged in the information, and that he was committed under the name of William F. Gordon, while the information charges him under the name of W. F. Gordon.

His first contention is that the court erred in denying his motion. If there were otherwise any merit in the motion, it is sufficient to say that counsel has failed to call our attention to any evidence in the record as to the commitment made by the magistrate or its contents, or even the name under which the defendant was committed by the magistrate, and upon inspection we have failed to find any such evidence. We must therefore presume in favor of the record that the district attorney performed his duty; that the information is founded upon the commitment as made by the magistrate. Not only is this so as matter of law, but we find by the record that when the information was read to the defendant he admitted his true name to be W. F. Gordon, and before sentence the district attorney withdrew the charge of a prior conviction.

The information is said to be so fatal that the demurrer to it should have been sustained. The argument is made that after the first charging part of the information, and, after setting forth a copy of the instrument, it states that "whereas in truth and in fact there was no such individual as H. C. Watson then or there in existence," and it is contended that the words "then or there" are indefinite and may have different meanings. The criticism is highly hypercritical. The information charges in the portion preceding the quoted clause that the instrument was false and fictitious. The statement that there was no such person "then" in existence is very comprehensive, and certainly if there was no such person in existence on the 20th day of May, 1909, there was no such person "there" in the city and county of San Francisco. The information was sufficient to enable the defendant or any person of common understanding to know what was intended, and it sets forth the acts charged with such degree of certainty as to enable the court to pronounce judgment upon conviction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There was no error committed by the court in allowing the district attorney to ask of prospective jurors the questions pointed out in appellant's brief as to the jurors being personally acquainted with certain persons therein named. The juror Lemmon was asked by the district attorney if he knew one Mr. Tompkins who used to be the warden at San Quentin, and also if he knew a man named Dan Sullivan, who was in some way connected with the county clerk's office. The juror replied that he did not know either of them. The juror Blanchfield, in answer to a question by the district attorney, said he knew Dan Sullivan. The principal complaint is made as to the examination of the juror Rulfs. In answer to a question by the district attorney in direct examination Rulfs testified that he did not know Dan Sullivan, but that he did know one A. Jacobs. In cross-examination of the juror by defendant's counsel, it was shown that the juror had read some account of the matter in the newspapers; that he remembered "about a prisoner over there getting acquainted with the warden's wife, something like that; that is all I remember about it." This is said by defendant's counsel to have reference to the fact that the defendant had before been in San Quentin for a prior offense. It is sufficient to say that we cannot determine from the record what prisoner the juror referred to. We cannot presume that the reference was to this defendant; and, even if the answer raised a suspicion that the prisoner referred to was the defendant, the matter was elicited in answer to questions asked by defendant's own counsel in cross-examination. There was no motion to strike out, and the juror further stated that he was not in any way prejudiced by what he had read.

The admission of the written instrument in evidence without showing that it had been placed in a bank for collection was not error, nor was it necessary to have the draft sent through a bank for collection. If the draft was false and fictitious as alleged in the information, it would not have been paid and would have been returned by the bank. Hence it was not necessary to do a vain and useless thing.

It is stated that the court committed error of the most prejudicial character in admitting in evidence over defendant's objection a document marked "People's Exhibit B." It appears that the exhibit was a letter, and was offered and admitted in evidence merely for the purpose of the "physical appearance of the paper and the handwriting" and evidently for the purpose of comparison. Prior to the time the letter was offered one Riggs had been called as a witness for the prosecution, and testified that about April 10th of 1909 the defendant came to his place of business with a man claiming to be W. C. Watson, whom defendant introduced to the witness as W. C. Watson; that the person purporting to be W. C. Watson signed a written order to the witness for an encyclopedia that the witness appears to have been agent for, and that the order was signed in the presence of the witness "W. C. Watson, 103 Natoma street." The witness Riggs was further examined and identified a paper marked "People's Exhibit A" (which appears to be the instrument described in the information). The witness testified that he received the letter—"Exhibit B"—by mail on the 12th day of April, 1909; that it had been in his possession ever since. The letter—"Exhibit B"—was a request to Riggs not to deliver the encyclopedia, as the writer of the letter would not receive it, and was signed "W. C. Watson." The witness further testified that he compared the signature of the letter with the signature on the written order that he saw signed in the defendant's presence by the man purporting to be W. C. Watson, and that they appeared to be the same. Now the only object of admitting the letter in evidence on the testimony of Riggs was for the purpose of the physical appearance of the letter and the handwriting for comparison. The court did not err in admitting it for the purposes named. The facts preceding it, to wit, that the defendant had gone with the party W. C. Watson to the place of business of Riggs and introduced him to Riggs, and that an order was then signed by said party W. C. Watson for an encyclopedia on which defendant received a commission from Riggs, that the said Watson never took or paid for the encyclopedia, tend at least in some degree to show guilty knowledge on the part of defendant. The witness Riggs, having seen the purported Watson sign his name to the order for the encyclopedia, and having received in due course of mail a letter countermanding the order so signed "W. C. Watson," stated that he had compared the signature to the letter with the signature to the order, and that they appeared very much alike. The Code provides (Code Civ. Proc. § 1943): "The handwriting of a person may be proved by any one who believes it to be his and who has seen him write or has seen writings purporting to be his on which he has acted or been charged, and who has thus acquired a knowledge of his handwriting." The witness Riggs had seen the man who claimed to be W. C. Watson write, and had acted upon the writing so made by the man purporting to be said W. C. Watson, and the effect of his testimony is that he believed the letter to be in the same handwriting. While the evidence was not as convincing as in many cases, we cannot say as matter of law that it was not sufficient to prove to the satisfaction of the trial judge that the letter was written by the same man who wrote the order for the encyclopedia.

It is claimed that the court erred in refusing the defendant's requested instruction as follows: "The nonexistence of the individual H. C. Watson mentioned in the information, like all the other essential elements which go to make the offense for which this defendant is being tried, is one of the material issues involved in the case. The nonexistence of the said H. C. Watson must be proved by the prosecution beyond and to the exclusion of all reasonable doubt and to a moral certainty, and if there be any reasonable doubt in your minds as to whether or not there was in existence anywhere in the world such an individual as H. C. Watson on the 20th day of May, 1909, you must resolve that doubt in favor of the defendant and find a verdict of not guilty." The instruction was properly refused. The prosecution certainly was not required to prove, nor were the jury required to believe, beyond a reasonable doubt, that there was no such person in the world as H. C. Watson at the time the writing was signed. It was only necessary to show to a common certainty that there was no such person in existence in the vicinity of and connected with the particular acts charged in the place and county where jurisdiction accrued. People v. Eppinger, 105 Cal. 36, 38 Pac. 538; People v. Terrill, 133 Cal. 120, 65 Pac. 303. If the proposition contended for in the instruction be the law, it would be impossible in any case to prove beyond a reasonable doubt that there was no such particular person in the world.

The instruction of the court as to evidence covering another transaction between defendant and H. C. Watson and the witness Riggs was evidently an inadvertence as to the use of the initials "H. C." instead of "W. C." This is plain from what follows, wherein the jury are told that that was offered as "tending to show a connection between the defendant and said H. C. Watson whom the people claim to be the maker of the draft in question." The jury evidently understood that the court referred to the transaction where the order for the encyclopedia was signed by the man purporting to be "W. C. Watson." We do not think the court intended to lead the jury to believe, nor could the jury have believed from the language used by the court, that the court was charging them as a matter of fact that the writer of the draft was the same W. C. Watson referred to by Riggs as giving the order for the encyclopedia.

We have examined the instructions as a whole, and we think that they fairly and fully instructed the jury as to the questions of law bearing upon the issues before them. It is not for imaginary errors, or errors in regard to getting one initial wrong in an instruction, or in some other part of the record, that the court will reverse a case that appears to have been fairly tried; and, in regard to other errors which are claimed to have occurred in rulings on testimony, we have examined them, and we do not find any of sufficient importance to justify a reversal of the case.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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13 Cal. App. 649

RAMBOZ v. STANSBURY et al. (Civ. 819.)

(Court of Appeal, Second District, California. June 20, 1910.)

1. CORPORATIONS (§ 466*) — INDORSEMENT BY CORPORATION—FORM.

Where a note was indorsed by the payee corporation in due form, the indorsement being signed by the vice president and general manager and the secretary, it was valid though the corporate seal was not attached and there was no resolution of the board of directors authorizing the indorsement; it being sufficient to show that the indorsement and transfer were made in the usual course of business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1827–1830; Dec. Dig. § 466.*]

2. BILLS AND NOTES (§ 496*)—INDORSEMENT—OWNERSHIP—PRESUMPTIONS.

In the absence of any evidence to the contrary, the holder of a note under an indorsement will be presumed to be the owner thereof as provided by Code Civ. Proc. § 1963, subds. 11 and 15.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1669–1674; Dec. Dig. § 496.*]

3. BILLS AND NOTES (§ 496*)—INDORSEMENT—TITLE OF INDORSEE.

In the absence of mala fides, indorsee's prima facie title to a note by reason of possession is not subject to rebuttal so long as the maker is protected from further claim by payment of the judgment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1669–1674; Dec. Dig. § 496.*]

4. PLEDGES (§ 38*) — COLLATERAL NOTE — TRANSFER.

Indorsement and transfer of a note for which collateral has been pledged as security carries the collateral as provided by Civ. Code, § 1084.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 97–102; Dec. Dig. § 38.*]

5. PLEDGES (§ 38*)—COLLATERAL—TRANSFER—TRUSTS.

Where the payee of a note for which collateral has been pledged transfers the note by indorsement, but retains possession of the collaterals, he holds the collaterals as trustee for the holder of the note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 97–102; Dec. Dig. § 38.*]

6. BILLS AND NOTES (§ 372*) — TRANSFER — EQUITIES.

Where a note was transferred for full value before maturity, defendant was not entitled to set off as a counterclaim against the indorsee, a claim that, through mistake and inadvertence, the amount specified in the note was $2,700 in excess of the sum actually due on the debt for which the note was given, in the absence of some proof that the indorsee took the note with notice of existing equities.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 953; Dec. Dig. § 372.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. BILLS AND NOTES (§ 489*)—ABSENCE OR FAILURE OF CONSIDERATION — DEFENSES — PLEADING.

Absence or failure of consideration is available as a defense to a suit on a note by an indorsee only where such defense is specially pleaded, and, in addition, facts are alleged showing that the instrument is subject in plaintiff's hands to defenses.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1604; Dec. Dig. § 489.*]

8. PLEADING (§ 238*)—AMENDMENT TO CONFORM TO PROOF.

Where evidence was offered as to the subject-matter of amendments subsequently made to the complaint to conform to the proof, the court did not abuse its discretion in permitting such amendments authorized by Code Civ. Proc. §§ 469, 470, without notice to defendants.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 620-625; Dec. Dig. § 238.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by J. H. Ramboz against Charles Stansbury and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Scarborough & Bowen, for appellants. Percy R. Wilson (Constan Jensen, of counsel), for respondent.

SHAW, J. On July 12, 1906, the defendants made and delivered to the Consolidated Lumber Company, a corporation, their certain negotiable promissory note for $13,500, payable to its order on or before January 1, 1908. To secure the payment thereof they deposited in pledge with the Consolidated Lumber Company 250 shares of the capital stock of the Western Lumber & Mill Company. Plaintiff sues as the indorsee of an intermediate indorsee of the note to foreclose the lien upon the stock so pledged to secure the payment of the note. Judgment was rendered for plaintiff, and defendants appeal therefrom upon bill of exceptions. The answer admitted the execution of the note, but denied the indorsement and transfer thereof to plaintiff. The court found that on May 1, 1907, the Consolidated Lumber Company, payee in said note, did, in the ordinary course of business, duly indorse, transfer, and deliver the same to the Merchants' National Bank of Los Angeles, which received it in good faith and in the ordinary course of business, paying therefor $13,500; that at the same time the Consolidated Lumber Company transferred and delivered to said bank the stock so pledged to secure the payment thereof; that prior to the institution of this action the bank indorsed the note and transferred the same, together with said stock so pledged to secure the payment thereof, to plaintiff herein. Appellants attack these findings, assigning as grounds therefor that they are unsupported by the evidence.

It is conceded that the note was transferred to plaintiff by the bank merely for the purpose of collection. The question presented is whether the note was assigned to the bank by a valid indorsement thereof. The indorsement is sufficient in form, and on behalf of the Consolidated Lumber Company is signed by the vice president and secretary. Nevertheless, appellants insist that, in the absence of the corporate seal, a resolution of the board of directors authorizing the indorsement for and on behalf of the corporation was a prerequisite essential to a valid transfer of the note to the bank. There is no merit in this contention. Possession of the note, indorsed in due form, together with uncontradicted evidence that on behalf of the Consolidated Lumber Company it was, in the absence of the president, indorsed by the secretary and the vice president, the latter of whom was also general manager and as such had full control of the business of the corporation, which on May 1, 1907, received from the bank $13,500 as the proceeds of the sale and transfer, and that it was the custom of the company to sell its notes to banks, was sufficient to show that the indorsement and transfer to the bank was made in the usual course of business. From these facts the necessary authority will be inferred, notwithstanding the absence of the corporate seal and the fact that evidence of the adoption of a formal resolution is wanting. Mr. Thompson in his work on Corporations, vol. 4, § 5741, says: "The presumption (of right acting) extends to dealings in negotiable securities other than to the act of issuing them. Under its operation, an assignment by a corporation of a note held by it is presumed to be valid until the contrary appears. Here again it is assumed that the corporation has a general power to assign such instruments, and the force of the presumption is that its officers exercised the power rightly in the particular instance, or in the ordinary course of its business." In the absence of any evidence to the contrary, the holder of the note under the indorsement made will be presumed to be the owner thereof. Code Civ. Proc. § 1963, subds. 11, 15. Indeed, the general rule appears to be that, in the absence of mala fides, which is not claimed here, plaintiff's prima facie title by reason of possession is not subject to rebuttal so long as the maker is protected from further claim by the payment of the judgment. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036; Ellicott v. Martin, 6 Md. 509, 61 Am. Dec. 327; Marbourg v. Lloyd, 21 Kan. 545; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Hawkins v. Bank, 150 Ind. 117, 49 N. E. 957.

Appellants also contend that the evidence was insufficient to support the finding to the effect that the stock pledged as security for the payment of the note was transferred to the bank. No evidence was offered upon the subject; none was necessary. The indorsement and transfer of the note carried with it the collateral pledged as security for the payment thereof. Civ. Code, § 1084; Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626. Plaintiff's right to the collaterals pledged was not dependent upon the actual delivery thereof. His interest therein was by virtue of being the holder of the note, and if the payee of the note after transferring the same retained the collaterals, his holding was as trustee for the bank. "Where a note is secured by collaterals and the pledgee assigns the note, the fact that he does not deliver the collaterals to the assignee does not deprive the latter of his interest under or title to them, because the pledgee, after selling the note, holds the collaterals as agent or trustee for his assignee." Am. & Eng. Encyc. of Law, vol. 22, p. 879. Conceding that the transfer of the note was not sufficient evidence of the transfer of the collateral, nevertheless, the finding, if unsupported by the evidence, is harmless.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The courts refused to permit defendant Nofziger to offer evidence in support of a counterclaim filed with his answer, wherein it was alleged the note was given in settlement of a sum appearing to be due from him in a certain transaction had with the Consolidated Lumber Company, but through mistake and inadvertence the amount specified therein was $2,700 in excess of the sum actually due. There was no prejudicial error in the ruling. Conceding the facts alleged in the pleading to be sufficient to constitute a counterclaim against the Consolidated Lumber Company, nevertheless, defendant could not avail himself of such defense in this action as against plaintiff, for the reason that the note having been transferred to the bank before maturity for full value, it was necessary in order to constitute a counterclaim against plaintiff to allege additional facts showing that the bank took the note with notice of existing equities. It is not alleged that plaintiff or the bank had notice of the facts set up in the counterclaim, nor are any facts alleged therein showing want of good faith on the part of the bank in the purchase of the note. "The general rule is that absence of consideration or a failure of consideration is available as a defense in a suit by an assignee of the instrument only by specially pleading the same and showing by additional allegations why the instrument is subject in his hands to the defense, as, for instance, that the assignee is a holder with notice." Encyc. of Plead. & Prac. vol. 14, p. 641. In the absence of an allegation that the bank had notice of the facts set up in the pleading at the time the note was transferred to it, a counterclaim based upon a partial failure of consideration constituted no defense to the action, and, hence, no evidence was admissible in support thereof. Hancock and Mills v. Hale, 17 Fla. 808; Malsch v. Heller (Tex. Civ. App.) 37 S. W. 384; Gee v. Saunders, 66 Tex. 333, 1 S. W. 272.

After the evidence was closed, the court, without notice to defendants, permitted plaintiff to amend his complaint to conform to the evidence introduced upon the trial, it being stipulated that the allegations of the amendment should be deemed denied. Sections 469, 470, Code Civ. Proc. There was no abuse of discretion on the part of the court in allowing the amendment. Upon the trial evidence had been offered as to the subject-matter of the allegations contained therein. Under the circumstances, it would have been idle to have required notice thereof to defendants. Maionchi v. Nicholini, 1 Cal. App. 690, 82 Pac. 1052; San Joaquin Valley Bank v. Dodge, 125 Cal. 77, 57 Pac. 687. Moreover, it clearly appears that in no event, conceding the alleged error, were the substantial rights of defendants prejudiced by the ruling.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

13 Cal. App. 621

D. I. NOFZIGER LUMBER CO. et al. v. SOLOMON et al. (Civ. 813.)

(Court of Appeal, Second District, California. June 18, 1910.)

1. Mechanics' Liens (§ 104*)—Contracts to Prevent Liens—Requisites—Retention of Money.

Retention of 20 per cent. of the contract price of a building is not substantial compliance with Code Civ. Proc. § 1184, requiring retention of 25 per cent. in order to defeat attachment of mechanics' liens; and under a written contract providing for insufficient retention the owner cannot show an actual retention of the required amount, if it was not revealed to the lien claimants.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 104.*]

2. Mechanics' Liens (§ 154*)—Verification—Purpose.

The purpose for requiring verification of mechanics' lien claims is to show good faith in filing them and prima facie support for the purpose of giving notice, and not to prove the lien on attempt to enforce it.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 261–267; Dec. Dig. § 154.*]

3. Mechanics' Liens (§ 281*)—Claims as Evidence.

A mechanics' lien claim introduced in evidence does not prove its contents, but establishes giving of the required notice.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 281.*]

4. Evidence (§ 325*)—Claims as Evidence—"Public Record."

A mechanics' lien claim sufficiently signed to entitle it to be filed, and filed, is admissible in evidence as a "public record" under Code Civ. Proc. § 1894.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 325.*

For other definitions, see Words and Phrases, vol. 6, p. 5818; vol. 8, p. 7773.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. TRIAL (§ 83*) — OBJECTIONS TO WRITTEN EVIDENCE—SUFFICIENCY.

When an objection is made that sufficient foundation has not been laid for the introduction of evidence, the particulars wherein the foundation is insufficient should be specified.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–210; Dec. Dig. § 83.*]

6. EVIDENCE (§ 370*) — MECHANICS' LIEN CLAIMS—PRELIMINARY PROOF.

No proof of the genuineness of the signatures to either the claim or the verification is a necessary preliminary to the admission in evidence of a lien properly verified and filed.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 370.*]

7. TRIAL (§ 45*)—RECEPTION OF EVIDENCE—OFFERS OF PROOF—SCOPE.

An offer by a materialman, in a suit to enforce a lien, to prove his contract and the furnishing of materials thereunder, comprehends proof of the value of the materials as specified in the contract, in the absence of objection.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 45.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Consolidated actions by the D. I. Nofziger Lumber Company and others against A. Solomon and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

R. L. Horton, for appellants. Scarborough & Bowen, John F. Poole, and Schweitzer & Hutton, for respondents.

TAGGART, J. Consolidated action to foreclose mechanics' liens. Judgment for plaintiffs, and defendant owners appeal from judgment and order denying their motion for a new trial.

The record on appeal is made up in accordance with a stipulation "that no point is made on this appeal as to any pleading, nor as to any papers in the judgment roll, in said actions, except as herein mentioned," and consists of the findings and judgment and a bill of exceptions. The questions presented for consideration are: (1) Was the clause in the contract which provides for the retention of $500, instead of $625, as the final payment, the whole contract price being $2,500, a substantial compliance with the provisions of section 1184 of the Code of Civil Procedure, "that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract"? and (2) Were the original liens filed by each of the lien claimants, upon the face of which appeared a verification in the ordinary form, entitled to be introduced in evidence, without further proof that the claims were verified?

There are earlier cases which in principle, perhaps, support the argument of appellants that the contract shows a substantial compliance with the statute. These declarations were due to the failure of the courts to recognize the change wrought in the law relating to mechanics' liens by the adoption of the Constitution of 1879. There was no special provision in the Constitution of 1849, or the amendments thereto, for a mechanics' lien law. The law was therefore entirely the creature of statute, and it was during this period that our present lien law was enacted. Being continued in force so far as consistent with the provisions of the Constitution of 1879, by the express terms of section 1 of article 22 of that instrument, the courts accepted it as the means provided by the Legislature in response to the constitutional mandate that "the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens," no new procedure having been provided. Germania, etc., v. Wagner, 61 Cal. 349. The phraseology of the law, which in all of its provisions implied that the lien was of legislative creation, was not revised to meet the change caused by the adoption of section 15 of article 20 of the Constitution of 1879, and was and still is, grammatically at least, out of harmony with the view that the right of lien is due to the provision of the Constitution that "mechanics, materialmen, artisans and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The recognition of the constitutional origin of the right and the true relation of the statute is much clearer in the later cases, it being said of the clause here under consideration, by Justice Henshaw in Hampton v. Christensen, 148 Cal. 729, at page 737, 84 Pac. 200, at page 203: "Every provision of the laws which the Legislature may enact must be subordinate to and in consonance with this constitutional provision. It will be noted that, in framing these laws, primarily designed for the protection of materialmen and laborers, the Legislature has seen fit to reserve for the use of these lien claimants but one of the payments. After providing that no payment shall be made until the commencement of the work, it sets aside a fund amounting to 25 per cent. of the contract price, to be held for 35 days after the completion of the building, and this fund, in case of a valid contract, is practically the only money available to meet the demands of lien claimants. Whatever may be said of other payments, this amount of money cannot lawfully be depleted or reduced to the injury of any such claimant. If it could be, it would be setting at naught the constitutional provision granting a lien for the full value of the labor done or material furnished." See, also, Stimson Mill Co. v. Nolan, 5 Cal. App. 754,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

91 Pac. 262; Goldtree v. San Diego, 8 Cal. App. 505, 97 Pac. 216; L. A. Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414, 420. Considered in this light the statutory provisions as to the terms, form and recording of the contract become in effect a means provided whereby the owner may place some limit upon the liability of his property to be entirely taken to satisfy the constitutional lien. As said in the Hampton-Christensen Case, the law accords the owner ample opportunity to protect himself by providing in the contract for as large a reserved payment as is necessary for every emergency. The Legislature has certainly gone as far in the protection of the owner as can well be expected, when it declares that 25 per cent. of the contract price is a sufficient reservation to cover the full value of the labor done and the material furnished, for which the Constitution provides a lien.

This construction of section 1184 is in accord with the decision of the Supreme Court in Burnett v. Glas, 154 Cal. 249, 97 Pac. 423, which answers the first question adversely to appellants' contention. In that case, like in the case at bar, the amount provided to be retained by the contract was only 20 per cent. of the whole contract price, and the Supreme Court says: "There was also a substantial departure from the provisions of section 1184 of the Code of Civil Procedure. * * * It has always been recognized by this court, in line with the express declaration of this section, that where there is a substantial departure in the contract from the provisions as to the times of payment and the reservation of at least 25 per cent. of the contract price for at least 35 days after completion of the building, the property is subject to liens in favor of those doing labor or furnishing materials to the same extent that it would have been had there been no contract, and the labor and materials had been furnished at the personal instance and request of the owners."

The request of appellants to be permitted to show that they actually retained the 25 per cent., notwithstanding the terms of the contract were not in accordance with the provisions of section 1184, was properly denied. They did not offer to show that the lien claimants had any knowledge of this, or how this could be made available to the lien claimants against the rights of the other party to the contract, if the contract, as they contend, is valid. Upon an issue made by them the court found that the failure to provide the proper amount in the contract was not due to a mistake of law. Section 1184 provides that by the terms of the contract 25 per cent. of the whole contract price shall be made payable, etc., and an unrevealed intention to retain or the actual retention of 25 per cent. is not a compliance with the section. Evidence of the retention of the full amount without such a provision in the contract was, therefore, immaterial.

It is not clear how the second point made by appellants is before us on the record. The bill of exceptions in the case of the plaintiff Nofziger Lumber Company reads: "Evidence was offered on behalf of the plaintiff * * * to prove the contract under which they furnished materials to the defendant J. B. Cook as contractor, and having proved their said contract with the said defendant contractor, and that they had furnished the materials thereunder, on June 18, 1908, the said plaintiff, by and through one of its attorneys, Mr. Scarborough, offered in evidence its original claim of lien. No evidence other than the lien itself was offered or introduced as to the signatures of the parties or verification thereof. Said offer was objected to by defendants" upon the grounds "that said claim of lien is incompetent, irrelevant and immaterial and no foundation laid." The concluding portion of the lien is given, showing the value of materials furnished and balance due and the name of the claimant corporation signed thereto, "By S. T. Davison." The verification is in the usual form by Davison as the vice president of the company.

That the purpose of the verification is not to prove the lien when it is sought to enforce it in the court may be conceded. The statement filed with the recorder which is required to be verified is but a notice by the claimant that he intends to avail himself of his right to a lien in the particular case. The verification of the claim by his own oath or that of some other person is required as an evidence of good faith and a prima facie support to his claim for the purpose of giving such notice only. The introduction of this claim in evidence is not to prove its contents, but to establish that notice has been given as required by law. It is entitled to admission when it is shown that it complies with the statutory requirements. If the signature and verification were sufficient to entitle it to be filed with the recorder, and it was so filed, it became a public record and thereafter became entitled to be received in evidence under the rules governing the admission of private writings which may become public records by recording under the statute. Code Civ. Proc. § 1894. The objection that "no foundation was laid" for its introduction might cover the absence of evidence in the record that the lien was recorded, but no point is made of this. When an objection is made that sufficient foundation has not been laid for the introduction of a writing or other evidence, the particulars wherein the foundation is insufficient should be specified. If the objection were limited to the grounds implied by the statement in the bill of exceptions that "no evidence other than the lien itself was offered or introduced as to the signatures of the parties or verification thereof," it was properly overruled. No proof of the genuineness of the signatures to either the claim or the verification is a necessary preliminary to the admission in evidence of a lien properly verified and filed. The offer of the plaintiff was to prove the contract and the furnishing of materials thereunder. In the absence of any objection, this seems to include proof of the value of the materials as specified in the contract. The record as to the other judgment lien plaintiffs is substantially the same as the record in the Nofziger Case.

No error appearing in the record, the judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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13 Cal. App. 662

SHEER v. HOYT et al. (Civ. 817.)

(Court of Appeal, Second District, California. June 22, 1910.)

1. Corporations (§ 121*)—Stock—Rescission—Fraud.

Where a complaint to rescind a sale of stock of a corporation organized to sell mining machinery alleged that misrepresentations were made as to the character of the assets of the corporation, and as to the mechanical fitness and productive capacity of the machine, which constituted its sole source of income, it was not objectionable as alleging misrepresentations as to mere matter of opinion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

2. Fraud (§ 11*)—Deceit—Opinion.

Matters which might otherwise be expressions of opinion when stated as accomplished facts by one of the parties to the contract, and accepted and relied on by the other as such, may become the basis of an action for fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

3. Exchange of Property (§ 7*)—Fraud.

Where a husband induced plaintiff to convey certain real estate to his wife in exchange for certain corporate stock by false representations, the wife did not become a bona fide purchaser of the property for value; the court having further found that the conveyance was made for the benefit of the husband.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 12-14; Dec. Dig. § 7.*]

4. Corporations (§ 121*)—Sale of Stock—Rescission—Fraud—Evidence.

In an action to rescind a sale of corporate stock, evidence *held* to sustain a finding that the sale was induced by false representations, and that plaintiff was induced to enter the contract by reason of such misrepresentations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

5. Corporations (§ 121*)—Sale of Stock—Relevancy of Evidence.

Where, in an action to rescind a sale of corporate stock for false representations, the witness for defendants had testified in his direct examination that the machine manufactured by the corporation, which was represented to be perfect and feasible for its purpose, was defective in certain parts, a question as to whether or not, considering the principle on which the machine was constructed, the witness considered it a perfect one when he first saw it, was irrelevant; the representation being that the machine was perfect as a matter of practical demonstration, and not that it was theoretically perfect, though mechanically a failure.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Emma L. Sheer against F. J. Hoyt and another. Judgment for plaintiff, and, from a judgment denying defendants a new trial, they appeal. Affirmed.

Campbell & Moore, for appellants. Cryer & Tuttle, for respondent.

TAGGART, J. Action to rescind contract to purchase stock in corporation organized to manufacture mining machinery and operate same on a royalty; also to procure return of real property conveyed in part payment. Defendants by way of counterclaim seek to recover balance of purchase price of stock evidenced by writing in form of a promissory note payable on demand after such stock shall reach a salable value of 50 cents per share. Judgment was for plaintiff, and defendants appeal from the judgment and an order denying their motion for a new trial.

The trial court found, in accordance with the allegations of the complaint, that plaintiff made a contract with the defendant F. J. Hoyt to purchase 20,000 shares of the stock of the Hoyt Mining Machinery Company for $5,000; that she conveyed the lot of land mentioned above to A. M. Hoyt, wife of said F. J. Hoyt, which conveyance was accepted as the first payment on said stock, and gave her note for $3,000, in the form above stated, to F. J. Hoyt for the deferred payment. The court also found the deed was so made to A. M. Hoyt at the direction and for the benefit of F. J. Hoyt; that to induce plaintiff to purchase said stock and to make such conveyance F. J. Hoyt represented to her that the "Hoyt Ball Amalgamator" (which was practically the sole asset of the corporation whose stock she was buying) was a machine that would effectually and economically abstract and collect from gold-bearing dirt and gravel the finest particles of gold, to wit, flour gold; that said machine had passed the experimental stage and was a perfected machine; that nothing remained to be done by said corporation but to manufacture and market its machines; that these representations were the material inducements which led plaintiff to purchase the said stock; that they were false and untrue; that she relied and acted upon them and had no knowledge herself of mining machinery. It is contended in support of this appeal that these findings are unsupported by the evidence and that the complaint fails to state a cause of action.

The complaint is sufficient against the attacks made upon it. An allegation which states that misrepresentations were made as to the character of the assets of a corporation, and the mechanical fitness and productive capacity of the machine which constitutes its sole means of income, must be regarded as alleging something more than a mere opinion as to the value of an invention, or the market value of the stock of the corporation. The representations made were not statements of what the machine in question might be expected to do, but of things which it had done and was capable of doing. Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract and accepted and relied upon by the other as such may, and often do, become the basis of actions for fraudulent misrepresentations. Johnson v. Withers, 9 Cal. App. 52, 98 Pac. 42; Pomeroy on Equity Juris. (3d Ed.) § 878, p. 1562. The conveyance of the title to the real property to Mrs. Hoyt does not entitle her to any of the rights of a bona fide purchaser for value, or justify her in retaining the property obtained from plaintiff, if it were obtained by means of the fraudulent misrepresentations found by the court to have been made by her husband. The finding of the court that this conveyance was made for the benefit of F. J. Hoyt has support in the circumstances of the case and the evidence in the record. If the court had found the statement of F. J. Hoyt, when on the stand—"I think I used Mrs. Hoyt's stock in making the transaction; that was how it happened to be made to Mrs. Hoyt."—to be true, and accepted this as showing that the stock which was sold belonged to Mrs. Hoyt, it must also have reached the conclusion that she was bound by her husband's acts and representations made in effecting the sale. Authorities considering the rights of purchasers in good faith from vendees obtaining title to real property by fraudulent representations have no application here. Mrs. Hoyt is not a purchaser from the vendee. She is either the vendee or holds title for the benefit of the vendee. The court found her to be the latter, and there is evidence to sustain that finding. The answer admits that the conveyance was made to her by virtue of the transactions connected with the sale of the stock, and pursuant to the agreement of plaintiff to convey the property to F. J. Hoyt, and, other than in the above-quoted statement, it nowhere appears that there was any consideration moving from her for such conveyance. This issue as here made was not specially presented at the trial, the parties apparently resting principally upon the pleadings in this respect.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The finding that the representations of F. J. Hoyt were untrue is sustained by the testimony of the witness Higby. This witness testified, not only that the machine was not as represented, but that Hoyt himself had admitted this to be the case. He also testified, without objection, to an effort of Hoyt to induce him to join in furthering other sales based upon an improved machine. In speaking of the improved machine Hoyt said: "This is a good looking machine. It has got lots of wheels and lots of screws. It will sell, won't it?" As an inducement to the witness to join in this venture, Hoyt said to him: "We want to make some money, don't we?" If the new and improved machine was open to the comment made by Hoyt, it might well be inferred that the unimproved one failed to justify the statements made by him to plaintiff in regard to it. This manner of speaking of the improved machine and the conversation of Hoyt in this connection gave color to all of the projects to sell stock based upon the value of his inventions.

Appellant's other assignment of insufficiency of the evidence to support a finding of the court, to wit, that plaintiff was induced to enter into the contract by the representations of Hoyt, is equally unsupported by the record. The evidence abundantly shows that the moving inducement to plaintiff was that defendant was the inventor and the corporation the owner of a perfected machine which it had been demonstrated would successfully take out the fine flour gold from the dirt and the gravel, and that this machine had advanced beyond the experimental stage. These statements were untrue, and plaintiff had neither knowledge, experience, nor independent advice by which to determine their truth or falsity when she purchased the stock. That she saw the machine in Los Angeles is in no way inconsistent with this, and does not show, as appellants contend, that she was fully acquainted with the condition of the company and its affairs at the time she bought. The financial condition of the corporation was not the inducement presented to her when solicited to purchase the stock. It was the ability of the machine, which the corporation owned, to do certain work that gave the value to the shares of stock purchased, and as to this she relied upon Hoyt's representations.

We see no prejudicial error in the court's sustaining the objection of plaintiff to the question propounded by defendants to the witness Deck. This witness, who was called on behalf of defendants, had testified in his direct examination that the machine was defective in certain respects. Notwithstanding this, defendants asked him whether or not, considering the principle on which the machine was constructed, he considered the machine a perfect one when he first saw it. The court sustained an objection to this question, which is assigned as error. The representation to the plaintiff was that it was a perfected machine as a matter of practical demonstration, and not that it was theoretically perfect, although mechanically a failure. The answer called for covered no issue in the case and the ruling of the court was correct.

No prejudicial error appearing in the record, the judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

13 Cal. App. 582

DAWSON v. SUPERIOR COURT OF KINGS COUNTY et al. (Civ. 854.)

(Court of Appeal, Second District, California. June 13, 1910.)

1. STATUTES (§ 90*)—SUBJECT TO GENERAL LAWS—MUNICIPAL AFFAIRS—WHAT CITIES ARE EXCEPTED.

Under Const. art. 11, § 6, as amended in 1896, providing that cities and towns shall not be created by special laws, but shall be subject to and controlled by general laws, but two classes of municipal corporations are relieved from the control of general law in municipal affairs, those cities organized by special legislative charter prior to the adoption of the Constitution of 1879, and cities operating under a "freeholder's charter," but other cities organized under the municipal corporations act, are subject to general laws even in municipal affairs.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98–100; Dec. Dig. § 90.*]

2. COURTS (§ 472*)—CONFERRING JURISDICTION —EXCLUSIVE JURISDICTION IS NOT TO BE INFERRED.

Where jurisdiction is conferred upon a court or a body to exercise judicial fuctions, exclusive jurisdiction is not to be inferred, except where the language is so plain as to show the legislative intent in that regard.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1200; Dec. Dig. § 472.*]

3. ELECTIONS (§ 275*)—ELECTION CONTESTS—COMMON COUNCIL—CONCURRENT JURISDICTION WITH SUPERIOR COURT.

The jurisdiction given common councils of cities of the sixth class organized under the municipal corporations act to determine election contests is not an exclusive jurisdiction, but is concurrent with that of the superior court.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 250–256; Dec. Dig. § 275.*]

John H. Dawson against the Superior Court of the County of Kings, State of California, and John G. Covert, as judge thereof. On application for writ of prohibition. Writ denied.

Maurice E. Power, Dixon L. Phillips, and J. L. C. Irwin, for petitioner. H. Scott Jacobs and Choynski & Humphreys, for respondents.

PER CURIAM. This application as presented is based upon the theory, first, that cities organized under the municipal corporations act are not subordinate to general law with reference to municipal affairs; and, second, that the general municipal corporations act, which by its terms confers jurisdiction upon the city councils of the respective cities organized thereunder to hear and determine election contests, is the exclusive jurisdiction in that regard. With neither of these propositions do we agree.

Our Supreme Court in Ex parte Helm, 143 Cal. 556, 77 Pac. 453, has construed section 6 of article 11 of the Constitution of this state, as amended in 1896, to the effect that but two classes of municipal corporations are relieved from the control of general law in municipal affairs, these being those cities organized by special legislative charter prior to the adoption of the Constitution of 1879, and cities operating under what is denominated a freeholder's charter, that other cities organized and operated under the municipal corporations act are subject and subordinate to general laws even in municipal affairs. As to the jurisdiction of the common council to hear and determine election contests, we are of opinion that it is but a jurisdiction concurrent with the superior court conferred by the Constitution and laws of the state. A long line of decisions tends to establish the proposition that where jurisdiction is conferred upon a court or a body to exercise judicial functions exclusive jurisdiction is not to be inferred, and is only to be so regarded where the language is so plain as to show the legislative intent in that regard. We see nothing in the municipal corporations act which confers upon common councils of cities of the sixth class organized thereunder authority to hear and determine election contests as in any sense conferring exclusive jurisdiction.

Application for writ denied.

(158 Cal. 73)

DAWSON v. SUPERIOR COURT OF KINGS COUNTY. (S. F. 5,614.)

(Supreme Court of California. June 23, 1910.)

COURTS (§ 207*)—APPELLATE COURTS—ORIGINAL JURISDICTION—WRIT OF PROHIBITION.

Where an application for writ of prohibition is denied by the District Court of Appeal on the merits, the Supreme Court will not thereafter entertain an application for the writ, since under the Constitution the district court has concurrent jurisdiction with the Supreme Court in such cases, and hence that decision would be a bar to the application; the only way of obtaining the intervention of the Supreme Court being by a transfer of the cause to the Supreme Court for reconsideration.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 512; Dec. Dig. § 207.*]

In Banc. Petition in the Supreme Court by John H. Dawson against the Superior Court of the County of Kings for a writ of prohibition. Writ denied.

Dixon L. Phillips, J. L. C. Irwin, Maurice E. Power, and Robert W. Miller, for petitioner. H. Scott Jacobs and Choynski & Humphreys, for respondent.

PER CURIAM. It appears in this case that an application for a writ of prohibition against the respondent was made to the District Court of Appeal of the Second District on May 23, 1910, that an alternative writ was issued therein, and that on June 13, 1910, the said district court gave judgment denying the application on its merits (110 Pac. 479). Under the Constitution the district court has concurrent jurisdiction with the Supreme Court in original proceedings of this character. A judgment by that court is therefore an adjudication of the matters set forth in the petition. If this court should entertain a distinct application of the same character, the petitioner would be met by an answer alleging the former adjudication in the district court, and that adjudication would be a bar. In such cases, if the applicant desires the intervention of this court in the matter, the only effectual method of obtaining it is by application for a transfer of the case to this court for a reconsideration and decision. If the district court had decided the case without an adjudication upon the merits, perhaps its judgment would not be a bar, but petitioner's application shows that the adjudication of that court was a decision upon the merits.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

For these reasons, the application for a writ is denied.

(158 Cal. 160)

McDONALD v. CURRY, Secretary of State, et al. (S. F. 5,644.)

(Supreme Court of California. July 28, 1910.)

1. Elections (§ 126*) — Primary Election Law — Misconduct of Officers — Correction—Courts—Jurisdiction.

St. 1909, c. 405, § 27, provides that, when it appears by affidavit to the Supreme Court or District Court of Appeal or superior court of a proper county that an error has occurred or is about to occur in the placing of any name on an official primary election ballot, that any error has been or is about to be committed in printing such ballot, or that any wrongful act has been or is about to be done by any primary election officer, or that any neglect of duty has occurred or is about to occur, such court shall order the person charged forthwith to correct the error or show cause. *Held*, that such section conferred concurrent jurisdiction on such courts to correct by a summary proceeding any misconduct of the officers charged with the duty of carrying out the provisions of the law, but that it was essential that the act objected to constituted a violation of the duty enjoined or a refusal to perform such duty.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 126.*]

2. Elections (§ 126*)—Primary Election—Nomination by Petition—Competency of Signers.

Under the primary election law (St. 1909, c. 405, § 4), providing that, where nominations are by petition, the county clerk or register shall compare the signatures with the registry list and disregard any name appearing on such paper which is not on the court register in his office, a county clerk is under no duty to compare signers of different petitions for the same office to see that a signer of one petition has not subsequently signed another, and is for that reason disqualified under the provision forbidding each signer of a nomination paper to sign another for the same office.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 126.*]

3. Elections (§ 126*)—Primary Elections—Nominating Petitions—Validity.

Under the primary election law (St. 1909, c. 405), providing for nominations by petition, and forbidding each signer of a nomination paper to sign another for the same office, but providing only a penalty for violation of its provisions, a nomination petition was not invalid so as to deprive the candidate of his right to have his name entered on the official primary ballot by reason of the fact that so many signers of his petition had also signed another petition for the same office, so that their rejection would leave less than the required number of petitioners to sustain his petition.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 126.*]

In Bank. Application by Henry M. McDonald for a writ of mandamus against Charles F. Curry, Secretary of State, and others. Petition denied.

Sidney M. Van Wyck, Jr., for petitioner.

BEATTY, C. J. This is an application based upon the provisions of section 27 of the recently enacted primary nomination law. St. 1909, p. 691. The prayer of the petition is for an order directed to the defendants Curry and Keyes requiring them and each of them to desist from placing the name of defendant Martin Bekins upon the official primary ballot as candidate for the Democratic nomination for state senator from the Thirty-Eighth senatorial district. The allegations of the petition show that the petitioner, McDonald, possesses all the qualifications entitling him to hold said office, and that he is a candidate for said nomination; that on July 14th he filed with defendant Keyes, as county clerk, certain petitions nominating him as such candidate, and that said Keyes on the same day certified that of the names signed to said petitions 460 were names of voters properly registered at the date of signing; and that they constituted more than the requisite 3 per cent. of the Democratic vote cast at the last presidential election. It is further shown that said Martin Bekins is also a candidate for the same nomination, and that on July 12th he filed petitions nominating him as such candidate; that on July 14th said Keyes certified that the number of names signed to said petitions was only 154 registered voters, but that they were more than 3 per cent. of the Democratic vote in said district at said last election. Both of these certificates, together with the nominating petitions, were forwarded to and duly filed in the office of the Secretary of State. It is alleged that of the 154 electors whose names are signed to the Bekins petitions 96 were disqualified by reason of the fact that they had previously signed for this petitioner, and consequently that said Bekins had only 58 qualified signers where 130 were necessary to entitle him to a place on the primary ballot. Upon these grounds, the petitioner lodged with the defendant, Curry, a protest against the filing of the Bekins petitions, but his protest was disregarded, and said defendant is about to issue a certificate to the effect that said Bekins has filed in his office a regular and proper nominating petition, etc. And it is alleged that the defendant Keyes threatens to, and will, unless restrained, place the name of Martin Bekins on the Democratic primary ticket as a candidate for the Democratic nomination for state senator from the Thirty-Eighth district, thereby involving the petitioner—the only legitimate candidate—in a costly and unnecessary contest for a nomination.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 27 of said act (St. 1909, p. 709) reads as follows: "Whenever it shall be made to appear by affidavit to the Supreme Court or District Court of Appeal or superior court of the proper county that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, that any error has been or is about to be committed in printing such ballot, or that any wrongful act has been or is about to be done by any judge or clerk of a primary election, county clerk, registrar of voters in any city and county, canvassing board or any member thereof, or other person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur, such court shall order the officer or person charged with such error, wrong or neglect to forthwith correct the error, desist from the wrongful act or perform the duty, or forthwith show cause why he should not do so. Any person who shall fail to obey the order of such court shall be cited forthwith to show cause why he shall not be adjudged in contempt of court."

It will be seen that by this section a very ample concurrent jurisdiction has been conferred upon this court, the District Courts of Appeal, and the superior courts to correct by a summary proceeding any misconduct of the officers charged with the duty of carrying out the provisions of the law, and the first question to be considered is whether the Secretary of State or the county clerk has done anything contrary to law or omitted to do anything that the law enjoins upon him as a duty, or whether he is intending or threatening to do what the law forbids. We cannot see that either of the two officers has done or neglected to do anything that the law enjoins on the one hand, or forbids on the other. Assuming the truth of all that is alleged in the petition, they have simply observed the statutory requirements. It is true that "each signer of a nomination paper" is forbidden to sign another for the same office, but it is no part of the duty of the county clerk or registrar to compare the signatures to the different nomination petitions for a particular office to see whether the same person has signed more than one. All he is required to do is to compare the nomination papers with the registry list, and all the discretion conferred upon him is to "disregard any name appearing upon such paper or papers which is not on the great register in his office." If the papers answer this test, he is required in case of a state or congressional or district or legislative office to forward them promptly to the Secretary of State, with his certificate to that effect. St. 1909, § 4, p. 694. If, instead of doing this, he should assume to purge a set of nomination papers by throwing out those petitions signed by electors disqualified by reason of the fact that they had first signed for another candidate, he would be usurping a power, and neglecting a duty at the same time. No such duty being imposed, it cannot be imported into the law upon the ground that the Legislature must have so intended. And, besides, there are various considerations upon which the Legislature may have omitted ex industria any provision for visiting upon candidates the faults of electors. No great harm is done if a candidate who has in good faith secured the signatures of a sufficient number of electors to entitle him to a place on the primary ballot should be allowed that advantage notwithstanding the fact that enough of his signers were disqualified by signing for other candidates to deprive him, if their petitions were disregarded, of the requisite percentage of his party vote. The principal reason for limiting as the statute intends to limit the number of candidates whose names are to be printed on the ballot is to prevent the appearance of so many names as to make it confusing to the voters or too unwieldy for use, and it could rarely, if ever, happen that either result would be brought about by the violation on the part of electors of the inhibition against signing more than once for the same office. Aside from the inconvenience to be apprehended from a contingency which, in view of the penal consequences of a violation of the law, is so remote, every consideration of policy and justice is in favor of having printed on the ballot the names of all candidates who have in good faith complied with the conditions upon which the privilege depends. If the names of disqualified electors are signed to an essential number of their papers, they have no means of discovering the defect until too late to remedy it.

Whatever the clerk or registrar may be able to discover by a comparison of the several papers after they have been filed, the candidate has no means of discovering such defects except by comparing his petition with the register of voters, and, if by that test it is sufficient, it is scarcely just that he should be excluded from a place on the ballot by reason of a latent defect in his nomination papers wholly due to the misconduct, or possibly to the deliberate fraud, of the very electors whose previous petitions are to be counted for his competitor. And, if it is not just to the candidate that he should pay the penalty of a fault not his own, it is equally certain that no public policy requires its infliction. With his name on the primary ballot he only competes on perfectly fair and equal terms with others who are in the same advantageous position. If he is defeated, no harm is done. If he is nominated, it proves that he is the candidate having the largest following in his party, and that by his nomination the purpose of the law has been accomplished, when the purpose and policy of the law might have been subverted by the omission of his name from the official ballot.

Whether upon these or other considerations the Legislature may have deliberately omitted to provide any other safeguard than the penal clauses of the statute against the minor and improbable inconvenience of having here and there an extra name printed on the ballot, or whether the omission was due to oversight, the result is the same. Under the law the Secretary of State and the several county clerks and registrars are invested with merely ministerial functions, and their duties in respect to the preparation of the official ballots to be used at the primary election are exactly prescribed. They are only obeying the law in placing the name of Bekins on the ballot, and they cannot be commanded to do otherwise. No harm to the public and no wrong to any individual results from this conclusion—freedom of choice on the part of the electors is enlarged instead of being curtailed, and the inconvenience involved, if any, is trifling.

Petition denied.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; SLOSS, J.

158 Cal. 175

KINLEY v. THELEN et al. (L. A. 2,465.)

(Supreme Court of California. Aug. 2, 1910.)

1. ACCOUNT STATED (§ 6*)—DUTY TO ACCOUNT—COMPLAINT.

Where, after an indebtedness, for which certain property had been pledged in trust for the creditor bank, had been running for a considerable time, plaintiff received from the trustee, who was the bank's cashier, a statement that there was then due the bank $6,000, whereupon plaintiff executed his note for that amount, received a reconveyance of certain land which had been conveyed to the trustee as security and deposited certain other securities in place thereof, such transaction constituted a settlement of account between the parties as of the date thereof, precluding plaintiff, in the absence of fraud, from thereafter maintaining a bill for an accounting as to prior transactions connected with the indebtedness.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30–40; Dec. Dig. § 6.*]

2. TRUSTS (§§ 17, 18*)—PAROL TRUSTS—DUTY OF TRUSTEE.

Where plaintiff conveyed certain land to the cashier of a bank by an absolute deed subject to a parol trust that the same should be held as security for plaintiff's indebtedness to the bank, and that the land should be sold by the trustee and the proceeds applied on the debt, the trust was void for want of writing required by Civ. Code, § 852, in the absence of facts raising an implied or constructive trust, and hence the trustee was under no obligation to plaintiff to prevent a sale of the land for taxes.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. §§ 17, 18.*]

3. TRUSTS (§ 261*)—DEFAULT OF TRUSTEE—BILL.

Where a complaint against a trustee of certain land for failure to prevent a sale of the land for taxes, did not aver that the title was lost by the trustee's failure to pay the taxes and did not allege a divestiture of title as plaintiff would have been required to do if he had been seeking to establish a title in himself on the proceedings to forfeit title for nonpayment of taxes, it was fatally defective.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 261.*]

4. TAXATION (§ 809*)—TAX TITLE—PLEADING.

Whenever a tax title is specially alleged in a pleading, every fact should be averred which is required to show that each of the statutory requirements have been complied with.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 809.*]

5. TRUSTS (§ 261*)—TRUSTEE—LOSS BY TRUSTEE'S NEGLIGENCE.

Where plaintiff conveyed to an alleged trustee as security for loans a contract for the purchase of state school lands, and claimed that the trustee was negligent in permitting a foreclosure of the contract by the state for failure to pay installments of the price as they matured, a complaint alleging the recovery of a judgment of forfeiture by the state, but failing to show the date of the judgment or to contain any averment that at the time the land was reconveyed to plaintiff by the trustee the judgment of foreclosure had become final, was demurrable.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 261.*]

6. FRAUD (§ 44*)—DECEIT—COMPLAINT—LOSS.

Where plaintiff conveyed certain land to a bank cashier as security for a debt to the bank, and thereafter accepted a reconveyance in exchange for a deposit of other securities, on the alleged representation that the title reconveyed was the same as that conveyed to the cashier by plaintiff, a complaint for fraud in that the title to part of the land had been lost because of nonpayment of taxes, and that the balance had been forfeited by the state, failing to show that the title had been actually lost in such proceedings, was demurrable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 38; Dec. Dig. § 44.*]

7. PLEADING (§ 49*) — PLEDGE — SALE BY PLEDGEE—THEORY OF COMPLAINT.

Where a pledgor of certain corporate stock as security for a debt sued for the alleged conversion thereof, but the complaint did not clearly show whether plaintiff relied on a sale of the stock for less than its real value, or on a pretended sale thereof by the pledgee to itself, the complaint was demurrable under Code Civ. Proc. § 426, requiring that the complaint shall contain a statement of the facts constituting the cause of action in ordinary and concise language.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 107–111; Dec. Dig. § 49.*]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Joseph M. Kinley against E. Thelen and another. From a judgment in favor of defendants after the sustaining of a demurrer to the complaint, plaintiff appeals. Affirmed.

Hammack, Noyes & Hammack, for appellant. Haines & Haines and Max Thelen, for respondents.

SLOSS, J. Demurrers interposed by defendants to plaintiff's second amended complaint, as amended, were sustained, and, leave to further amend not being asked, judgment was given in favor of defendants. The plaintiff appeals from the judgment.

The complaint in question, which is somewhat voluminous, may be summarized as follows. The defendant People's State Bank of National City is a banking corporation doing business in San Diego county, and the defendant Thelen a director of said bank and its cashier and general managing officer. From 1891 to 1906 plaintiff was the owner and holder of 60 shares of the capital stock of the bank and a depositor therein. He was the owner in fee of certain lands, to wit, "320 acres in Uvalde county, Texas, in the Jonathan Golden survey made in 1848," which land he is unable to describe more definitely; of an interest in a described 80-acre tract of land in San Diego county, holding a certificate of purchase thereof from the state of California and having made partial payment thereon; and also of four other tracts of land (undescribed) in San Diego county, aggregating 310 acres. About the year 1892 it was agreed between plaintiff and the defendant bank that the bank should from time to time make loans to plaintiff upon the security of said 60 shares of stock and certain notes and demands owned by plaintiff, as well as the real property above mentioned. It was agreed by plaintiff, Thelen, and the bank that Thelen was to be a trustee of both the bank and plaintiff, and the personal property was to be received by him as such trustee, and deeds of the real property should be executed to him as such trustee, but be absolute in form. It was further agreed that Thelen should, as occasion might offer, sell said real estate and apply the proceeds to the payment of plaintiff's indebtedness, and that any sums collected on the notes and demands due the plaintiff should be applied in the same way. It was also agreed that out of the funds so received by Thelen as trustee he should pay the taxes on all said lands and the deferred payments on the 80-acre tract of land in San Diego. Said agreement was made on the part of said bank by Thelen as its cashier and general managing officer, and the said bank in pursuance of said agreement made the loans as set out. The agreement on the part of the bank to loan said sums and of Thelen to act as trustee, and of the plaintiff to deliver said collaterals and to receive said sums, were in parol. Thereupon the plaintiff executed and delivered to Thelen conveyances of all the real estate referred to, and plaintiff also delivered to Thelen the notes and demands aforesaid duly indorsed and transferred so as to enable him to collect the same. At the time of making said deeds and turning over said notes and demands plaintiff made a statement in writing addressed to Thelen as cashier of said bank, stating, in substance, that plaintiff turned over said deeds and said notes and accounts as collateral in conformity with the agreement aforesaid. With the exception of said written memorandum the agreement with Thelen and the bank was in parol.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Thereupon the said bank turned over to plaintiff a large sum of money which plaintiff alleges on information and belief to have been about $6,000, and at the same time plaintiff executed and delivered to the bank a note for the sum received by him. Under the agreement divers sums were collected by Thelen on said notes, accounts, and claims, and from time to time certain of the real estate was sold by him as such trustee, with plaintiff's consent, until all of the tracts comprising the undescribed 310 acres in San Diego county were sold, and the proceeds received by Thelen for the bank. Plaintiff is unable to state the amounts so received from collections and sales, nor the amounts applied on his indebtedness. Said collections by Thelen and the bank continued for many years until about 1905, plaintiff's indebtedness varying in amount from time to time and credits thereon being made, and new notes being given from time to time "representing the changed accounts of said indebtedness from plaintiff to the bank."

The complaint contains allegations to the effect that plaintiff removed from San Diego to San Francisco in 1904 taking with him his papers and books of account, all of which were destroyed by fire in 1906, for which reason plaintiff is unable to give the details of his indebtedness to the bank, but alleges, on information and belief, that the loans made to him at various times amounted in the aggregate to $12,000, upon which credits had been made for collections and sales, until in March, 1905, there was due from plaintiff to the bank the sum of about $4,800. It is averred that the proceeds of the sales of the 310 acres in San Diego county were properly accounted for by the trustee and the bank, as were the sums collected on the notes and accounts transferred to Thelen.

About March, 1903, Thelen, "trustee, cashier, and managing officer as aforesaid, and in his capacity as trustee, and as cashier and managing officer of said bank," informed the plaintiff that he had not been able to sell the Texas land nor the 80 acres of San Diego land, and that he still held the title to the same as conveyed to him by the plaintiff, and requested plaintiff to take a conveyance of said tracts and to place other securities in their place with the bank and the said trustee. The plaintiff, believing and relying upon such statement, took a quitclaim deed from Thelen conveying said tracts to him (the plaintiff), and delivered to Thelen as such trustee 10 bonds of the Mexican Anthracite Coal Company, a corporation, of the value of $5,000, to be held by such trustee as security for the indebtedness then unpaid. The plaintiff also executed his renewal note for $6,000, the amount of his remaining indebtedness, as represented by Thelen. At the time the two said tracts of land were so deeded to plaintiff, Thelen, as such trustee, cashier, and general managing officer, represented to plaintiff that the title thereto was still vested in said Thelen, and that by such new conveyance plaintiff was being reinvested with the same title he had held before deeding the lands to Thelen, and plaintiff accepted and received said deed in reliance upon said representations.

The plaintiff, however, avers the fact to be that, while said Texas land had been held by Thelen as trustee, Thelen and the bank "had failed and neglected to pay the state and county taxes thereon due the county of Uvalde and the state of Texas, and that on account of said neglect and failure the state of Texas had, by virtue of and under its revenue laws, caused the same to be sold for several years' delinquent taxes, which said defendant failed and neglected to pay as aforesaid; and the said defendant failing and neglecting to pay said taxes, or to redeem said land from said sales, tax deeds had been made and delivered by the proper officers of the state of Texas to the purchasers at such tax sales, and title to the land irrevocably passed under such tax sales and tax deeds and the plaintiff and said defendant had been finally divested of all interest and title in and to said Texas land." It is alleged, upon information and belief, that the taxes were assessed and levied upon said lands in the years between 1894 and 1900, and that said taxes were unpaid and became delinquent, and the land was thereupon, in the year 1899, sold by the tax collector of Uvalde county, Tex., for such delinquent taxes, and that no redemption was made, whereupon a deed was issued to the purchaser at such sale, all of which was long prior to the reconveyance by Thelen to plaintiff, and all of which was well known to said bank and said Thelen at the time of said reconveyance, and was not known to plaintiff. It is alleged that said Texas land was at all the times mentioned in the complaint of the value of $6,400.

It is further averred, upon information and belief: That while the 80 acres of San Diego land was held by Thelen as trustee the said bank and Thelen failed and neglected to pay each year the state and county taxes due thereon, and failed to make the payments accrued and accruing to the state of California on said land according to the terms of said certificate of purchase. The sum of $120, it is averred, was due on said land at the time of the conveyance by plaintiff to Thelen as trustee. After said conveyance certain payments became due and delinquent upon said contract of purchase, and Thelen as such trustee, although having full knowledge of the maturing of said payments, failed and neglected to make any of said payments, and by reason thereof the contract became delinquent and subject to foreclosure. "That afterwards, by an action in the superior court of San Diego county against the said land and against the said Thelen as trustee and as the owner and holder of said land, the interest of the said Thelen and of the plaintiff was foreclosed and sold, and the title reverted and revested in the state of California. That the foreclosure was by the usual suit in equity provided by law in such cases. That the complaint was duly filed and the summons issued and served upon the said Thelen, and he having failed to answer or plead to such complaint, such proceedings were had that a decree of foreclosure was made and entered by said court. That said land was sold at a judicial sale according to the decree of said foreclosure and was bid in by the state," whereupon the title became entirely divested from the plaintiff and the defendants and completely vested in the state of California.

The complaint alleges that the land was a part of the school lands of the state, and the foreclosure was in the manner provided by law for the foreclosure of delinquent contracts for the sale of school lands, and that the facts of such foreclosure were well known to the defendant and not known to plaintiff. The plaintiff had no knowledge or information that the title to said Texas land and San Diego land had been divested and lost until April, 1905, and he avers that it was well known to Thelen and the bank at the time of the reconveyance to plaintiff that plaintiff had no knowledge of said titles having been so lost and divested.

It is averred that all times the trustee had in his possession moneys arising from the sales of lands and from collections of notes and accounts sufficient to have made payments of installments and taxes on said San Diego land as they matured, and that at the time the Texas lands were sold for taxes and until tax deeds were made they had funds in hand from such collections and sales sufficient to have paid such taxes and to have redeemed from such sales. The plaintiff's interest in the San Diego land foreclosed was, at the time of the foreclosure, of the value of $800.

After the execution of the deeds of reconveyance to plaintiff there remained in the hands of the trustee the said 10 bonds of the Mexican Anthracite Coal Company and 60 shares of the capital stock of the People's State Bank, which Thelen held as collateral security for the payment of the notes made by plaintiff to the bank for $6,000 or thereabouts. At the same time and at all times up to March 8, 1908, Thelen, as such cashier, trustee, and managing officer, was empowered and authorized by plaintiff to sell said 60 shares for not less than $9,000. About April, 1906, Thelen and the bank sold and turned over to one E. D. Webster the said 60 shares of stock for the pretended sum of $6,000, and said shares were canceled and a new certificate issued in lieu thereof to said Webster. Plaintiff avers that all of said acts were done with the intent to wrongfully divest the plaintiff of his said stock, and plaintiff avers that said directors and said trustees had full knowledge that said stock had a much larger value than $6,000, but, notwithstanding this, Thelen and the bank reported to plaintiff that they had sold said shares for $6,000 and credited plaintiff with this sum only on his indebtedness. The pretended sale, plaintiff avers on information and belief, was not in good faith to said Webster, but was in fact for the benefit of said bank, and the said shares became the property of said bank. At the time the shares were pledged and delivered to the trustee the certificate for the same was in plaintiff's name and was indorsed by him in blank and the officers of the bank transferred said certificate to Webster, as plaintiff is informed and believes, and divested plaintiff of the title thereto. At the time of said transfer the stock was of the value of $10,000. It is alleged that the bank, and Thelen, as trustee, still hold the said 10 bonds of the said Mexican Anthracite Coal Company and also certain notes executed by plaintiff although the plaintiff is not indebted to the defendant bank in any sum. After the discovery by plaintiff of the foregoing facts he made demand on the bank and Thelen as trustee to return the shares of bank stock or pay him the difference between

$6,000 and the real value of the shares, and to return to him the 10 bonds of the Mexican Anthracite Coal Company or the value thereof, and to deliver to him the same title to the Texas land and the San Diego land which he had conveyed to Thelen, or to pay him the value thereof, and that a full accounting be had to plaintiff of the said trusteeship and of all the property received thereunder; that the defendants refused to do this or any of the things so demanded. The prayer is for an accounting of such trusteeship, that any balance be delivered and returned to plaintiff, that it be adjudged that the bank is chargeable with the full value of the bank stock, that the bonds of the Mexican Anthracite Coal Company or their value be returned to plaintiff, that the lands be restored to plaintiff with the same title which he conveyed by the trustee or that said trustee and bank account to plaintiff therefor, that any balance due plaintiff be paid, and in case any sum is found to be due the bank from plaintiff that said sum be ascertained and a proper decree be rendered in relation thereto. The defendants filed separate demurrers. Each of the demurrers stated the general ground of want of facts, and in addition specified a number of particular objections. Some of the more important of these will be mentioned in the course of the discussion.

The complaint contains a mass of averments having no substantial relation to any cause of action that appears. Indeed, it is difficult to extract from the extended narration of the pleading a definite idea of the cause of action which plaintiff intended to set up. The consideration of the various points may be clarified if, adopting the suggestion of one of the respondents, we first undertake to ascertain what causes of action are not stated. In the first place, the complaint does not show grounds for an accounting. While the plaintiff alleges at some length his ignorance of the various items of debit and credit arising during the earlier years of the transactions, it appears that in March, 1903, Thelen represented to plaintiff that his indebtedness was $6,000, and that plaintiff gave his note for such sum. At the same time the lands unsold were reconveyed to plaintiff, and he turned over the 10 bonds of the Mexican Anthracite Coal Company. These bonds, with the 60 shares of bank stock, remained in Thelen's hands as security, and, apparently, as the sole security, for the $6,000 note. Indeed, the plaintiff expressly avers that the trust was properly executed so far as the 310 acres of San Diego land and the notes and accounts were concerned. There is no averment that any part of the indebtedness represented by the $6,000 note has ever been paid. There appears, therefor, to be no occasion for an accounting. Plaintiff's debt was, in 1903, fixed by the agreement of the parties, and certain security for that debt was then given, or had theretofore been given. Whatever uncertainty may have existed, regarding the earlier dealings of the parties, all doubts were resolved by the giving of the last note. This transaction constituted a settlement of account between the parties and the plaintiff, after acquiescing in that settlement, will not, in the absence of a charge of fraud or mistake, be permitted to reopen questions which were then closed. No such charge is made. Furthermore, there is no allegation that the statement of Thelen concerning the amount of plaintiff's indebtedness was not, in fact, entirely correct. Nor does there appear to be any occasion for an accounting with respect to the bank's dealings with the security following the giving of the $6,000 note. The amount of damage sustained by reason of the wrongful sale of the bank stock is not unknown to plaintiff. He alleges that the shares were worth $10,000 and that they were sold for $6,000. If this sale was unauthorized, the damage was $4,000.

Again, if the intent of the pleader was to seek redress for the violation of the trustee's obligation to make the deferred payments on the San Diego school land, and to pay taxes on this and the Texas land, the complaint does not state a cause of action in this behalf. These lands were conveyed to Thelen by a deed absolute. The agreements of Thelen and the bank were, it is expressly averred, in parol. The only writing was one signed by the plaintiff. But no express trust in relation to real property is valid unless created or declared "(1) by a written instrument subscribed by the trustee, or by his agent thereto authorized by writing"; or "(2) by the instrument under which the trustee claims the estate affected." Civ. Code, § 852. The mere conveyance of the land imposed upon the defendants no duty to make payments of taxes or other claims against the land. The foundation of that duty was the agreement of trust. Such agreement, being in parol, is not enforceable in the absence of a statement of facts giving rise to an implied or constructive trust. Barr v. O'Donnell, 76 Cal. 469, 18 Pac. 429, 9 Am. St. Rep. 242; Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Hasshagen v. Hasshagen, 80 Cal. 514, 22 Pac. 294; Babcock v. Chase, 111 Cal. 351, 43 Pac. 1105; Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543. A further objection to the complaint, viewing it as one based on the failure of the defendants to protect plaintiff's title in the San Diego school lands and the Texas land, is the want of sufficient averments that the title was lost by want of payment. No injury accrued to plaintiff unless the title was divested in consequence of Thelen's neglect. It was necessary, therefore, for plaintiff to show such divestiture as fully as he would have been required to do if he had been seeking to establish in himself a title resting upon the proceedings to forfeit title for nonpayment of taxes or other dues. "Whenever a tax title is specially set forth in a pleading, it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with." Russell v. Mann, 22 Cal. 131. See, also, Himmelman v. Danos, 35 Cal. 441; Perine v. Forbush, 97 Cal. 305, 309, 32 Pac. 226. So far as the tax sales are concerned the complaint states no facts, but only conclusions of law, purporting to show the validity of the proceedings, which, as plaintiff claims, took away the title to the lands. With respect to the foreclosure of the San Diego lands at the suit of the state, the recovery of a judgment is alleged, but its date is not given, nor is there any averment that it has or had at the time of the reconveyance, become final. (This objection is made a ground of special demurrer by one of the defendants.)

The failure to properly show a loss of title furnishes, further, an answer to the claim that the complaint sets forth a cause of action for damages for the fraud committed in representing to plaintiff that the title to the Texas and San Diego lands held by Thelen was the title which had been conveyed to him. An essential part of such action is an averment of the falsity of the representation relied upon.

The only causes of action alleged, if any, are, then, one for the recovery from Thelen of the 10 bonds of the Mexican Anthracite Coal Company, held as security for a debt which has been paid, and one for damages for the wrongful sale of the 60 shares of bank stock. The latter is stated in a confused way, leaving it doubtful whether the plaintiff relies upon a sale to Webster for a sum less than the real value, or upon a pretended sale to the bank itself. The demurrers, which specify a great many objections, point out this defect. In addition, the demurrers are directed to a number of other grounds of criticism of the complaint. It will not be necessary to discuss these in detail. The analysis already made will sufficiently show that there is an almost hopeless jumble of allegations of facts, many of which are immaterial to any cause of action stated, with conclusions of law. The demurrers were clear and direct in pointing the attention of court and counsel to the uncertainties, misjoinders of causes of action, and other defects in the pleading. The complaint required radical amendment before it could conform to the Code requirement that it should contain "a statement of the facts constituting the cause of action, in ordinary and concise language." Code Civ. Proc. § 426. The original complaint had already been followed by a first and a second amended complaint, and the second had itself been amended. It appears that leave to further amend was not asked. Under these circumstances, we are satisfied that the court below was justified in sustaining the demurrers, and, having sustained them, in ordering judgment in favor of the defendants.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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158 Cal. 165

WALNUT IRR. DIST. v. BURKE et al.

(L. A. 2,526.)

(Supreme Court of California. Aug. 1, 1910.)

1. APPEAL AND ERROR (§ 162*)—JUDGMENT—SATISFACTION IN PART—RIGHT TO APPEAL.

In general, if a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is such that the part adverse to him cannot be reversed without affecting the part satisfied, and requiring a reversal of that part also, the party so accepting satisfaction is estopped to appeal from those parts of the judgment which are adverse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 984; Dec. Dig. § 162.*]

2. APPEAL AND ERROR (§ 162*)—JUDGMENT—SATISFACTION IN PART—RIGHT TO APPEAL.

Where a party to a judgment accepts satisfaction of a portion thereof which is favorable to him, he is not thereby estopped to appeal from the adverse portion in order to increase the amount of the recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 988; Dec. Dig. § 162.*]

3. APPEAL AND ERROR (§ 162*)—JUDGMENT—SATISFACTION IN PART—RIGHT TO APPEAL.

Where defendants recovered a judgment for costs, their acceptance of a payment of the costs did not estop them from appealing from so much of the judgment as was adverse to them; it appearing that a reversal on such appeal would not necessitate a new trial, but only a modification of the judgment, eliminating erroneous conditions to which defendants objected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 991; Dec. Dig. § 162.*]

In Bank. Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by the Walnut Irrigation District against Osborn Burke and others. From a judgment for plaintiff, defendants appeal. On motion to dismiss. Denied.

See, also, 110 Pac. 518.

Edw. L. Payne, for appellants. Stephens & Stephens, for respondent.

SHAW, J. This is a motion by the plaintiff to dismiss the defendants' appeal from the judgment.

The controversy involved in the case is the respective rights of the plaintiff and defendants in the use of certain water diverted from the San Gabriel river. The judgment of the court below is that each party is entitled to a certain portion of the water, to be used in a certain manner at specified times, and that each be enjoined from interfering with the use of the water to which the other is entitled. It is also adjudged that the defendants recover of the plaintiff their costs laid out in the action. After the decision was filed, the defendants filed a memorandum of their costs. Before the judgment was drawn or entered, the plaintiff paid and the defendants accepted the amount of the costs as stated in said memorandum. The defendants have appealed from the judgment "and from each and every part, and the whole thereof." The ground of the plaintiff's motion to dismiss the appeal is that by the acceptance of payment of the costs awarded to them by the judgment the defendants are estopped and barred from prosecuting an appeal from the whole, or any part of the judgment, of which the judgment for costs is a part.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is no doubt that the general rule is that if a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring the reversal of that part also, the party so accepting the fruits of a part of the judgment in his favor is estopped from prosecuting an appeal from those parts which are against him. Turner v. Markham, 152 Cal. 246, 92 Pac. 485, and cases there cited.

The following statement of the rule, taken from Baylies on New Trials, p. 18, sec. 7, has been approved by this court: "If all the provisions of a judgment are connected and dependent, so that a part cannot be reversed without a reversal of the whole, a party cannot proceed to enforce such portions of the judgment as are in his favor, and appeal from the part which is against him. In such case the right to proceed on the judgment and enjoy its fruits, and the right to appeal, are not concurrent, but wholly inconsistent, and an election to assert one right is a waiver and renunciation of the other." Storke v. Storke, 132 Cal. 353, 64 Pac. 578. This suggests that there may be exceptions. As to these the court, in San Bernardino Co. v. Riverside Co., 135 Cal. 620, 67 Pac. 1048, says: "A limitation to this rule exists where a reversal of the judgment or order cannot affect the right of the party to the benefit which he has secured thereby; as, for example, where there is no controversy as to his right for the amount for which the judgment was given, but he claims that he was entitled to a greater amount. In such a case he is not precluded from an appeal, even though he has received the amount awarded to him." In 2 Cyc. 653, one of the exceptions is thus stated: "So an appellant, by the collection of a judgment in his favor, will not be estopped from appealing for the purpose of modifying the judgment so as to increase the amount of his recovery—as where the judgment allows a counterclaim, makes a deduction for usurious interest, for the value of improvements, or disallows certain items of account,"—citing New Rochelle, etc., Co. v. Van Benschoten, 47 App. Div. 477, 62 N. Y. Supp. 398; Monnet v. Merz (Super.) 17 N. Y. Supp. 380; Beals v. Lewis, 43 Ohio St. 222, 1 N. E. 641; Clay v. Miller, 7 Ky. 461, and Bryam v. Polk Co., 76 Iowa, 75, 40 N. W. 102. These cases support the text. See, also, Embry v. Palmer, 107 U. S. 8, 2 Sup. Ct. 25, 27 L. Ed. 346; Knapp v. Brown, 45 N. Y. 210.

The appeal in this case is from the whole of the judgment. If the judgment should be reversed for a new trial, the judgment for the costs which defendants have received would be vacated, and their ultimate right thereto would depend upon the result of the new trial. The appeal, in that event, would directly affect their right to that which they have accepted, they would be estopped from prosecuting it, and the court would necessarily refuse such relief or dismiss the appeal. But this would not be true, if the relief which the defendants seek by their appeal can be given by a modification of the judgment, eliminating therefrom the part which was erroneously adjudged against them, leaving the remainder in force. A reversal for that purpose would not require a new trial nor affect their right to the costs already received. No injustice would thereby be done to the plaintiff. It will have paid that which it should have paid, and no more. Under the rules above stated there would be no estoppel, and the appeal may be retained, unless upon an examination of the merits it appears that a new trial must be ordered. The appeal has been submitted in department on the merits. The matter will there be determined upon the principles here stated.

The motion to dismiss the appeal is referred to the court in department, to be there further considered and decided.

We concur: BEATTY, C. J.; SLOSS, J.; LORIGAN, J.

ANGELLOTTI, J. I concur in the judgment on the authority of Stockman v. Riverside, etc., Co., 64 Cal. 57, 59, 28 Pac. 116.

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158 Cal. 168

WALNUT IRR. DIST. v. BURKE et al.

(L. A. 2,526.)

(Supreme Court of California. Aug. 1, 1910.)

1. WATERS AND WATER COURSES (§ 145*)—IRRIGATION—CHANGE OF PLACE OF USE.

Where the owner of an irrigation water right in the use of water from a common dam and ditch was entitled to water to irrigate 60 acres of a certain tract, he was entitled to use such right to irrigate a similar quantity of other land pursuant to such right, involving a mere change of the place of use, and no injury to any other person interested in the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 145.*]

2. WATERS AND WATER COURSES (§ 145*)—IRRIGATION RIGHT—CHANGE OF USE—IRRIGATION.

Where the owner of a paramount right to water for irrigation is so situated that without substantial injury to himself he may use it in such a manner as to cause little or no injury to one having an inferior right, or he can so use it with the same benefit to himself, but in a different manner so as to cause needless injury to the owner of the inferior right, equity may impose on the paramount owner reasonable regulations for the use of the right, so as to prevent such unnecessary injury to the owner of the inferior right.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 145.*]

3. Waters and Water Courses (§ 152*)—Irrigation Rights—Use — Regulation — Issues and Proof.

Where the complaint in an action to determine irrigation rights conceded defendants' superior right to the water except as to a transfer of the place of use, and the lawful use of defendants' superior right would necessarily interfere with the exercise of plaintiff's inferior right, and there was no allegation that defendants had made or threatened any improper use of their right, or that such use as proposed would cause needless injury to plaintiff, there was no issue authorizing the court to impose restrictions on defendants' superior use.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

4. Appeal and Error (§ 1177*)—Reversal—Disposition of Cause—New Trial.

Where there was no substantial conflict in the evidence as to the facts in issue, nor any indication that different evidence could be produced throwing doubt on the facts found which were within the issues, but the court made certain findings and imposed certain restrictions on defendants which were not within the issues, no new trial was required, but the judgment would be reversed with directions to enter a new judgment eliminating such provisions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4597; Dec. Dig. § 1177.*]

Department 1. Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by the Walnut Irrigation District against J. H. Burke and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

See, also, 110 Pac. 517.

Edw. L. Payne, for appellants. Stephens & Stephens, for respondent.

SHAW, J. This is an appeal by the defendants from the judgment. The principal points urged for a reversal are that certain findings are not supported by the evidence and are not within the issues, and that certain parts of the judgment are not justified by the evidence.

Prior to 1882 a number of landowners in the San Gabriel valley had severally acquired rights to divert water from the San Gabriel river and use the same upon their respective tracts of land for irrigation and domestic purposes. Among them the defendant J. H. Burke owned 190 acres, known as the "Barton place," and had the right to enough water for 60 acres thereof. In that year they made a written agreement under which they thereafter diverted the water and conducted it to their respective tracts of land by means of a common dam and ditch, operated by a zanjero or superintendent at common expense. The aggregate area of land thus watered was 1,204 acres, and each owner was entitled to a proportion of the common water equal to his proportionate part of the land entitled to water. The total quantity of water to which all were entitled was never definitely fixed, except that it was an amount sufficient for 1,204 acres, but each was entitled to a share of the water sufficient for a fixed number of acres, being a proportion of the whole equal to the proportion that area bore to the whole area. Burke also owned another tract of 75 acres, known as the "Stockton place." About the year 1889, he began using his share of the common water upon the Stockton place, and thereafter he continued using it upon either place, as he chose, and acquired the right to do so; taking, however, no more water than before, but merely to that extent, changing the place of its use. As this caused no injury to any other person then interested in the water, he had a right to make the change. Southern C. I. Co. v. Wilshire, 144 Cal. 72, 77 Pac. 767, and cases there cited; Southside I. Co. v. Burson, 147 Cal. 410, 81 Pac. 1107. In 1899 he conveyed the Stockton place to the defendant Osborn Burke, with the right to receive and use thereon all the water of the 60-acre right that was not used on the Barton place. In 1902 the owners of these water rights and ditch organized a corporation, the Standifer Ditch Company, to act as an agency for the management and control of the ditch and the diversion and distribution of the water among the landowners, according to their respective rights. The water rights were not conveyed to the corporation, but it was given, and has ever since exercised, the control and management thereof. The defendants still retain the rights thus acquired. After the entry of the judgment in the court below J. H. Burke died, and his executors have been substituted as defendants in his place.

In making the diversion and distribution of water under these rights, it generally happened that the amount turned in at the dam would not all be used, and sometimes more was taken than was necessary. The Barton place was at the lower terminus of the common ditch. The surplus and unused water was sometimes turned into a wasteway conducting it back to the river channel, and sometimes sold to other landowners below Burke's land. The Walnut Irrigation District, plaintiff herein, was organized under the irrigation district statute with a view of using such surplus. It acquired the right to all this surplus water and also an interest as tenant in common with the Standifer Ditch Company, in the headworks and dam on the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

San Gabriel river at the head of the Standifer ditch, and in the main ditch leading therefrom to the upper boundary of the Barton place. It also acquired the right to the use of the ditch of Burke through his lands, (though not, so far as appears, the fee therein), subject to Burke's right to use it for his 60-acre water right, and, with Burke's consent, enlarged it, and uses it to carry this surplus water to the lands served with water by the district. The Stockton place is within the limits of the district.

Differences arose between the plaintiff and the defendants in relation to the right of the defendants to use the water of the 60-acre water right from the Standifer ditch upon the Stockton place, the defendants asserting the right, the plaintiff denying it. The plaintiff's claim is that, if any of the water is used on the Stockton place, it is to be considered as part of the surplus water belonging to the district, and must be accounted for as such and the district rates paid therefor. It does not claim any part of the water belonging to the 60-acre water right of Burke that may be used on the Barton place. That is conceded to Burke, but it asserts that, when such water passes below the Barton place, it immediately becomes "surplus" water and belongs to the district. The object of this action is to obtain a judgment to that effect, and to enjoin the use of water of the 60-acre water right on the Stockton place. Osborn Burke has a right in common with others owning land therein to receive water from the district for use upon 25 acres of the Stockton place. This is alleged, admitted, and adjudged. No question arises concerning it upon this appeal. The complaint also asks further that, if the court should find that defendants have a right in the water in excess of the rights conceded to them, then that the judgment shall so regulate the use under such right that its exercise shall not interfere with the rights of the plaintiff.

The pleadings, findings, and judgment state and declare the rights of the respective parties, as above stated, the findings and judgment being in favor of the defendants upon the points in controversy, as aforesaid. The evidence fully sustains the findings and judgment, in these respects. There is no conflict on the subject. So far as these rights are thus defined and declared, the defendants are content. The findings and judgment proceed further, however, to impose certain limitations and restrictions upon the manner in which the defendants shall take and use the water constituting this 60-acre water right. The defendants claim that in this they are without foundation, either in the pleadings, the evidence, or the law. We are of the opinion that the defendants' position is correct.

It is conceded that the 60-acre water right of the defendants is paramount and superior to the rights of the plaintiff. The latter confessedly extend only to the surplus remaining after the defendants' said right is supplied. As the defendants' right was acquired long before that of the plaintiff to the surplus accrued, or ever the plaintiff came into being, it follows that it was and is free from any burdens, easements, servitudes, or limitations in favor of the plaintiff. Where the owner of a paramount right to water is so situated that, without substantial injury to himself, he may use it in such a manner as to cause no injury, or little injury, to one having a subordinate and inferior right thereto, or, on the other hand, can make the same use of it with the same benefit to himself, but in a different manner and so as to cause needless injury to the owner of the inferior right, a court of equity may, in an action for that purpose, upon proper allegations of fact, give judgment imposing upon the paramount owner reasonable regulations for the use of the right, so as to prevent unnecessary injury to the inferior right. The complaint in this action contains no allegations upon which to base such relief. It concedes to the defendants the first right to the water, except in the particular above stated, and as to that the evidence and findings show that the defendants had the right to use the water on the Stockton place, as fully as they claimed. The lawful use of such first right will necessarily interfere with the use and exercise of the secondary right. It is not alleged that the defendants have made, or threaten to make, any unlawful or improper use of the disputed right which the court finds they possessed, or that the use of it as proposed will cause needless injury to the plaintiff, or that there is any different manner of use which would be equally beneficial to defendants and less injurious to the plaintiff.

The court made its findings and judgment defining the rights and customs of the Standifer Ditch Company in making distribution of the water under its control, requiring the defendant Osborn Burke to give to plaintiff 12 hours' previous notice before turning the water to the Stockton place, declaring that the defendants, even when water is abundant, shall not receive a "turn" of water, under their 60-acre water right, oftener than once every 12 days; that said right of the defendants is subject to the condition that its use shall not materially interfere with the running of water belonging to the plaintiff; and that they have no right, title, or interest in any of the water except as stated in the decree.

The custom of the Standifer Ditch Company and its stockholders in distributing and using the water belonging to the paramount right is a matter of their own discretion and convenience, and, unless a change would unduly injure subordinate rights, it may be changed at their pleasure. It is not alleged that such change is proposed, or that a different method would affect the substantial rights of the plaintiff. There was no occasion for this provision in the judgment. The provision as to notice has nothing in the evidence or pleadings to support it. The testimony shows that the Standifer ditch water is sometimes delivered oftener than once in 12 days, and there is nothing to show that the right as originally acquired was limited to runs or turns at 12-day intervals, or that the plaintiff had ever secured the right to impose such a burden or restriction upon the use of the Standifer ditch water by the defendants, or any other of the persons concerned in the Standifer water rights. These provisions were improperly inserted in the judgment, and should be stricken out. The defendants do not complain of the general clause of the decree purporting to enjoin them from in any manner interfering with the distribution of the water to which the plaintiff was declared therein to be entitled. There was, however, nothing to justify such an injunction. The only interference which it is alleged the defendants threatened, or had exercised, against the plaintiff, was no more than was necessarily involved in the exercise of the superior right of the defendants to use water of the 60-acre water right upon the Stockton place. This they had a lawful right to do. No injunction was called for to prevent an injury which has not been inflicted and is not threatened.

It is not necessary to order a new trial of the action. There was no substantial conflict in the evidence as to the facts really in issue, and there is nothing indicating that different evidence could be produced, or throwing doubt upon the facts above stated. Such of the findings as were properly made under the issues were fully proven, and they sufficiently declare the facts upon which the rights of the parties depend. The unnecessary findings may be disregarded and a new judgment may be framed, omitting the objectionable parts, as herein indicated. The seventh and twelfth paragraphs of the judgment should be omitted and the eighth and thirteenth changed so as to leave out all the restrictions upon the defendants as to the times of using the water, the manner of such use, and the requirements concerning notice to plaintiff. There are other particulars in the way of detail, which should be changed so far as necessary to make them consistent with what we have said herein.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment in accordance with this opinion. The motion to dismiss the appeal is denied for the reasons given in the opinion thereon by the court in bank.

We concur: ANGELLOTTI, J.; SLOSS, J.

13 Cal. App. 667

EIDINGER v. SIGWART. (Civ. 687.)

(Court of Appeal, Third District, California. June 23, 1910.)

1. APPEAL AND ERROR (§ 977*)—TRIAL COURT —DISCRETION—NEW TRIAL.

Where there are stated in the notice of motion for a new trial several grounds upon which the court could reasonably, in the exercise of a sound discretion, grant a new trial, its order doing so will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

2. NEW TRIAL (§ 131*) — MOTION—SPECIFICATION OF ERRORS—REQUISITES.

Where one of the grounds of a motion for a new trial was the insufficiency of the evidence to support the verdict, the specification in the bill of exceptions that the plaintiff "has introduced evidence to prove," etc.. and "that the testimony of the plaintiff himself shows," etc., and that the evidence "shows that August Eidinger contributed," etc., although not in the negative form, yet was sufficient to show wherein the moving party claimed the evidence to be insufficient, so that the motion could be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263–269; Dec. Dig. § 131.*]

3. NEW TRIAL (§ 131*)—MOTION—REQUISITES.

If the specification in the bill on a motion for a new trial is sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough to enable the motion to be sustained.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263–269; Dec. Dig. § 131.*]

4. EXECUTORS AND ADMINISTRATORS (§ 449*)—ACTION — ALLEGATIONS AND PROOF — VARIANCE.

Where, in a suit against an executor to recover for services rendered deceased, the claim in the complaint was based upon a quantum meruit, while the proof showed an express contract, this was a fatal variance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 449.*]

5. NEW TRIAL (§ 70*)—DISCRETIONARY POWERS OF THE COURT—EVIDENCE.

In a suit against an executor to recover for services rendered deceased, evidence on the issue whether decedent ever agreed to pay plaintiff for his services *held* to be such that the trial court did not abuse its discretion in granting a new trial after verdict for plaintiff.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

6. APPEAL AND ERROR (§ 979*)—DISCRETION OF TRIAL COURT—NEW TRIAL.

The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict where there is a substantial conflict in the evidence rests so fully in the discretion of the trial court that its action is conclusive upon the Supreme Court, unless it appears that there has been an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873; Dec. Dig. § 979.*]

7. NEW TRIAL (§ 72*)—GROUNDS—EVIDENCE—SUFFICIENCY.

Where the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146–148; Dec. Dig. § 72.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Emil A. Eidinger against Joseph A. Sigwart, as executor of August Eidinger, deceased. There was verdict and judgment for plaintiff, and, from an order granting a new trial, plaintiff appeals. Order affirmed.

William F. Bray (Francis J. Heney and Charles W. Cobb, of counsel), for appellant. Abe Darlington, for respondent.

HART, J. This is an appeal from the order granting the defendant a new trial.

The action was for the recovery of compensation for alleged personal services rendered by the plaintiff for the defendant's intestate during the lifetime of the latter.

The complaint alleges and the evidence shows that the deceased in the month of December, 1905, was stricken with paralysis, and that he continued to suffer from that malady until the date of his death on the 29th day of July, 1908. It is averred that the plaintiff, "at the special instance and request of the deceased," performed "work, labor, and services in nursing, tending and waiting upon" deceased from the time he was taken ill until his death; "that said labor, work, and services so performed in nursing, tending, and waiting upon said August Eidinger were and are reasonably worth the sum of $5 per day for each and every day thereof; and that 730 days of said labor, work, and services were performed and rendered to the said August Eidinger within two years next preceding the commencement of this action." Plaintiff presented his claim in due form to the executor of the will of the deceased, and the same was by said executor rejected and disallowed. The cause was tried by a jury and verdict returned in favor of the plaintiff in the sum of $1,825. Immediately after the return and recordation of the verdict, and on the same day, judgment was entered in favor of plaintiff for the amount awarded by the jury. Within due time the defendant moved for a new trial on the grounds that the evidence was insufficient to justify the verdict, that said verdict is against law and "errors in law occurring at the trial and excepted to by said defendant." As stated, the court granted this motion.

From the evidence it appears that the deceased, who was a widower and without a family, resided at Placerville, in El Dorado county, where he owned several pieces of real estate. Plaintiff was a nephew of the deceased, and the testimony shows that a couple of years prior to the time the deceased was stricken with paralysis the plaintiff's mother, Mrs. Wilhelmina Eidinger, also a sister-in-law of deceased, and her daughter, came to his home and took up their residence with him; that Mrs. Eidinger "kept the house" for the deceased from that time until his death; that the deceased, a few months before he was stricken with paralysis, gave to Mrs. Wilhelmina Eidinger real estate and personal property of the aggregate value, approximately, of $5,000. Mrs. Eidinger testified that she and her daughter, Augusta, went to the house of the deceased in the year 1903 for the purpose of "keeping house" for him; that the deceased said that he would give his property "to whoever would come up and take care of him and he carried out this proposition by giving me the deed." (By his will the deceased also gave to her one-fourth of all the estate of which he was seised at the time of his death.) Mrs. Eidinger further testified that she and her daughter and the wife of the plaintiff "helped to take care of deceased and were very faithful; * * * that their efforts were all combined to care for the deceased."

Upon the question of the employment of plaintiff by the deceased, Mrs. Eidinger testified that her daughter, at the request of the deceased, "wrote to plaintiff offering him $2.50 per day to come up and take care of him; that plaintiff replied that he could not come right away; that deceased then dictated another letter to him, offering him $3 per day, and plaintiff replied that he would come right away, and he did come on December 10, 1905; that the other nurse, Mr. Hirsch, stayed only four days after the arrival of plaintiff." The plaintiff testified that the deceased, during his lifetime, paid him (plaintiff) the sum of $3, which amount constituted all that he had received on his claim for services rendered the deceased. On cross-examination he admitted that he expected, "when I found out I was not going to get any pay," that he would be provided for or compensated for his services in the will of deceased, but that, having been entirely overlooked by the deceased in his will, he therefore presented his claim against the estate. There was some other testimony introduced by plaintiff showing that he performed certain services as a nurse for deceased. By cross-examination of some of plaintiff's witnesses, it was established that the deceased during the several years of his illness maintained and supported plaintiff and his wife, as well as his mother, Wilhelmina Eidinger, and his sister, Miss Augusta Eidinger. It was also shown through the testimony of Mrs. Minnie Eidinger, wife of plaintiff, that the bills paid by the deceased for the maintenance of his household, during the period of his sickness, amounted to something over $3,000, said money having been received by him during that period from time to time from various sources of income available to him.

For the defense, the witness Maginness, who was then engaged in the business of buying and selling grain, testified that the plaintiff worked for him "off and on for about a year during 1907 and 1908 at unloading cars, and that he unloaded from one to three cars a week, taking two and a half or three hours to unload a car. Sometimes he got a car a week and sometimes two or three. In the fall he had as high as three in one week, generally about one or two; the average being about one car a week with occasionally an increase."

Joseph A. Sigwart, executor of the will of the deceased, testified that he had known the deceased for 35 years, and that his acquaintance with him was intimate; that plaintiff never had talked to him about his claim, nor asked him (witness) about it; but that he did hear plaintiff say, after the death of the testator, that "he had something coming to him," but that plaintiff never came to the office of the witness to talk about or discuss any claim he might have against the estate. Sigwart testified that the deceased "was very punctual in the matter of paying his bills," and, without objection, further testified that some six or eight months before he died he asked deceased if he had money with which to pay his bills, to which deceased replied, "Yes; I got money." Witness then asked deceased if he had "paid everything." He answered: "I pay everything as I go along."

The foregoing, which represents a fair synopsis of the testimony received at the trial, is a sufficient statement of the evidence for the purposes of the consideration and disposition of the questions involved in this appeal.

It will be observed that the plaintiff pleads and relies upon a quantum meruit. At the close of his case the defendant moved for a nonsuit on the ground that there was a variance between the allegations of the complaint and the proof, in that, while the former, as stated, disclosed an implied contract, the latter established an express contract. This motion was denied. It does not appear from the record whether the trial court granted the motion for a new trial on one only of the several grounds set out in the notice of motion or upon all of them. But where there is stated in the notice any one ground of several upon which the court could reasonably, in the exercise of a sound discretion, grant a new trial, the order will not be disturbed.

It is, however, preliminarily objected that "the specifications of insufficiency of the evidence in the bill of exceptions in this case are wholly improper and insufficient in form and precluded the lower court from examining the evidence." There are but three specifications of the kind referred to, and they are not in the negative form, which is always to be preferred, but state that the plaintiff "has introduced evidence to prove," etc., and "that the testimony of the plaintiff himself shows," etc., and that the evidence "shows that August Eidinger contributed," etc.

The objection is addressed to form rather than substance. It is readily ascertainable from the specifications wherein the moving party claims that the evidence is insufficient to justify the verdict, and this is all that should be required in this respect in a bill of exceptions or statement on motion for a new trial where the insufficiency of the evidence to justify the verdict is one of the grounds of the motion. The opposing counsel could certainly have experienced no difficulty in determining what additional evidence, if there is any in the record upon the points to which the specifications refer, should be inserted in the statement. Speaking on this subject, the Supreme Court, in the case of American Type, etc., Co. v. Packer, 130 Cal. 461, 62 Pac. 744, says: "If the specification is sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough. The statute in this matter is not primarily for this court, but for the trial court. That court should not hear the motion unless the statement contains such specifications. Upon that subject, the trial judge, who tried the case, has a decided advantage over this court in determining whether the specifications are sufficient." It is further declared in that opinion that such a specification "is in the nature of a notice, the sufficiency of which should be tested by inquiring whether the opposite party is injured by defects. It is not even regarded with the strictness with which an error of the court must be. If error at all, it is committed by a party and in a manner in which great liberality should be exercised by courts. Whenever there is a reasonably successful effort to state 'the particulars,' and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, and the trial court has entertained and passed upon the motion, in my opinion this court ought not to refuse to consider the case on appeal."

In disposing of an objection similar to the one here, and referring to a number of cases cited by counsel in support of said objection, and particularly to the case of De Molera v. Martin, 120 Cal. 548, 52 Pac. 825, the Supreme Court, in Drathman v. Cohen, 139 Cal. 313, 73 Pac. 182, has this to say: "If the decision in that case were followed, perhaps the specifications here in question would be declared insufficient; but experience has proven that the rule there laid down was too strict, and that it has been productive of evil and not good. Perhaps some of the other cases cited may also tend to establish the same rule. But latterly the court has been more liberal in such matters, and the rule now followed is stated in American etc. Co. v. Packer, 130 Cal. 459, 62 Pac. 744." See, also, on this question, Stuart v. Lord, 138 Cal. 672, 72 Pac. 142; Holmes v. Hoppe, 140 Cal. 212, 73 Pac. 1002; Bell v. Staacke, 141 Cal. 186, 74 Pac. 774; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939; Southern Pacific Co. v. Lipman, 148 Cal. 480, 83 Pac. 445.

It is but the statement of an elementary proposition to say that the plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proof. Mondran v. Goux, 51 Cal. 151; Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; Reed v. Norton, 99 Cal. 617, 34 Pac. 333; Shenandoah etc., Co. v. Morgan, 106 Cal. 409, 39 Pac. 802; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Davis v. Pac. Tel., etc., Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; Schirmer v. Drexler, 134 Cal. 134, 66 Pac. 180. That there is a clear technical variance between the contract declared upon and the one proved there is no ground for possible doubt. The complaint, as seen, declares upon an implied contract or a quantum meruit. The only testimony in the record showing or tending to show a contract was that given by the plaintiff's mother, Mrs. Wilhelmina Eidinger, and her testimony shows that the deceased dictated a letter to plaintiff, agreeing to pay him at the rate of $3 per day for his services as a nurse to wait upon and care for the deceased, and that plaintiff replied that "he would come right away"; that plaintiff did on December 10, 1905, go to the home of deceased, and remained with and served him as a nurse until his death. It is thus to be observed that, if there was any contract at all, it was an express contract. The terms were fixed and definite. Deceased offered plaintiff a certain wage if he would "come up and take care of him"— that is, take care of him during his illness.

But whether, in view of the fact that there is some testimony in the record from which the conclusion may reasonably follow that the alleged services of plaintiff were reasonably worth the sum of three dollars per day, this variance might be held to be fatal, or of such vital and material importance as to have entitled the defendant to a favorable ruling on his motion for a nonsuit, is a matter which it is not necessary to decide here. The fact of the variance, however, whether sufficient to have warranted the granting of the motion for a nonsuit or not, when considered with certain other testimony, possesses some importance in the determination of the question whether the court below abused its discretion in its order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict, and, presumably, judging from the record before us, that was one of the grounds, if not the principal one, upon which the order was made.

That the trial court was justified in granting a new trial on said ground we think appears reasonably clear even from the record here.

The plaintiff declared upon a quantum meruit. If the proof disclosed any contract at all, it was, as seen, an express contract. The plaintiff himself testified that he expected to be provided for in the will of the deceased—that is, giving his testimony a construction the most favorable to him, he expected his compensation to be attended to by the deceased in his will, but, the matter having been thus neglected by the deceased, he presented his claim against the estate. The testimony shows that deceased was very punctual in the payment of his debts and the extinguishment of his obligations; that he had ample means at his command during his illness to pay all bills incurred in the maintenance of his household affairs; that he paid plaintiff the sum of $3 only during the whole period of plaintiff's engagement with him; that plaintiff occasionally worked at other employment for another party; that deceased asked Mrs. Wilhelmina Eidinger, mother of plaintiff, to come to his home and "keep house" for and take care of him, and that "he would give his property to whoever would come up and take care of him," and that "he carried out this proposition by giving witness the deed," and, in addition, some personal property, and, besides, giving her by will one-fourth of the residue of his estate. This testimony, excluding from consideration the testimony of Sigwart, which, although going in without objection, might be regarded as incompetent because involving self-serving declarations, to the effect that deceased, just before his death, said to him that he had paid all his bills—that he paid "everything as I go along"—is sufficient to inspire distrust in the justness of plaintiff's claim or grave doubt whether the plaintiff was in reality ever employed for any purpose by deceased. Why did not deceased pay plaintiff more than the sum of $3 during the long period of his alleged service to deceased? Why did plaintiff occasionally work for another party during that period? Why, if he had an understanding with deceased that he was to render services as a nurse, did plaintiff expect that the payment of his compensation would be postponed until after the death of deceased and said compensation arranged for in the will of deceased? If deceased employed plaintiff to take care of him, why did he also employ plaintiff's mother to do like service and promise to give her in return all his property and why did he give her the bulk of it? If plaintiff was employed under an express contract as to compensation, why did he present a claim to the executor based upon an implied contract for greater compensation than that agreed upon and then plead the latter in his action against the estate? These are questions which would naturally suggest themselves and which no doubt occurred to and influenced the mind of the trial judge in the consideration and decision of the motion for a new trial. In any event, the evidence as it appears before us is such that we cannot say that the trial court abused its discretion in granting the order for a new trial.

"The granting or denying a new trial on

the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence," says the Supreme Court, in Domico v. Casassa, 101 Cal. 413, 35 Pac. 1024, "rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion." In Warner v. Thomas, etc., Works, 105 Cal. 411, 38 Pac. 960, it is likewise held that it is settled law in California that a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court, with whose decision thereon interference is unwarranted unless there clearly appears an abuse of such discretion. And it is further declared in that opinion that, "when the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial." See, also, Bjorman v. Fort Bragg R. R. Co., 92 Cal. 500, 28 Pac. 591; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Bledsoe v. De Crow, 132 Cal. 312, 64 Pac. 397.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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13 Cal.App. 677

PEOPLE v. HECK. (Cr. 237.)

(Court of Appeal, First District, California. June 23, 1910.)

CRIMINAL LAW (§ 1182*)—APPEAL—FAILURE TO PROSECUTE—AFFIRMANCE.

Where, after a conviction for passing a fictitious check, defendant appealed, but failed to apprise the appellate court of his grounds for appeal, either by an oral argument or by the brief, the court would not search the record for reversible errors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203–3214; Dec. Dig. § 1182.*]

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Victor Heck was convicted of passing a fictitious check, and he appeals. Affirmed.

James J. Van Hovenberg, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was charged with the crime of passing a fictitious check. Upon the trial he was convicted, and this is his appeal from the judgment of conviction and from the order denying his motion for a new trial.

The case was upon the calendar for oral argument May 9, 1910, at which time no one appeared for the defendant; but, upon the suggestion of the Attorney General that it had been agreed between the Attorney General and the counsel for the defendant that the defendant might have 15 days in which to file a brief, such time was given. He did not file any brief within the time allowed, nor has any extension of time been asked or granted. The case was therefore submitted for the decision of this court.

As we have not been apprised, either by an oral argument or by any brief, of the grounds upon which appellant claims that either the judgment or order should be reversed, we do not feel called upon to search the record for error which possibly might justify a reversal of either the judgment or the order.

The judgment and order are therefore affirmed.

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13 Cal. App. 686

PEOPLE v. BOERO. (Cr. 252.)

(Court of Appeal, First District, California. June 28, 1910.)

1. RAPE (§ 52*)—SUFFICIENCY OF EVIDENCE.

Evidence in statutory rape *held* sufficient for a conviction.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–76; Dec. Dig. § 52.*]

2. RAPE (§ 40*)—PREVIOUS INTERCOURSE.

On prosecution for rape, especially statutory rape, previous intercourse between the same parties may be proven, as showing disposition, and thus corroborating the evidence of the substantial charge.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 56; Dec. Dig. § 40.*]

3. CRIMINAL LAW (§ 1110*)—APPEAL—RECORD—SUGGESTION OF DIMINUTION—CORRECTION.

The objection that the judgment in the record does not show the term of imprisonment, but only that it is for "20," is removed on a suggestion of diminution of the record; the original entry by the clerk having omitted the word "years" after "20," and on due notice and hearing the entry having been corrected to read "20 years."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903–2919; Dec. Dig. § 1110.*]

4. CRIMINAL LAW (§ 995*)—RECORD—SHOWING DEFENDANT'S PRESENCE AT TRIAL.

It is not necessary that the judgment roll show defendant was present during the trial on a certain afternoon, it is enough that it does not show he was absent, all intendments being in support of the judgment, and defendant being required to show error, none being presumed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2536, 2537; Dec. Dig. § 995.*]

5. CRIMINAL LAW (§ 1105*)—APPEAL—REPORTER'S TRANSCRIPT—AUTHENTICATION.

Not only should the reporter's transcript be sworn to by him as required by Pen. Code, § 1247, but before it is transmitted to the appellate court it should be authenticated by the trial judge, in accordance with section 1247a.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887–2889; Dec. Dig. § 1105.*]

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Ernest Boero was convicted of rape, and he appeals. Affirmed.

D. C. Dutton, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of the crime of rape for having had sexual intercourse with a girl under 16 years of age, and appealed from the judgment and order denying his motion for a new trial.

It is first urged that the evidence was insufficient to justify the verdict. It is not claimed that the girl did not give evidence that fully supported the charge, but it is claimed apparently that the evidence was in itself unreasonable, because it appears that the act was committed in the presence and with the approval of the wife of the defendant. But in addition to the evidence of the girl, the testimony of the landlady of the house was to the effect that she found the girl in the room of defendant and his wife on the occasion in question after defendant and his wife had gone to bed. Medical testimony was also given tending to show that the girl had had sexual relations with some one near to the time of the alleged offense. It was for the jury to determine as to the truth of the testimony in the first instance. The judge of the trial court, who also heard and saw the witnesses, has approved the verdict. We cannot say that as a matter of law the verdict is not supported by the evidence. People v. Moore, 155 Cal. 237, 100 Pac. 688.

The court did not err in permitting evidence of other acts of intercourse between defendant and the prosecutrix, occurring before the act relied upon for a conviction. In prosecutions for adultery, incest, and rape (especially when committed by consent upon persons under the age of consent), other acts of sexual intercourse between the same persons may be proven as showing an adulterous disposition, and thus corroborating the evidence of the substantive charge. People v. Stratton, 141 Cal. 604, 75 Pac. 166; People v. Koller, 142 Cal. 621, 76 Pac. 500; People v. Castro, 133 Cal. 12, 65 Pac. 13; Lefforge v. State, 129 Ind. 551, 29 N. E. 34; State v. Markins, 95 Ind. 464, 48 Am. Rep. 733; State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124; Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110; People v. Cease, 80 Mich. 576, 45 N. W. 585; Proper v. State, 85 Wis. 615, 55 N. W. 1035; People v. O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530; State v. Parish, 104 N. C. 679, 10 S. E. 457; Ramey v. State, 127 Ind. 243, 26 N. E. 818; State v. Hilberg, 22 Utah, 27, 61 Pac. 215.

There is some conflict in the authorities as to the right to give evidence of acts of sexual intercourse occurring after the act upon which the indictment is based; but in this case the evidence objected to related to acts occurring before the act selected as the offense, and was well within the rule allowing evidence of this character. The language upon this subject, found in People v. Ah Lean, 7 Cal. App. 628, 95 Pac. 380, was evidently inadvertently used, as no authorities were cited upon the question to this court.

The objection that the judgment in the record does not show whether the imprisonment is for 20 years, months, or days has been removed upon suggestion of a diminution of the record. The original entry by the clerk omitted the word "years" after the figure "20." After due notice and hearing the entry was corrected to read "20 years." People v. O'Brien, 4 Cal. App. 723, 89 Pac. 438.

It is also contended that the judgment roll does not show that defendant was present during the trial on the afternoon of February 17, 1910. It does not show that he was not present, and all intendments are in support of the judgment. In other words, the appellant must show error; it will not be presumed. People v. Douglass, 100 Cal. 4, 34 Pac. 490; People v. Russell, 156 Cal. 450, 105 Pac. 416; People v. Holmes, 118 Cal. 444, 50 Pac. 675.

The evidence as to the alibi relied on by defendant simply raises a conflict with the evidence for the prosecution. In such a case the verdict of the jury is conclusive on this court.

This disposes of all the points presented by appellant, and we have considered them as though the entire record was properly before us. The reporter's transcript, however, is not indorsed or authenticated by the trial judge as required by section 1247a of the Penal Code. Not only should the reporter's transcript be sworn to by him, as required by section 1247, Pen. Code, but before it is transmitted to this court it should be authenticated by the trial judge in accordance with section 1247a, Pen. Code.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

158 Cal. 197

RECLAMATION DIST. NO. 17 v. BONBINI et al. (Sac. 1,758.)

(Supreme Court of California. Aug. 12, 1910.)

1. DRAINS (§ 82*)—RECLAMATION DISTRICTS—SUPPLEMENTAL ASSESSMENTS—ACTION TO DETERMINE VALIDITY—OBJECTIONS.

The taxpayer who is given no opportunity to contest before the commissioners or board of supervisors a supplemental assessment for the benefit of a reclamation district, authorized by Pol. Code, § 3459, and required to be made as provided by sections 3456, 3460, and 3461, may, in an action under section 3493½ to determine the validity of the assessment, urge any objection going to its validity.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 83–87; Dec. Dig. § 82.*]

2. DRAINS (§ 83*)—RECLAMATION DISTRICTS—SUPPLEMENTAL ASSESSMENTS—NEW WORK—PLANS OR STATEMENT OF WORK.

Under Pol. Code, § 3454, providing that the trustees of a reclamation district must prepare original plans, and thereafter at any time in its discretion modify them or adopt supplemental plans, section 3455 providing that the trustees must report such original plans of its work, and every new, supplemental, or additional plan, together with estimates of the cost of the works necessary for the reclamation in pursuance of any such plan or plans, and section 3459 providing that if the original assessment is insufficient for the complete reclamation, or if further assessments are required to provide for the protection, maintenance, and repair of the reclamation works, the trustees must present to the county supervisors "a statement of the work * * * to be done," and its estimated cost, and the supervisors must direct commissioners to assess the amount of such estimated cost on the lands in the district, though new work, not in the scope or design of plans already adopted and reported, may be provided for in an assessment proceeding under section 3459, the "statement of the work * * * to be done," as regards such new work, must be as clear and definite as in the case of original plans.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 83.*]

3. DRAINS (§ 83*)—RECLAMATION DISTRICTS—SUPPLEMENTAL ASSESSMENTS—NEW WORK—STATEMENT OF WORK.

The "statement of the work to * * * be done, and its estimated cost," required by Pol. Code, § 3459, to be presented by the trustees of a reclamation district in supplementary assessment proceedings to the county supervisors, is insufficient as to new work not in the scope of plans already adopted and reported, being simply "to * * * raise the levees," with an estimated cost of a lump sum for doing that and repairing the old work on the levees, and "drainage ditches to be dug throughout the district and pumping plants to be installed," with an estimated cost of another amount.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 83.*]

4. DRAINS (§ 83*)—RECLAMATION DISTRICTS—SUPPLEMENTAL ASSESSMENT—VALIDITY.

A supplemental assessment for a reclamation district is invalid in the absence of a plan of new work not in the scope of a plan already adopted and reported, or of a statement showing in some detail and with some degree of certainty the extent, character, and general location thereof.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 83.*]

5. DRAINS (§ 85*)—RECLAMATION DISTRICT—INVALID ASSESSMENT—APPLICATION OF PAYMENT ON SUBSEQUENT ASSESSMENT.

Pol. Code, § 3466½, providing that where an assessment for reclamation purposes on the lands embraced in a reclamation district is adjudged invalid, and any landowner has before such adjudication paid the amount assessed, in such assessment, against his land the amount so paid by him shall be credited to his land on any subsequent assessment on the lands of the district has no application where there is a mere adjudication of the invalidity of the assessment as to the land of one, because of a mistake in the assessment list in the name of the owner; this not rendering the assessment invalid as to the others, who alone paid their assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 89; Dec. Dig. § 85.*]

Department 1. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by the Reclamation District No. 17 against Carlo Bonbini and others. Judgment for plaintiff. Defendants appeal. Reversed.

J. A. Plummer, Geo. F. McNoble, and John E. Budd, for appellants. Aug. E. Muenter and Nicol & Orr, for respondent.

ANGELLOTTI, J. This is an action under section 3493½, Pol. Code, to determine the validity of an assessment levied for the purposes of Reclamation District No. 17 on lands within the district within one year prior to the filing of the complaint. Judgment was given for plaintiff confirming the assessment, and defendants, who are landowners within the district, appeal from such judgment and from an order denying their motion for a new trial.

Reclamation District No. 17 was organized prior to January 1, 1873, and has ever since been prosecuting the object for which it was created. It is claimed by plaintiff that the assessment in question is one of those supplemental or additional assessments provided for by section 3459, Pol. Code. It is there provided that "if the original assessment is insufficient to provide for the complete reclamation of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance and repair of the reclamation works, the trustees must present to the board of supervisors of the county in which the district is situated, * * * a statement of the work done or to be done, and its estimated cost, and such board must make an order directing the commissioners who made the original assessment, or other commissioners, to be named in such order, to assess the amount of such estimated cost as a charge upon the lands within the district, which assessment must be made and collected in the same manner as the original assessment." Under other sections, it is the duty of three commissioners to be appointed by the board of supervisors to view and assess upon the land of the district "a charge proportionate to the whole expense and to the benefits which will result from such works," and to make and file with the county treasurer a list of the charges against each tract. Pol. Code, §§ 3456, 3460, 3461. This list constitutes the assessment list. The taxpayer is given no opportunity to contest this assessment before the commissioners or the board of supervisors, and, of course, has the right to urge any objection going to the validity of the assessment against his land in an action brought for the enforcement of the same, or in an action like the one before us, one given by the Legislature to provide a method by which all objections to the assessment may be conclusively determined after such notice and hearing as the property owners are of right entitled to. Reclamation Dist. v. Sels, 117 Cal. 164, 49 Pac. 131; Reclamation Dist. v. McCullah, 124 Cal. 175, 56 Pac. 887.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The assessment list involved in this case was filed with the county treasurer of San Joaquin county on August 29, 1907. The assessment was for the sum of $113,014.07. The statement presented to the board of supervisors by the trustees of the reclamation district upon which this assessment was based showed that $27,514.07 thereof was for the purpose of reimbursing certain landowners of the district on account of payments theretofore made by them on a previous assessment alleged to have been adjudged void. Section 3466½, Pol. Code. We shall refer to this portion of the assessment hereafter. Six thousand dollars was for work actually done in "the protection, maintenance and repairs of said reclamation works which said works consist of strengthening the levees, watching the same during high water and protecting them as far as possible against washouts and breaks," and for which work the district was legally liable. The "statement" of the work to be done and its estimated cost was as follows: (a) "To extend the head levee for about three-fourths miles and raise the present head levee on an average of two feet, the estimated costs of same is $5,500." (b) "To close the breaks of the levee near and under what is called the Corral-Hollow bridge, the estimated costs of which is $2,500." (c) "To close the two breaks of the levee on the river, at the lower end of the district, the estimated costs of which is $10,000." (d) "To repair and raise the levees along the San Joaquin river and French Camp slough, the estimated costs of which is $33,000." (e) "To cause drainage ditches to be dug throughout the district and pumping plants to be installed, the estimated costs of which are $25,000." (f) "To defray costs of incidentals for engineering work, expenses of superintending and the costs of calling the assessments now proposed to be made, estimated at $3,500."

It is claimed that the adoption and reporting of plans for the new work to be done was a prerequisite to a valid assessment, and that the foregoing statement as to such work was utterly insufficient in detail to constitute such a plan or any basis for the portions of the assessment based thereon. It is obvious, and there is no pretense to the contrary, that a large portion of the work to be done consists of new work not embraced in the original plans for the reclamation of the lands of the district. There is no denial of the claim of defendants that the only suggestion as to any of such work, so far as plan or statement is concerned, is that to be found in the "statement" we have already set forth. Such new work is (a) "to extend the head levee for about ¾ miles and raise the present head levee on an average of two feet," cost $5,500, (d) "to * * * raise the levees along the San Joaquin river and French Camp slough," which is combined in the statement with "repairs" of such levees, the aggregate cost of repairing and raising being estimated at $33,000, and (e) "to cause drainage ditches to be dug throughout the district and pumping plants to be installed," at a cost of $25,000. It seems clear to us that the law contemplates the adoption by the trustees of a clear and definite plan of all new work not embraced in the original and other previous plans already filed before any assessment is levied therefor, so that all concerned, including the landowners who pay the tax, may have means of ascertaining the specific purposes of the assessment, the real value of the proposed work, and the benefit that will be derived therefrom. By section 3454, Pol. Code, it is provided that the board of trustees must prepare original plans, and "thereafter, at any time, in its discretion, modify or change such original plan or plans, or adopt new, supplemental, or additional plan or plans," when in its judgment the same shall become necessary. By section 3455, Pol. Code, it is provided that the trustees must report such original plan or plans of its work "and every such new, supplemental, or additional plan, if any, together with estimates of the cost of the works necessary for the reclamation of the lands of the district in pursuance of any such plan or plans." These provisions appear to be mandatory as to all new work not included in the scope or design of the plans already adopted and reported, and it could not have been contemplated that the effect of section 3459, Pol. Code, would be to remove this safeguard simply because the assessment including such new work was a supplemental assessment instead of the original. There could be no reason for such a distinction. It may well be that such new work may be provided for in an assessment proceeding inaugurated under section 3459, Pol. Code, but, if so, it seems clear to us that the "statement of the work * * * to be done" made by the trustees to the supervisors must be as clear and definite as in the case of original plans. We cannot doubt that it was intended that the landowner should have such notice as would thus be afforded, and it is upon such a definite statement or plan that the assessment is based. See Reclamation Dist. v. Sels, 117 Cal. 166, 49 Pac. 131. We may assume that the statement of the first item of proposed new work, viz., the extension of the head levee for about ¾ miles and the raising of the present head levee on an average of two feet is sufficient, though probably not as clear and definite as it might be made. But we do not see how this can be held as to the item of raising the levees along the San Joaquin river and French Camp slough, which, including also the "repair" of said levees, amounts to the large sum of $33,000, without any designation of the amount proposed to be used for raising the levees. There was absolutely nothing in the statement from which any one could draw an inference as to the extent to which the trustees were to raise these levees, if, indeed, they had come to any conclusion upon that point themselves, which does not appear. It does appear that the landowners by resolution adopted May 4, 1907, had authorized and directed the trustees to formulate a plan for the reclamation and protection of the lands, including their drainage, and to employ necessary engineers and chain men to furnish the proper plan and estimate of cost, but nothing appears to have been done by the trustees under this resolution other than the presentation of the statement under discussion. So far as the particular point we are discussing is concerned, we have the mere statement of the trustees that they propose "to * * * raise the levees," and that the estimated cost thereof is some undesignated portion of $33,000.

This in our judgment is utterly insufficient to give to the landowners the notice which the law contemplates they should have, and insufficient to serve as a basis for the assessment in so far as such proposed work is concerned. The item of "drainage ditches to be dug throughout the district and pumping plants to be installed," at an estimated cost of $25,000, is likewise insufficient. There is no statement from which an inference can be drawn as to the character or amount of ditch work to be done, its estimated cost, or the location of any proposed ditches. All these matters are apparently left for future determination by the trustees. Nor is there anything from which one can know how many pumping plants are proposed or their estimated cost. We have simply an aggregate estimate of $25,000 stated to be needed for drainage ditches to be dug and pumping plants to be installed. In such a matter as a proposed system of drainage ditches we think the law clearly contemplates a plan showing in some detail and with some degree of certainty the extent and character of the proposed work, and the general location of the proposed ditches. In Reclamation Dist. v. Sels, supra, the plans and report held sufficient contained "not alone a general and comprehensive, but also a detailed statement of the character and amount of ditch work to be done, with estimates of the cost thereof, and also of the cost of the proposed pumping plant." Unless we are to hold that the plans and statement of work to be done, with the estimates of cost, are matters in no way affecting the validity of assessments based thereon, which we do not feel warranted in doing, we are satisfied that the assessment here involved must be adjudged invalid because of the absence of sufficient support in plan or statement of work to be done for any assessment for the two items we have discussed.

As stated before, the assessment included $27,514.07 to reimburse certain landowners under section 3466½, Pol. Code. That section enacted March 2, 1899, provides: "In all cases in which an assessment shall have been levied since October first, eighteen hundred and ninety-six, or shall hereafter be levied, for reclamation purposes, upon the lands embraced within any reclamation district, and the assessment shall have thereafter been or shall be adjudged invalid, by any court of competent jurisdiction, and any land owner of the district shall have paid the amount assessed, in said assessment, against land belonging to him, before said assessment shall have been or shall be so adjudged invalid, the amount so paid by said land owner, together with the legal interest thereon from the date of its payment, shall be credited, by the treasurer of the county in which said land is situated, to the tract of land on which the same was paid, and shall be applied upon any assessment thereafter levied on the lands of the district, to the payment, pro tanto, of the amount therein assessed against said tract of land." The uncontradicted facts in regard to this item are as follows: On October 5, 1897, a statement showing the necessity for an assessment of $20,000 was presented by the trustees to the board of supervisors. Commissioners were appointed to make the assessment upon the lands of the district, with the result that on November 11, 1897, the assessment list was filed with the county treasurer. So far as appears, the only defect in these proceedings was that a small tract of land containing some 69 acres belonging to one William S. Moss was assessed to one Mary B. Odell, the statute requiring the list to contain "the names of the owners of each tract, if known, and if unknown, that fact" (section 3461, Pol. Code), and not then providing, as it now does, that no mistake in the name of the owner or supposed owner shall render the assessment invalid. Between November 11, 1897, and March 26, 1900, certain landowners of the district paid their assessments in amounts aggregating $16,641.95. On March 5, 1900, the reclamation district brought an action against said Mary B. Odell to foreclose the lien of said assessment and prosecuted the same to a judgment in its favor. This judgment was never satisfied. On February 17, 1905, the successor in interest of said William S. Moss instituted an action in the superior court of San Joaquin county against the reclamation district to have the lien of said assessment and said judgment declared to be invalid against said property because the assessment had not been made to the true owner of the property. The trial court found the facts as to the assessment to be as alleged, and decreed that the reclamation district had no lien on the property under said assessment or judgment. It was further shown that several actions had been begun to collect from different landowners the amounts due from them on this assessment, but the result of said actions was not shown. It was further shown that no action was ever brought under section 3493½, Pol. Code, to have the validity of the assessment determined. The amounts paid on the assessment aggregated, as has been said, $16,641.95, leaving $3,358.05 unpaid. To provide for such credits to the landowners who had paid their assessments as are specified in section 3466½, Pol. Code, the amount of $27,514.07 was included in this assessment, being the $16,641.95 paid together with $10,872.12 interest.

Learned counsel for plaintiff make no reply to the claim of defendants that the facts shown make it apparent that the case is not one within the provisions of section 3466½, Pol. Code. It appears to us that the claim is well based. While there probably would be nothing inequitable in any proceeding the result of which would be to simply compel landowners who did not join in paying for necessary work done for the district to now pay their share for that work with interest, we must find the authority for any such proceeding in the statute, and, if the authority is not so conferred, it cannot be held to exist. In this case the previous assessment was not adjudged invalid as to work upon any ground that affected its validity as to the other landowners; in other words, there has never been any adjudication of its invalidity as to any land except that of Moss, and the adjudication as to him was simply that the assessment was not valid against his land because of a mistake in the assessment list in the name of the owner, a matter that apparently could have been corrected by the commissioners even "after the lists shall have been filed with the treasurer of the county." Section 3460, Pol. Code. We do not understand that this renders the assessment invalid as to the other landowners, or that any of them could have successfully resisted the payment of their assessments because of this mistake. The whole object and scheme of section 3466½, Pol. Code, was to provide for the reimbursement of those who may have paid the amounts assessed against their lands where such lands were not liable therefor because of the invalidity of the assessments against them prior to a determination of such invalidity. The showing here was that the lands upon which the amounts were paid were legally liable therefor, and that there has been no judgment of invalidity affecting the same. The amount of $27,514.07, for the purpose of reimbursement was therefore improperly included in the assessment.

In view of what we have said, the assessment must be held invalid, and it would serve no useful purpose to consider any other point made by defendants.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

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158 Cal. 185

PEOPLE v. LUIS. (Cr. 1,579.)

(Supreme Court of California. Aug. 11, 1910.)

1. CRIMINAL LAW (§ 520*)—EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER—INDUCEMENT.

An extrajudicial confession by accused to a third person is not objectionable because it was induced by the advice of such third person to the effect that it would probably be better for accused to tell the truth; the confession having been given in the absence of any officer or person in authority, and not under circumstances leading accused to suppose that it was given with the sanction of any such person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1166, 1175–1184; Dec. Dig. § 520.*]

2. CRIMINAL LAW (§ 519*) — EXTRAJUDICIAL CONFESSIONS—VOLUNTARY CHARACTER.

That accused secretly hoped that the effect of making a complete extrajudicial statement confessing his guilt would lighten his punishment and make it easier for him was insufficient to render the confession inadmissible, if the hope was not improperly induced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.*]

3. CRIMINAL LAW (§ 547*)—EVIDENCE—CONFESSIONS — PROOF—REPORTER'S TRANSCRIPT.

Where a reporter who did not understand Chinese attended the taking of the confession of accused through interpreters, and took down in shorthand the questions asked in English by the district attorney, and the answers as translated into English, and the statement as taken down by the reporter was not read to accused, nor subscribed by him, nor acknowledged in any way to be a correct statement of what he said, the confession could not be proved by the reporter nor by the transcript of his notes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237–1246; Dec. Dig. § 547.*]

4. CRIMINAL LAW (§ 547*)—EVIDENCE—CONFESSIONS—PROOF.

Where accused was examined through interpreters by the district attorney, and confessed the killing in such examination, and there was no competent written evidence thereof, the interpreters who heard and understood the whole statement and remembered the substance thereof could testify as to what they remembered, though they could not remember everything that was said.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1237–1246; Dec. Dig. § 547.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Homicide (§ 354*)—First-Degree Murder—Nature of Punishment—Evidence.

In a prosecution of a Chinese person for first degree murder, evidence that in the Chinese mind a Chinese woman amounted to very little, and that the taking of her life was not in their estimation a very serious matter, was inadmissible as bearing on the punishment to be inflicted under Pen. Code, § 190, providing that the jury shall determine in its discretion whether punishment for murder in the first degree shall be death or life imprisonment.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 354.*]

6. Criminal Law (§ 479*) — Evidence — Experts—Opportunity to Acquire Knowledge.

Where a physician with three years' experience in China testified that a part of her medical course had been to judge the mental character of a human being from his general appearance, and that she had seen accused in the courtroom, and had glanced at him once when he was going upstairs to the courtroom, a question whether in her opinion accused possessed the average amount of human intellect, to prove solely from defendant's exterior appearance that he was a person of feebler mind than that of the average intellect under the prevailing conditions was properly excluded on the theory that the witness had not been shown to have sufficient opportunity to acquire knowledge concerning defendant's mind as would qualify her to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.*]

7. Criminal Law (§ 538*) — Confessions — Evidence—Weight and Credibility.

The fact that accused testified in his own behalf solely as to the circumstances under which certain alleged confessions were made, and preliminary to their introduction in evidence, to show that they were not freely and voluntarily made, did not prevent the jury from considering its credibility in reviewing the evidence in accordance with all the facts and circumstances in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1227–1229; Dec. Dig. § 538.*]

8. Criminal Law (§ 1171*)—Appeal—Harmless Error—Misconduct of District Attorney.

The jury after submission requested that the testimony of accused be read to them, when the district attorney, addressing the court, stated that such testimony was not a part of defendant's case, "that he did not take the stand in his own behalf or give any testimony on his own behalf." On objection to the statement, the judge instructed the jury not to pay any attention to what was said between the court and counsel in the discussion and ordered the evidence of defendant read. *Held*, that the district attorney's statement, while objectionable, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Willie Luis was convicted of murder in the first degree, and he appeals. Affirmed.

Thomas Rhodes, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. On October 19, 1909, an information was presented and filed in the superior court of San Luis Obispo county, charging the defendant with the crime of murder in the killing of one Gon Ying Luis, a Chinese woman. Having entered his plea of not guilty, defendant was tried, and on November 24, 1909, the jury returned its verdict of guilty of murder in the first degree, and on November 29, 1909, he was adjudged to suffer the death penalty, his motion for a new trial having been denied. On the same day he duly took an appeal to this court from the judgment and order denying a new trial.

1. It is not claimed by counsel for defendant that the evidence was not legally sufficient to support the conclusion of the jury, and, in view of evidence given as to confessions made by defendant, such a claim could not be sustained. That the deceased was foully murdered as she lay asleep in her bed on the morning of September 30, 1909, is shown beyond the possibility of doubt, but it must be conceded that in the absence of the evidence of extrajudicial confessions by defendant, which was given exclusively by Chinese witnesses, the evidence tending to show that defendant was the person who killed deceased was exceedingly slight. Indeed, such evidence pointed with as much certainty to another as the sole perpetrator of the murder as it did to defendant. But, taking the evidence of the confessions as true, the case against the defendant was complete. The question of the truth of that evidence was one solely for the jury and the trial judge on motion for a new trial. Their conclusion is not surprising in view of the fact that defendant went upon the witness stand and admitted the making of a confession, and the further fact that there was not on the part of the defense any denial or attempt at denial of the evidence of the other witnesses as to what he said in that confession.

2. There is no support in the record for the claim that the trial court erred in concluding that the extrajudicial statements of defendant as to the commission by him of this crime were free and voluntary, made without any improper inducement or coercion. One of these alleged statements was testified to by Laine May Luis, a daughter of deceased and half-sister of defendant, as having been made to her by the defendant while confined in the county jail. She testified that she asked defendant if he did kill her mother, and that he answered that he did. As to this conversation between defendant and Laine May Luis, the showing was entirely satisfactory that there was no improper inducement. The other statement was a more formal affair. The defendant, in the presence of the sheriff, district attorney, and several other persons, including some Chinese, and within the walls of the county jail, made his statement by answering questions asked him by the district attorney. Before the introduction of evidence of this

statement, evidence was introduced to the effect that, before the making thereof, no promise was made to defendant by any one, no inducement held out to him, no threat made against him, and that defendant was told by the district attorney that he need not answer any questions, and that any answers he might give would be used against him. The nearest thing to an inducement of any kind testified to at all was that testified to by Wong Bick Yue, namely, that he had told defendant in the jail, no other person being present, in response to a question by defendant as to what was the best thing for him to do, that, if he committed this crime, he thought the best thing for him to do was to confess. This was from half an hour to an hour prior to the making of the statement, and the defendant then asked the witness to send for the district attorney. The defendant, a man about 40 years of age, was a witness for the purpose of showing the reason why he made the statement. He testified that he made it because he wished to ask the court to give him a lighter punishment, and that he thought it would be better and easier for him if he made it. He further testified that no one told him that it would be bad for him to make the statement or what the effect of such a statement would be, and, further, that no one told him that it would have any effect in any way if he made the statement. The evidence given was clearly sufficient to support the conclusion of the trial court in admitting evidence as to the statement itself. There was nothing to indicate that the advice of Wong Bick Yue was given under such circumstances as to lead accused to suppose that it was given with the sanction of a person in authority (see 1 Elliott on Evidence, § 282), and it amounted, according to the evidence, to no more than the expression of opinion on the part of a third person in no way connected with the public authorities that in his judgment it would be better to tell the truth, whatever the truth might be. The evidence of Wong Bick Yue on this was that he said: "If you did it, the best thing is to confess, I think." Mr. Elliott, in his work on Evidence, says that the rule of exclusion should not be extended to mere admonition or advice to speak the truth, where the language and circumstances are not such that they should be construed as an inducement to a confession of guilt. Volume 1, § 279. See, also, 1 Wigmore on Evidence, § 832. In People v. Barric, 49 Cal. 342, cited by defendant, the advice that "it would be better for him (defendant) to make a full disclosure" was assumed to have been given by the sheriff of the county, and this advice was given under such circumstances as were held to make it an improper inducement. We are aware of no case holding that a confession should be excluded merely because it was induced by the advice of a third person to the effect simply that it would probably be better to tell the truth, given in the absence of any officer or person in authority, and not given under such circumstances as to lead the accused to suppose it was given with the sanction of any such person. The mere fact that the accused secretly hoped that the effect of making a complete statement showing his guilt would be to lighten his punishment and make it better and easier for him could not operate to render the statement inadmissible if that hope was not improperly induced. It is manifest that the statement may be free and voluntary notwithstanding the existence of such a hope. The evidence here was sufficient to sustain a conclusion of absolute want of improper inducement. It was likewise sufficient to sustain the conclusion that defendant was fully advised by the district attorney of his rights, and that anything he might say would be used against him, and that he fully understood this. We do not mean to imply that this was necessarily essential to render the statement a free and voluntary one, but what we have said is a sufficient answer to the claim of counsel that the accused should have such an understanding of the matter.

3. Objection was made to the method used in proving the statements made by the defendant on the occasion last referred to. Among those present was Mr. A. B. Green, a shorthand reporter. The examination of the defendant was had solely through interpreters. Green took in shorthand the questions asked by the district attorney and the answers thereto as they came in English from the interpreters. It may be assumed that these shorthand notes were subsequently transcribed into longhand, and that such transcription was placed in the possession of the district attorney. There was no pretense, however, that the statement as taken down by Green was ever read to the defendant, or that he subscribed the same or in any way acknowledged it to be a correct statement of what had been said. Green, of course, did not act on this occasion in any official capacity. These being the circumstances, the Chinese interpreters, who were present throughout the proceedings, were allowed to testify to what questions were asked the defendant and what answers he gave thereto. This was the only evidence offered on the trial as to what the defendant said on that occasion; neither the transcribed statement made by the reporter being offered in evidence, nor the reporter being called upon to testify as to what was said. The district attorney was apparently of the opinion that the reporter, who did not understand the Chinese language, could not testify to what was said through the interpreters, notwithstanding that the correctness of the translations was sufficiently established. His conclusion in this regard is apparently supported by the decisions in this state. See People v. John, 137 Cal. 220, 69 Pac. 1063, and cases cited therein. While

the interpreters testified at great length as to the conversation between the district attorney and defendant, which they interpreted, and heard everything that was said in that conversation, naturally enough they did not pretend that they could remember every question asked or every answer returned. They did, however, remember the substance of the conversation, testifying in effect that defendant said that he killed Gon Ying Luis with a pistol found in the watercloset where he had put it; that she was asleep when he killed her; that he took certain tin boxes from her room and subsequently buried them in the garden where they were found; and that he did the shooting after his father had left the house, and testifying further to many other details of the crime as stated by defendant. The district attorney repeatedly offered to stipulate that the transcription of the reporter showing the whole conversation should be read in evidence or that the reporter should be allowed to testify as to the conversation, using his transcription as a memorandum, but this was declined by defendant. There was no error in the rulings of the court in this matter. The transcription of the reporter was, of course, not admissible. It had not been subscribed by the defendant or acknowledged by him in any way as being his statement, and therefore was not his writing, and did not constitute a written confession. The reporter himself occupied, as has been said, the position of a mere bystander at the hearing (People v. Gardner, 98 Cal. 127, 131, 32 Pac. 880), and both his notes and his transcription thereof constituted simply, in effect, private memoranda (Estate of Benton, 131 Cal. 472, 480, 63 Pac. 775). There was thus no competent written evidence of the confession. Parol evidence of the statement of defendant was, of course, admissible. Such evidence could properly be given by any person hearing it made by the defendant and understanding what he said. Under the doctrine of People v. John, supra, this was the only way in which it could be proved. The cases cited by counsel for defendant are not in point for the reason that they refer to cases where a writing has been so executed or acknowledged by the accused as to make it his own written document. For instance, in State v. Haworth, 24 Utah, 398, 68 Pac. 155, 159, the rule applied was the rule stated in 1 Roscoe, Cr. Ev. (8th Ed.) 90, as follows: "If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court." It is only where it has been so made the writing of the accused that he can claim that rules applicable in the case of a written confession are applicable. The mere fact that the witnesses could not remember word for word the whole conversation between the district attorney and defendant was not a sufficient ground for the exclusion of their evidence of what they did remember. It is true, of course, that a confession should be construed as an entirety and that it is the right of the accused if any part of a confession made by him is introduced in evidence to have the whole of what he has said admitted. But this rule does not prevent the substance or part of the confession that the witness heard and remembers being admitted in a proper case. See 1 Elliott on Ev. § 295, note. This does not mean that the hearing of such a mere scrap of a conversation as is insufficient to give the hearer an intelligible understanding of what was said is sufficient (People v. Irwin, 77 Cal. 506, 20 Pac. 56), or that where, by reason of his inability to understand the language of the accused the witness understood "only an occasional word," he can testify as to the few words he thought he understood (People v. Gelabert, 39 Cal. 663), or that where the witness shows that he fails to remember a portion of the words of the accused used to qualify his statement or that was essential to an understanding of the part given, he can testify to the words he did hear and remember (People v. Tarbox, 115 Cal. 64, 46 Pac. 896), but simply that where the witness heard and understood the whole statement, and it satisfactorily appears that he remembers the substance thereof, he is competent to testify as to what he does remember, even though he cannot remember everything that was said. This is as far as it is necessary to go in this case, and it is unnecessary to discuss the decisions just cited. It is said in the case last cited that "it is well settled that the witness may testify to a part of an entire conversation, if he heard only a part, and such part appears to be complete and intelligible." If anything said in People v. Keith, 50 Cal. 137, may be construed as opposed to our conclusion, it is opposed to the later statement of the court, just quoted, and is not in our judgment correct. It may be added that there was no claim on the trial that the interpreters did not fully and truthfully testify as to all material parts of defendant's statement.

4. Counsel for defendant urges that the court erred in excluding certain evidence as to the mental condition of the defendant, not amounting to evidence of insanity or idiocy, offered for two purposes: (a) To enable the jury to intelligently exercise the discretion confided to them of determining whether the defendant, if found guilty of murder in the first degree, should suffer death or imprisonment in the state prison for life (Pen. Code, § 190); and (b) to enable the jury to determine the intent or lack of intent of the defendant in committing this homicide. Section 190, Pen. Code, makes death the punishment for murder in the first degree, but gives the jury the power, in its discretion, to substitute life imprison-

ment therefor. People v. Welch, 49 Cal. 178; People v. French, 69 Cal. 176, 10 Pac. 378.

The evidence offered upon this matter was very meager. One branch of it consisted of a question asked a witness as follows: "What estimation or value is placed on the life of a female in China, if you know?" The object apparently was to show that in the Chinese mind a Chinese woman amounted to very little, and that the taking of the life of such a woman was not in defendant's estimation a very serious matter. This evidence could not, of course, assist in the determination of the question of the intent, deliberation, and premeditation essential to constitute murder in the first degree. And if we assume that a defendant in a murder case is entitled to introduce evidence not material or admissible on the question of his guilt or the degree of his offense, solely for the purpose of assisting the jury in the exercise of the discretion confided to it by section 190, Pen. Code, we are satisfied that the proposed evidence was not competent for that purpose. Whatever evidence may be so introduced, certainly evidence of the opinion of the murderer as to the value or importance of the life of the party murdered by him can play no legitimate part in his favor. The other branch of the proposed testimony consisted of certain questions addressed to Mrs. Helgesen, a physician who had practiced medicine in China for about three years. She said it had been a part of her medical course to judge of the mental character of a human being from his general appearance. She had seen the defendant in the courtroom, and had glanced at him once when he was going up the stairs to the courtroom. She was asked to state whether, judging from his appearance, he was "possessed of the average amount of human intellect." Counsel for defendant stated that it was not proposed to show "insanity or anything of that sort," but simply that it was proposed to show by an opinion based solely on defendant's "exterior appearance" "that he is a person with a feebler mind than that of the average intellect of the prevailing conditions." The court sustained the objection of the district attorney to the question. There was no error in this ruling. Even if this be conceded to be a proper subject for expert testimony, the trial court was amply warranted in concluding that the witness had not been shown to have had sufficient opportunity to acquire such knowledge concerning the defendant's mind as would qualify her to answer the question asked her and this ground of objection was substantially included in the objection made by the district attorney.

5. Prejudicial misconduct on the part of the district attorney is alleged. The defendant was examined as a witness solely as to the circumstances under which the confession was made and preliminary to its introduction in evidence, for the purpose of showing that it was not freely and voluntarily made, and therefore should not be admitted in evidence, and he did not otherwise testify on the trial. After the jury had retired to deliberate, they were again brought into court upon request, and, through their foreman, stated that the reason for their request was that they desired to have the evidence given by defendant read to them. The district attorney, while not formally objecting to the reading of this evidence, apparently considered it incumbent on him to call the attention of the court to the fact that such evidence was addressed only to the question of the admission of the confession, and in a discussion between counsel and court that ensued said to the court: "In other words, that was not part of the defendant's case. He did not take the stand in his own behalf or give any testimony on his own behalf." Defendant's counsel excepting to this language, the judge at once fully instructed the jury, in effect, that they must not pay any attention to what was said between court and counsel in the discussion that was being had, and must not consider anything so said as evidence. He then very properly ordered the evidence of the defendant read to the jury, and it was read. The jury then retired for further deliberation.

The view of the district attorney that the jury were not entitled to consider the evidence of defendant for any purpose simply because it referred exclusively to the circumstances under which the confession was made was erroneous. The rule is the same as in the matter of dying declarations, stated by Mr. Greenleaf and quoted therefrom in People v. Thomson, 145 Cal. 724, 79 Pac. 435, as follows: "But after the evidence is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony only such credit as, upon the whole, they may think it deserves." The trial court adopted this view, and consequently ordered the evidence read to the jury.

The statement of the district attorney to the court quoted above was, of course, not a proper statement to make in the presence and hearing of the jury. As long as our law relative to a defendant's failure to testify remains as it is, district attorneys cannot be too careful in the matter of refraining from commenting in any way within the hearing of the jury upon such a failure or neglect on the part of a defendant to testify. The statement was, however, clearly enough one made solely to the court, not intended by the district attorney to influence the jury in any way. That it was not to be considered by them for any purpose they were clearly instructed by the court. In view of these instructions, and in view of the further fact that the extent of the evidence given by defendant was very clearly brought to their attention by the evidence itself, read to the jury without objection of any kind being made by the defendant, it is manifest that the mere statement of fact by the district attorney cannot be held to have been prejudicial.

The foregoing are all the points made by counsel for defendant. We have nevertheless examined the whole record, and find nothing therein to suggest that the defendant did not have a fair and impartial trial. The proceedings were apparently devoid of even technical error on the part of the learned trial judge.

The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

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13 Cal. App. 734

Ex parte MULHOLLAND. (Cr. 143.)

(Court of Appeal, Third District, California. July 6, 1910.)

Habeas Corpus (§ 44*)—Appellate Court—Original Issuance.

Where the order of a superior court showed that an appeal from a judgment of the justice court convicting one of violating a certain statute was dismissed for want of jurisdiction of the appeal, so that the validity of the statute, the real matter in issue, was never before the court, the appellate court would not originally issue a writ of habeas corpus upon defendant's petition therefor, averring that the matter was fully determined by the lower court, under rule 22 (78 Pac. xi), providing that the application for the writ shall first be made to the lower court, unless such circumstances are set forth in the application for the writ as the appellate court may deem sufficient to warrant the original issuance thereof.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 44.*]

Application by Patrick Mulholland for a writ of habeas corpus. Writ denied.

W. A. Gett, for petitioner. Eugene S. Wachhorst, Dist. Atty., for the County.

PER CURIAM. In the above-entitled matter it appears that petitioner was convicted in the justice's court of Sacramento township, Sacramento county, for violating the act of the Legislature approved March 6, 1909 (St. 1909, p. 140), prohibiting the mooring and anchoring of house boats in rivers and streams of this state, within certain limits.

It is averred in the petition for the writ that "the said matter came on for hearing before the superior court of the county of Sacramento, state of California, and after consideration by the same the said judgment of the said justice court was by the said superior court * * * upheld and affirmed." It appears that no application or petition has been filed by the petitioner for a writ of habeas corpus in the said superior court. It appears also from the order of said court that, when said appeal came on to be heard in said court, the appeal was dismissed on the ground "that there is no statement on motion for a new trial settled and filed by or with the justice of the peace or filed with this court as required by law, and * * * this court has absolutely no jurisdiction of this appeal." There was therefore no hearing upon the merits and the real question at issue was not before the court, namely, the validity of the act called in question.

Rule 22 (78 Pac. xi), provides that the application for the writ shall first be made to the lower court, unless circumstances are set forth in the application, such as the appellate court may deem sufficient to warrant the issuing of the writ originally from the appellate court.

The only fact here shown in the petition on which the writ is asked for originally by this court is that the matter was fully heard and determined by the lower court and the validity of the act of the Legislature passed upon. The order of the lower court shows this not to be the fact.

The writ is denied.

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13 Cal. App. 735

Ex parte OSBORNE. (Cr. 142.)

(Court of Appeal, Third District, California. July 6, 1910.)

Courts (§ 102*)—District Court of Appeals—Concurrence of Judges—Necessity.

Where, on application for a writ of habeas corpus, the District Court of Appeal is unable to concur in a judgment to remand or discharge the prisoner, the writ will be deemed denied under Const. art. 6, § 4, providing that the concurrence of three justices shall be necessary to pronounce a judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 352; Dec. Dig. § 102.*]

Application of Daniel E. Osborne for a writ of habeas corpus against the Superior Court of Napa County. Denied, and prisoner remanded to the custody of the sheriff.

Theodore A. Bell, for petitioner. James A. Nowland, for Town of St. Helena.

PER CURIAM. The court is unable to concur in a judgment, either for remanding the prisoner or discharging him, and, under article 6, § 4, of the Constitution, and upon the authority of Ex parte Oates, 2 Cal. App. xiii, 83 Pac. 261, and Ex parte Sauer, 3 Cal. App. 237, 84 Pac. 995, the writ must be regarded as denied, and it is so ordered.

It is further ordered that upon the return of the prisoner to the custody of the sheriff, or upon his presumption of the custody of the prisoner, the order for bail pending the proceedings be discharged, and, if money was deposited by him in lieu of bail, that it be returned to him by the clerk of the court.

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13 Cal. App. 732

PEARSON v. HENDRICK et al. (Civ. 821.)

(Court of Appeal, Second District, California. July 5, 1910.)

1. WORK AND LABOR (§ 28*)—VALUE OF SERVICES—EVIDENCE.

In an action for services rendered, evidence *held* to show that the value of the services was a certain amount a day, though plaintiff himself based his opinion of the value of the services upon a percentage basis.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 28.*]

2. ESTOPPEL (§ 88*)—EQUITABLE ESTOPPEL—ADMISSIONS.

The presentation of a bill for services rendered of a smaller amount than subsequently claimed would not preclude a recovery for the fair value of such services.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 88.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by George M. Pearson against Eli E. Hendrick and D. E. Meyers. Judgment for plaintiff, and defendants appeal. Affirmed.

Purington & Adair, for appellants. Miguel Estudillo, for respondent.

ALLEN, P. J. The action was to recover the value of certain work and labor performed and expenses incurred as a civil engineer on behalf of and to the defendants at their special instance and request, the reasonable value of which was alleged to have been $5,518.55, and a balance unpaid of $2,605.95. The answer denied the performance of the services or their value, and alleged that such services as were performed were under a special contract through which the sum should not exceed $2,500. Trial was had by the court, findings and judgment in favor of plaintiff, from which judgment, and an order denying a new trial, defendants appeal.

The specifications of error all relate to the insufficiency of the evidence to support the findings. An examination of the record discloses that there is evidence tending to show that plaintiff rendered services as engineer to defendants at their request for a period of 200 days; that the fair value of such services in the locality was and is $15 per day; that there was no agreement limiting the cost of the work; that no payment had been made on account of these services; and that all the payments made were on account of expenses incident to the employment. These things being established, it is of no particular materiality that plaintiff himself should have based his opinion of the value of the services upon a percentage basis. Ignoring the plaintiff's testimony entirely as to the value of the services, it is established by independent evidence. It is true that it is disclosed in the record that, when plaintiff first presented his bill, it was for a smaller amount. This, however, would not preclude plaintiff from asserting a claim for the fair value of the services. Lackmann v. Kearney, 142 Cal. 115, 75 Pac. 668, and authorities cited. In our opinion the findings have ample support, and the judgment and order should not be disturbed.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

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13 Cal. App. 703

PEOPLE v. GRIDER. (Cr. 157.)

(Court of Appeal, Second District, California. July 1, 1910.)

1. CRIMINAL LAW (§ 1134*)—REVIEW—ORDER REFUSING NEW TRIAL.

Under Pen. Code, § 1259, permitting a review of all rulings, orders, etc., on accused's appeal from a judgment of conviction, all matters in the record including an order refusing a new trial can be reviewed if properly presented.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2997; Dec. Dig. § 1134.*]

2. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

Evidence *held* to warrant a finding that accused obtained, with intent to convert to his own use, the ring he is charged to have stolen.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.*]

3. LARCENY (§ 62*)—EVIDENCE.

On a trial for stealing a ring which accused obtained from the owner for use in a trade, the owner's declarations that "the worst of the whole thing" was that she had to give up the ring, and that she said she would only part with it for use in the trade, and that, if it was not necessary to so use it, the ring would be returned to her, and that she did not want to use it, are consistent with larceny by accused, and do not show that the owner parted with title through false pretenses, nor that accused came lawfully into possession as the owner's agent.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 62.*]

4. LARCENY (§ 1*)—"FALSE PRETENSES" DISTINGUISHED.

Larceny and false pretenses are distinguishable, in that in larceny the owner does not intend to part with his property to accused, though he may intend to part with possession; while in false pretenses he does intend to part with his title.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2662–2668; vol. 8, p. 7661; vol. 5, pp. 3991–4003.]

5. LARCENY (§ 1*) — "EMBEZZLEMENT" DISTINGUISHED.

Larceny and embezzlement are distinguishable, in that in larceny possession of the property may be obtained by fraud, while it cannot be so obtained in embezzlement.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2350–2358; vol. 8, p. 7649.]

6. LARCENY (§ 75*)—INSTRUCTIONS.

In a larceny trial, an instruction that the prosecution was limited to a taking by "fraud, trick, or device," and that, when by means of fraud, artifice, or contrivance accused acquires possession of personalty fraudulently and with intention feloniously to steal when he gets possession, the offense is larceny if the person from whom the property is taken remains the owner, was not improper as implying that Pen. Code, § 332, prescribing punishment for winning at gaming by fraudulent means, was invoked to secure a conviction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 75.*]

7. CRIMINAL LAW (§ 706*)—MISCONDUCT BY PROSECUTING ATTORNEY.

The test whether an improper question asked a witness by the prosecuting attorney is reversible misconduct depends upon the attorney's purpose in asking it, and if it was to take an unfair advantage of accused by intimating to the jury something that was not true, or not subject to proof in the manner attempted, it is error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

8. CRIMINAL LAW (§ 706*) — MISCONDUCT BY PROSECUTING ATTORNEY—ERROR NOT CURED.

If a prosecuting attorney knows when he asks a witness an improper question to prejudice accused before the jury that an objection should or will be sustained, the error is not cured by sustension of the objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

9. CRIMINAL LAW (§ 706*) — MISCONDUCT OF PROSECUTING ATTORNEY.

Where a prosecuting attorney asks accused questions which he knows to be improper, or to which he expects no answer, or where they are asked and withdrawn on objection, and are clearly intended to prejudice the jury against accused in a vital matter by the mere asking of the question, a conviction will be reversed, though objections to the questions were sustained, unless it appears that the questions could not have influenced the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

10. CRIMINAL LAW (§ 706*)—INTRODUCTION OF EVIDENCE — DUTY OF PROSECUTING ATTORNEY.

When a prosecuting attorney desires to show guilty knowledge by accused, or evidence that is a part of a scheme to commit the offense charged, or introduces other proper evidence and the purpose is not clearly apparent from his question, he should state to the court on what ground the evidence is proper, and, if its relevancy is not then made apparent, he may state the relation of the fact sought to be shown to the offense, but his declarations should be so stated as to give no color to the case in the jurors' minds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

11. CRIMINAL LAW (§ 706*)—MISCONDUCT OF PROSECUTING ATTORNEY—COMMENTS DURING TAKING OF EVIDENCE.

The persistent argument of the facts of the case by the prosecuting attorney on objections to questions propounded by him was prejudicial error where he apparently intended to influence the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 706.*]

12. CRIMINAL LAW (§ 655*) — REMARKS BY TRIAL JUDGE—PROPRIETY.

Where accused's attorney commented on the testimony of the complaining witness during the taking of evidence, it was proper for the trial judge to say that he did not desire counsel to pass such strictures on the witness, since it might tend to prejudice the jury against the witness, which ought not to occur at least before final argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1522, 1523; Dec. Dig. § 655.*]

13. CRIMINAL LAW (§ 634*)—TRIAL—TEMPORARY ABSENCE OF JUDGE.

Trial judges should not absent themselves from the courtroom during trial, however brief the absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461–1464; Dec. Dig. § 634.*]

14. CRIMINAL LAW (§ 1156*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — JUDICIAL DISCRETION.

A trial judge's action in refusing a new trial for newly discovered evidence will not be disturbed where he was best qualified to pass upon the matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. § 1156.*]

15. CRIMINAL LAW (§ 1162*)—ERRORS—HARMFULNESS.

The vital element to be considered in connection with all irregularities or misconduct of court, counsel, party, or jury is, Are the substantial rights of the complaining party materially affected thereby?

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. § 1162.*]

16. CRIMINAL LAW (§ 1163*)—ERRORS—HARMFULNESS.

The burden is on the moving party to show an irregularity or misconduct preventing a fair trial, and then the burden shifts to the successful party to show that the irregularity or misconduct did not affect the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090–3099; Dec. Dig. § 1163.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Charles C. Grider was convicted of larceny, and he appeals from the judgment, and from an order refusing a new trial. Reversed, and new trial ordered.

Milton K. Young and W. Ona Morton (Earl Rogers and W. H. Dehm, of counsel), for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for grand larceny, verdict of guilty, and sentence of imprisonment in state's prison for two years. Appeal in open court from judgment and from order of court denying defendant's motion for a new trial.

The Attorney General objects to the consideration of the appeal from the order denying defendant's motion for a new trial on the ground that, although such an appeal still exists under section 1237 of the Penal Code by reason of the amendment of sections 1239, 1240, and 1241 in 1909, no method for taking such an appeal is now provided by law; that, prior to the amendments referred to, a method of appeal from the judgment or any order was provided by section 1239, whereas, now the appeal in open court is limited to the judgment and orders made after judgment, and therefore does not include orders relating to a motion for a new trial. While the view of the Attorney General would be correct, if this matter were considered only in connection with the sections mentioned, under section 1259 of the Penal Code, all the matters in the record may be reviewed by this court if properly pre-

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sented. This objection is urged as affecting only the error assigned by the misconduct of the district attorney.

The larceny of appellant was predicated upon the taking from the complaining witness of a diamond ring of the value of $550. Owing to the pressing demands of the holders of some liens thereon, the complaining witness called upon the defendant, who was a real estate dealer, to negotiate a sale or exchange a lot in Venice belonging to her. According to her testimony, defendant advised her that one McCarthy would exchange two lots in Redondo for her Venice lot and a sealskin coat which she owned. To this she assented, but later defendant told her that McCarthy would trade if she put up the ring instead of the coat, but would not otherwise. She at first refused to part with the ring, but defendant insisted and reminded her of her possible loss of the Venice lot if she did not make the trade. As she testified: "I took it (the ring) off my finger (and had it in my hand, and) he took it out of my hand while we were discussing the matter." Not being able to get the ring back, she consented to its use, if necessary, to carry out the trade with McCarthy, but for no other purpose. Defendant never returned the ring to her, and McCarthy testified that he accepted the proposition to trade for the sealskin coat, but that in his negotiations with the defendant no mention was made of any ring; that he never demanded one and never received one. As these negotiations were all had prior to the time of the taking of the ring by the defendant, an intent upon his part to convert the ring to his own use at the time of procuring it from the complainant might reasonably be inferred from these facts.

In presenting the first point made by appellant, to wit, that the evidence is insufficient to justify the verdict, it is contended that certain statements which the complainant testified to having made to others, about the transaction, are inconsistent with the facts necessary to constitute a larceny. For instance: "The worst of the whole thing is that I had to give up my ring;" and "I said it would only be with that provision that if it was necessary to use the ring in the Redondo lots, but, if it was not necessary, that the ring should be returned to me, and in no way was the ring to be used in any other way. I didn't want to use it then." The theory upon which the case was tried is indicated in the instructions given by the trial court. The jury were instructed that the case for the people was limited to a taking by fraud, trick, or device, and that "the law is that, when by means of fraud, or artifice, or any other kind of contrivance the possession of personal property is fraudulently obtained from another, and the party so obtaining the possession acquires it with the intention feloniously of stealing the property when he gets possession of it, then the crime is larceny; provided, the person from whom the property was taken still remains the owner of the property, and has not parted with the title. One of the questions, therefore, for the jury to consider in this case is whether there was a parting with the title by the witness A. D. Van Houten." It also instructed them that, in order to convict the defendant, the jury must believe "that she did not at the time intend to part with her ownership in said ring, but was induced by fraud of the defendant to part with the possession," there being at the time a "felonious intention on defendant's part, in taking the ring, to steal the said ring."

The distinction between "false pretense" and "embezzlement" on the one hand and larceny on the other is clearly recognized by these instructions, and the statements quoted from the complaining witness' testimony are entirely consistent with the crime of larceny. These statements do not as appellant contends show that she parted with the title by reason of false pretenses, nor that defendant came lawfully, as distinguished from fraudulently, into the possession of the property as the agent of Mrs. Van Houten. These statements, together with the other evidence in the case, justified the jury in drawing the inference that the defendant obtained the ring with the felonious intent to convert it to his own use by means of his misrepresentations as to the McCarthy trade, knowing that the complainant had no intention of parting with the title to him when she gave him the possession of it. Indeed, under the evidence, they might well have found that he obtained possession of it against her will and retained it (the possession) by fraud, and that she did not give it to him at all. They were justified in finding from the evidence that it was his intention from the beginning to obtain it by force or fraud and appropriate it to his own use.

In a larceny of the kind under consideration the owner of the thing has no intention to part with his property therein to the person taking it, although he may intend to part with the possession. In false pretenses the owner does intend to part with his property in the money or chattel to the person to whom he delivers the possession, but is induced to do so by the fraud or false pretenses of such person or some one on his behalf. People v. Delbos, 146 Cal. 734, 736, 81 Pac. 131. As between a larceny of this character and an embezzlement, the chief distinction lies in the presence of the fraudulent and felonious intent with which the possession of personal property is procured by the accused, in the case of the larceny, and the absence of this in embezzlement. Measured by these distinctions, the evidence here does not disclose a variance, as appellant contends, but sustains the charge in the information. It seems hardly necessary, in the light of what is said above, to distinguish the charge here and the evidence in its support from the acts punishable under section 332 of the Penal Code. The use of the terms "fraud, trick, or device" by the trial court in its instructions does not imply that this section was invoked to secure a conviction. The instruction in which these words appear is one in which the crime of larceny is being defined by the court, and, if the element of "felonious" intent be necessary, it is sufficiently supplied elsewhere to prevent prejudice. The instruction is not one which directs a conviction. This is true of the other instructions of similar purport to which exception is taken.

The refusal of the trial court to instruct the jury as requested by the defendant with reference to his honest belief that he was entitled to the ring was not error. The instruction given by the court on this matter was all that defendant could ask.

It is also contended that defendant was deprived of a fair trial by the misconduct of the district attorney during the trial of the cause. Among the instances of misconduct assigned as error are the following: An expert witness testifying to the value of the diamond in question on behalf of the prosecution exhibited a diamond belonging to himself, which he characterized as an exact match for the one in question in the case, and the defendant asked that this diamond be made an exhibit in the case. To this the district attorney objected, as he stated, "in view of the fact that the defendant himself has the ring alleged to have been stolen in this case, and in the absence of any showing * * * that he cannot produce it, * * * when there is no showing that the real thing, the stolen diamond, the ring alleged to have been stolen, could not be produced in court." After objection made, the court directed the first sentence reread by the reporter and ordered it stricken out, and instructed the jury to disregard it. Nothing was said or done as to the rest of the statement, although the entire language was objected to. On the cross-examination of the defendant, in seeking to elicit evidence tending to show that the complaining witness was under great financial stress of which defendant had taken advantage, the district attorney asked the question: "Didn't she give that reason in her conversation that she would turn that property over because of the judgment?" The witness replied: "I think Mrs. Van Houten said that she would not transfer that lot, or make a deal on account of the judgment, because she didn't have the money to pay for it, if I remember correctly." Whereupon, the district attorney made the following comment: "Yes, I think that was right. She didn't have the money and she was under this burden. She had to get out from under it as fast as she could and she went to you to help her out." This was followed by the question: "I think that was the way, wasn't it?" No answer to this question was sought and none was given. On another occasion, in cross-examining the defendant as to a conversation had with the complainant, the district attorney asked this question: "Didn't she say in that conversation that she had talked with her attorney, and he had said for her to have absolutely nothing to do with you unless you could be bound up in black and white?" Upon an objection being made to this question, the district attorney withdrew it, but added to his statement making the withdrawal: "The defendant knows all about it." To this remark the defendant's counsel excepted and objected on the ground that this was an improper method of getting before the jury a matter which was not evidence.

Were these the only matters, perhaps it might be said that they are not sufficient to justify the setting aside of a verdict of guilty and a reversal of the judgment, but these are only instances showing the general atmosphere of adverse comment, remark, and running argument of the case by the district attorney throughout the trial. In a number of instances, under the guise of stating the purpose for which evidence was sought to be introduced, the conclusions and deductions of the district attorney and comments upon the evidence already in were made. These arguments were objected to and in some instances the court instructed the jury in relation thereto; at other times these remarks were unrebuked and no instructions given, and in one instance, while the evidence was being received, when the attorney for defendant objected to the district attorney making a speech before the jury, the trial court, instead of suggesting that the remarks be confined strictly to what was proper, said: "No, I want to hear this. But you can take your exception." The language of the district attorney preceding this objection was: "I will have to state my purpose is to show by this witness it runs to the intent of the defendant, and his good faith in dealing with the prosecuting witness in this case relative to this ring. In other words, had he been seeking every opportunity possible to place this prosecuting witness— (Here interrupted by the objection and remark of the court.)" After an argument in similar vein to that apparent in the last sentence, covering a page of the transcript, the district attorney was again interrupted by defendant's counsel, whereupon the court said: "In order that there may be no prejudice, the jury are instructed that what the attorney says is not evidence." In another instance the district attorney, in stating his purpose for introducing certain acts and statements of defendant, said they would "indicate that his intention, possibly from the very earliest acquaintance with this woman, after, as she has testified, he continually admired the ring, and continuously schemed and devised and practiced artifice and fraud, with a view to obtaining possession of that ring—what for? In order to steal it." There are numerous other instances of similar character. Where an improper question is asked of a witness by a district attorney, the test whether it is misconduct is found in answer to the question: "What was the purpose of counsel in asking the question?" If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted, then it is error. And, if the district attorney knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained. Where the prosecuting attorney asks a defendant questions which he knows to be wholly wrong, and where the questions are asked without expectation of answers, or where they are asked and withdrawn upon objection, and the clear purpose is to prejudce the jury against the defendant in a vital matter, by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict. People v. Wells, 100 Cal. 459, 34 Pac. 1078.

When a district attorney desires to introduce evidence of guilty knowledge on the defendant's part, or evidence that is a part of a system, scheme, or conspiracy to commit the crime charged, or any other evidence properly admissible, and the purpose is not clearly apparent from the question propounded, he should state to the court upon what ground he bases his right to have the evidence admitted. If its relevancy to the purpose declared is not then made apparent to the court, he may state the relation of the facts sought to be elicited to those constituting the crime. In doing this he should have due and proper regard to the fact that his proffer is being made in the presence of the jury, that it is merely tentative and may be denied by the court, and that what is said ought not to be so stated as to give any color to the case in the minds of the jurors. When the evidence is all admitted and the testimony closed, it is early enough for the jury to consider it, and the views of the district attorney as to its weight must be reserved until the proper time to argue the case arrives. For him to do otherwise would be to induce the jurors to violate the oath taken by them at each adjournment of the court "not to form or express any opinion upon the case until it is finally submitted to them." The persistent argument of the facts of the case by the district attorney here whenever an objection was made by the defendant to a question propounded by the district attorney, or at least for quite a number of times, was certainly prejudicial. There can be no doubt that the iteration and reiteration of these conclusions and arguments were intended to support what the district attorney regarded as a weak point in his case. It was his apparent intention to influence the jury and we cannot say that he did not.

The rule was properly stated by the trial court when it rebuked the attorney for defendant for commenting on the testimony of the complaining witness in the following language: "I don't want you to pass those sort of strictures upon the witness, because that may have a tendancy to prejudice the jury against the witness, which, if such feeling is created, ought not to be done, at least before the final argument of the case." This and several other remarks of the trial judge are assigned as misconduct on the part of the court and as showing feeling upon the part of the judge adverse to the defendant. The trial judge's rebuke to counsel in the foregoing language was proper under the circumstances. The other remarks of the court which are assigned as misconduct do not indicate any feeling of prejudice toward defendant or his case. It is not necessary that we determine whether or not the trial court violated the rule recognized by the Supreme Court in People v. Blackman, 127 Cal. 248, 59 Pac. 573, and People v. Tupper, 122 Cal. 424, 55 Pac. 125, 68 Am. St. Rep. 44, by being absent from the courtroom temporarily during the time counsel was arguing the case to the jury, but we think it our duty to say that, while those cases are accepted as precedents by the appellate courts of the state, absences of trial judges from the courtroom while the trial is in progress, however brief, cannot be safely indulged in.

The showing of newly discovered evidence is not such as to warrant us in saying the trial court abused its discretion in not granting a new trial on this ground. This is true whether we consider it as evidence affecting the issues tried, or as impeaching evidence tending to weaken the testimony of the complaining witness. The effect of the evidence, considered in either way, is a matter which the trial court is best qualified to pass upon, and its conclusion will not be disturbed in this instance. Loath as appellate courts are to set aside verdicts or reverse judgments in criminal cases upon the ground that the defendant's rights have been prejudiced by the misconduct of district attorneys alone, this has been found necessary in at least two recent cases. People v. Mohr, 109 Pac. 476; People v. Derwae, 155 Cal. 592, 102 Pac. 266. In the latter case the court, in speaking of the effect of the rebuking of counsel by the court as a correction of the error, quotes from People v. Valliere, 127 Cal. 65, 59 Pac. 295, as follows: "Rebukes do not seem to have any effect upon prosecuting officers, and probably as little on juries. The only way to secure fair trials is to set verdicts so procured aside."

The vital element to be considered in connection with all irregularities or misconduct of court, counsel, party, or jury is, Are the substantial rights of the complaining party materially affected thereby? This being shown, it will be presumed that he was injured, unless the contrary affirmatively appears. In other words, the burden is on the moving party to show the irregularity or misconduct which might have prevented a fair trial. When this is done, the burden shifts to the successful party to show as a matter of fact that the irregularity or misconduct did not affect the result. It is the reasoning of this rule which underlies the declaration of the court in People v. Wells, supra, that where the misconduct of a district attorney tends to prejudice the jury against the defendant, in a vital matter, the judgment will be reversed unless it appears that the asking of the improper questions complained of could not have influenced the verdict. We are unable to say that the misconduct did not influence the jury in this case.

Judgment and order reversed, and new trial ordered.

We concur: ALLEN, P. J., SHAW, J.

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13 Cal. App. 689

NORTHWESTERN REDWOOD CO. v. DICKEN. (Civ. 703.)

(Court of Appeal, Third District, California. June 29, 1910. Rehearing Denied by Supreme Court Aug. 25, 1910.)

1. New Trial (§ 123*)—Motion—Statement.

Where the notice of intention to move for a new trial required by Code Civ. Proc. § 659, to state whether the motion will be on affidavits, or the minutes, or a bill of exceptions, or statement of the case, states it will be on a statement, the record of the proceedings settled by the judge as a "bill of exceptions," and on which the motion was made, may be treated as a statement.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-279; Dec. Dig. § 123.*]

2. New Trial (§ 131*)—Motion—Statement—Specification of Error.

The specification of error in a statement on which a motion for new trial is made that "the court erred in each and every time in which evidence was admitted, over plaintiff's objections, of statements made by R. not in the presence or hearing of plaintiff or any of its officials or agents, to the admission of which evidence plaintiff duly excepted"—is sufficiently direct and definite.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 131.*]

3. Evidence (§ 121*) — Res Gestæ—Completion of Transaction.

The point at issue in an action for price of supplies furnished by plaintiff for a mill after R. had taken possession of it under an instrument signed by defendant as to the transaction between defendant and R., being as to their legal relations under the instrument—whether it effected an executory contract of sale of the mill by defendant to R., or only an offer of sale by defendant to R. with a provision that R. should take possession of the property to manage it for defendant till R. determined whether he would buy it—the transaction was completed as regards the admissibility as part of the res gestæ, of R.'s declaration, while in possession, that he had bought the mill from defendant, when the instrument was signed, as well if the instrument was an executory contract of sale, and a formal transfer of the property had not taken place, as if it was a mere option.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1117; Dec. Dig. § 121.*]

4. Evidence (§ 317*) — Hearsay — Declarations.

One's declaration, not admissible as part of the res gestæ of the transaction to which it related, having been made after the consummation thereof, not having been made in the presence of the parties to the action to which he is not a party, is mere hearsay, and so inadmissible for any purpose except on proper foundation laid to impeach him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

5. Appeal and Error (§ 1054*)—Harmless Error—Admission of Evidence.

The ruling of the court admitting evidence aliunde an instrument for the ascertainment of its intent, whether an executory contract of sale or an option was intended to be effected by the transaction as evidenced thereby, being conclusive that it was in doubt as to its legal effect, it must have been influenced by, so as to render prejudicial the admission of, the declaration of a party to the contract, but not to the action, made after he had gone into possession of the property under the instrument, that he had bought the property; the language of the instrument being apparently opposed to the construction put on it by the court, even if there was some language in it lending color thereto, and it having nothing but the instrument and such declaration on which to rest its conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Northwestern Redwood Company against J. D. Dicken. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Thomas, Pemberton & Thomas, for appellant. Robert Duncan, for respondent.

HART, J. This is an action by the plaintiff to recover from defendant the sum of $664.79, alleged to be a balance due on an account. The case was tried by the court without a jury and the defendant given judgment. A new trial was denied to the plaintiff, and this appeal is from the order disallowing the motion therefor.

Respondent makes a preliminary objection to the consideration of the record here, claiming that the record of the proceedings contained in the transcript is neither a statement of the case nor a bill of exceptions. The notice of motion for a new trial states that said motion "will be made upon affidavits and upon a statement of the case," and counsel for respondent declares that, inasmuch as the document intended as a statement or a bill of exceptions is thereafter at all times referred to by counsel for the appellant and the judge in his certificate as a "bill of exceptions," we must accept such characterization of the document as conclusive of its character and treat it as a bill of exceptions and not a statement. But it is further insisted that, even if it may be said to be a statement, it must be disregarded, since it does not contain, as required by section 659 of the Code of Civil Procedure, specifications of the particular errors occurring at the trial and excepted to by the appellant referred to in the notice of motion. While the record of the proceedings in the court below as set forth in the transcript was settled by the judge as a "bill of exceptions," we think that it may be treated as either a statement or a bill of exceptions, and that in either case the principal, if not, in fact, the only, errors of law occurring at the trial and excepted to for which a reversal of the order is asked, are sufficiently pointed out in the "specification of errors" to have enabled the trial court to properly consider them and to enable this court to review them without difficulty or inconvenience. These errors are thus specified in the statement or bill: "(1) The court erred in each and every time in which evidence was admitted over plaintiff's objections of statements made by L. J. Roach not in the presence or hearing of plaintiff or any of its officials or agents, to the admission of which evidence plaintiff duly excepted." Then follows a general or an omnibus specification assigning as error all the other rulings of the court against the objections of appellant. The first specification, however, was, as stated, sufficiently direct and definite to indicate the errors upon which appellant relied for a new trial and demands a reversal of the order denying it, and we shall therefore proceed to review the record as to the errors thus pointed out. The plaintiff is a corporation, organized in pursuance of the laws of this state, and engaged, among other things, in the general merchandising business, at Willits, in Mendocino county. The defendant had for a number of years prior to July 6, 1907, prosecuted the business of cutting and manufacturing lumber on a body of timber land, consisting of 1,800 acres, situated on Cave creek, in said county. During all said time the plaintiff furnished defendant with supplies necessary for his domestic use and for the purposes of his lumber mills, and the latter, it seems, was accustomed to shipping and delivering to plaintiff from time to time, or as it was manufactured, the lumber from his mill. The plaintiff would upon the receipt of the lumber credit the defendant upon its books for the lumber so delivered and received at the current market prices. On the 6th day of July, 1907, the defendant, having previously entered into negotiations with one L. J. Roach for the sale of his lumber mill and the timber growing on the land mentioned, executed the following agreement with said Roach, said agreement being upon its face, as will be observed, unilateral: "Willits, Cal., July 6, 1907. For and in consideration of the sum of ten dollars, receipt whereof is hereby acknowledged, I hereby agree to sell to L. J. Roach all my timber on 1800 acres, more or less, situated on Cave Creek in Mendocino county, for seventy-five cents per M ft. as determined by a disinterested competent timber cruiser, or two thousand dollars cash, at option of Roach, and to allow said Roach fifteen years from date of final consummation of sale to remove said timber, said Roach to be allowed mill sites and all necessary rights of way on any portion of said lands for twenty years from date of sale, same to be incorporated in formal instrument of transfer to be drawn by parties hereto. I also agree to sell to L. J. Roach all my mill property and appurtenances of every description, including saw mill, machinery, logging tools, skid-ways, four horses, ten oxen, harnesses, yokes, four wagons, two trucks, rigging, cooking utensils, etc., all for $4,400 to be incorporated in inventory to be taken by parties hereto. I agree to furnish complete abstract of title to said land and to allow 30 days from date of delivery to said Roach to examine same, and to allow ten days from acceptance by said Roach to complete sale after all necessary legal requirements shall have been complied with. Said Roach to take immediate possession of said premises and conduct operations for me until final sale or rejection of title. J. D. Dicken." The sum of $10 was paid to Dicken by Roach upon the execution of said instrument. On the 7th day of July, 1907, in pursuance of the foregoing agreement, said Roach took possession and control of the mill and lumber manufacturing business referred to therein. The plaintiff continued to furnish supplies to the mill, but charged the same on its books to the defendant, and Roach delivered to the plaintiff, as defendant had always done, the lumber manufactured at the mill. The lumber so delivered was credited by plaintiff on the account of defendant. Roach operated the business for a little over a month, when he abandoned it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It may here be stated that "it was stipulated and agreed by the parties in open court that the account sued on and an itemized bill for which was then on file among the papers in the case was correct, so far as the particular items thereof were concerned; that the goods to the amount of $800 had been sold and delivered to some one at the 'Dicken Mill' mentioned in the evidence; but it was not admitted that defendant was liable therefor." It was further admitted that "the controversy was in part whether said goods were sold to defendant through one L. J. Roach, as his agent, or to said L. J. Roach on his own account." The claim of the defendant against the complainant is that he agreed to sell and Roach agreed to buy the mill and the timber on his land on the 6th day of July, 1907, and that the instrument above quoted was intended as evidence of a contract of sale. The plaintiff and Roach insist that the quoted instrument was intended as evidencing an option only, and that Roach took possession of the property, not as a purchaser, but to manage the same for Dicken until he (Roach) should determine whether he would buy the property or not. It appears that the written instrument or agreement on the part of Dicken quoted above had been altered in a material respect either before or after the time at which it was signed by Dicken. The document was prepared by one E. A. Selfridge, Jr., president of plaintiff corporation. As so prepared originally the last sentence of the writing read as follows: "Said Roach to take immediate possession of said premises and conduct operations from date until final sale or rejection of title." Selfridge and Roach testified that, when Dicken was about to sign the instrument, Roach objected to the words "from date" contained in said last sentence, saying to Selfridge in the presence of Dicken that "he would not go out there with the possibility of the option being rejected, the sale not going through." Selfridge then said, "Very well. We will change 'from date' and say 'for me.'" The alteration thus suggested was then made, and, according to the testimony of Selfridge and Roach, with the consent of both Dicken and Roach, and as so altered the agreement or writing was signed by Dicken. Dicken flatly contradicted Selfridge and Roach on this point, and emphatically declared that the alteration was made after he had signed the instrument and without his knowledge and consent. The court found with and in favor of Dicken as to the alteration, and held the transaction resulting in the writing to have constituted a contract for the sale of the property to Roach.

It appears from testimony offered and received on behalf of plaintiff that at the time of the alleged sale of the property to Roach Dicken was indebted to plaintiff for supplies in a large sum of money, and that Roach, while running the mill, delivered lumber to plaintiff of much greater value than the supplies and cash furnished Roach by plaintiff during the period of time he was operating the business. As stated, the lumber delivered to plaintiff by Roach was credited to the account of Dicken so that the excess in the value of the lumber delivered by Roach over the supplies and cash received by him from plaintiff obviously contributed materially toward the reduction of the latter's account against Dicken. As seen, according to the complaint, the sum to which plaintiff's claim against Dicken was thus and otherwise reduced amounted to $664.79, to recover which this action was instituted. From what has thus far been seen of this controversy, as it is presented by the pleadings and the evidence, the vital point hinges upon the legal nature and effect of the transaction between Dicken and Roach as evidenced by the writing executed by Dicken on July 6, 1907, and quoted in this opinion.

If the transaction amounted to the making of an executory contract of sale of the mill and the timber on defendant's land, then manifestly Roach was alone responsible for all obligations incurred while he operated the mill, and was entitled to all credits for lumber delivered by him to plaintiff during the same period or term. If, on the other hand, the transaction involved only an option on the part of Dicken to sell to Roach and the latter assumed control and management of the property for Dicken, then it is equally manifest that, in the absence of any other agreement to the contrary, Dicken continued to be responsible for all supplies furnished the mill necessary in the operation thereof and was entitled to all credits for all lumber delivered to plaintiff by Roach during the period the latter operated the mill. In this latter case, in other words, Roach was only an agent of Dicken. A correct construction of the transaction between Dicken and Roach is therefore of vital importance.

To aid it in the construction of said transaction, the trial court, over the objections of plaintiff, admitted evidence of the declarations of Roach, made to the witnesses testifying thereto, after Dicken had executed the writing and Roach had taken charge of the property, and not in the presence of either plaintiff or defendant, to the effect that he (Roach) had bought from Dicken, and was the owner of, the lumber mill and the business connected therewith. The rulings of the court admitting this testimony constitute the principal subject of discussion in the briefs as well as the main reason for which appellant urges that the order should be reversed. The rulings referred to were, in our opinion, not only erroneous, but, in view of the purpose of the evidence admitted thereunder, were highly prejudicial to the plaintiff. Roach is not a party to this action, and his declarations after the consummation of the transaction not in the presence of the plaintiff that he had bought the mill and lumber business from Dicken constituted the plainest sort of hearsay testimony and could have been admissible under no conceivable theory except, after proper foundation had been laid therefor, for the purpose of impeaching Roach. These declarations were not properly receivable in evidence under the rule of res gestæ, and obviously not admissible on the ground that they constituted declarations against the interest of the declarant. Nor would proof of such declarations constitute proper substantive or independent and affirmative evidence contradictory to the testimony of Roach. Undoubtedly, where the intention of the parties to a written contract is rendered obscure by the ambiguity of the language in which its terms are expressed, evidence of declarations of the parties to said contract or either of them made contemporaneously with the negotiation and execution of the agreement, if explanatory of the purpose or intent of the same, would be admissible as part of the transaction or res gestæ. But it is very clear that such declarations made by either of the parties, not in the presence of the parties to the action, after the transaction has been fully completed, in an action between one of the parties to the transaction and a third party, would involve a narrative of a past event, and therefore constitute hearsay testimony pure and simple. By no known rule of law are declarations thus made binding upon a stranger to the transaction.

But counsel for respondent advances the theory that at the time the alleged declarations were made "the transaction was not completed and would not have been completed until the final transfer of title by Dicken to Roach." In this counsel is mistaken. The question to be determined by the court as to the transaction between Dicken and Roach was: What were the legal relations established between them by the instrument whose terms were sought to be explained in part by the declarations of Roach after the execution of said instrument? Whatever was intended to be accomplished by the transaction evidenced by the writing—whether an agreement to sell and buy the property involved or only an option to buy the same—was completed by the execution by Dicken of said writing. The point at issue as to this transaction, was whether an executory contract of sale had thus been effected or only an offer to sell tendered to Roach. Dicken claimed that it was an executory contract of sale. Roach contended that it was only intended as an offer or an option, and, as stated, the question was as to the legal effect of that transaction, which was, whatever may have been its ultimate purpose and scope, as fully completed as a transaction resulting in the actual sale of property could be. In other words, a contract involving an option to buy property is as fully a completed contract to the extent of the only purpose intended to be accomplished thereby as is a contract of sale or a contract for any other purpose. The gist of a contract of option is the right given thereby to accept or reject an offer to sell within a stipulated or reasonable time. If, therefore, as Roach testified, the transaction evidenced by the writing amounted to an option only, then it was completed as such upon the execution of the instrument by Dicken. If, on the other hand, it was intended as, and in fact constituted, an executory agreement to sell, as the trial court found the transaction to be, then the transaction itself was completed, even though there was something remaining to be done to fully consummate the effect of said transaction. In other words, accepting the defendant's construction of the transaction, the execution or completion of the agreement on his part to sell and on Roach's part to buy the property was a completion of that transaction, and the fact that a formal transfer of the property had not taken place at the time the declarations were made by Roach would not extend the "transaction" culminating in the agreement to sell and buy so as to make said declarations admissible under the rule of res gestæ.

The case of Lewis v. Burns, 106 Cal. 381, 39 Pac. 778, cited by respondent, was where the declarations of one De Blainville, deceased at the time of the trial, were allowed in evidence for the purpose of showing the character of a transaction by which certain real property was conveyed by the declarant to the wife of the plaintiff. De Blainville, by whom the plaintiff and his wife were employed, retained their wages, and during the period of said employment acted as their friend and adviser, and also acted for them in the investment of their earnings. The deeds to the property so bought by De Blainville for plaintiff and his wife were by the advice of De Blainville taken in the wife's name. The plaintiff was then a man of dissipated habits, and it was perhaps on this account that De Blainville suggested that the deeds be taken in the name of his wife. However, the wife, before her death, conveyed the property to her brother and sister, reserving to herself during life the rents, issues, and profits thereof. Upon her death her husband brought an action to quiet title to said property, and the question submitted for trial was whether the property was a gift from De Blainville to the wife, "or whether in purchasing said property De Blainville acted as the agent of the plaintiff and his wife and as their adviser," and the property so purchased constituted community property because of having been purchased with community funds. The Supreme Court held that "the declarations of De Blainville as to his intentions in the premises, made at the time he purchased the lots and constructed the houses upon them illustrative of his intent, formed a part of the res gestæ, and were admissible in evidence." In other words, the declarations of De Blainville constituted a part of the very transaction on which the cause of action in that case rested. They were not, as here, made after the completion of the transaction.

The case of Bates v. Ableman, 13 Wis. 644, also cited by respondent in connection with the attempted application of the rule of res gestæ to the declarations of Roach, afford no support to his position. This case, as we read it, is against him. There the validity of an assignment by a party for the benefit of his creditors was the question in controversy. The trial court refused to allow a witness to testify to declarations made by the assignor in insolvency after the assignment as to his intention in making it. The Wisconsin court, speaking of this ruling, said: "We think it (the testimony) was properly excluded. The statements of Seymour were not those of a party to the suit, and were not admissible on that ground. They were not admissions of a vendor with respect to his title, made before he had parted with it. They were no part of the res gestæ. We can therefore see no principle of evidence upon which they could be admitted. It is undoubtedly true that, where the intent of a party to a sale is in issue, his statements at the time, and so connected with the transaction as to be a part of the res gestæ, are competent evidence to show such intent, even though the person is not a party to the suit. But where they are not so connected with the transaction, but are offered as mere admissions after it occurred, he not being a party to the suit, they are no more competent for that purpose than they would be to prove any other material fact. They are then mere hearsay. And, although a person may be presumed to know very well what his intention was, yet that fact does not make his mere statements, not under oath, proper evidence to prove it, any more than any other material fact equally well known to a witness, could be proved in the same way." We think the foregoing language very clearly expresses the situation here.

The very recent case—in the Matter of the Estate of Henry Gird, Deceased, 108 Pac. 499—was where the question whether the decedent was the father of the distributees of the estate of the deceased was the vital issue. A futile attempt was made to prove certain declarations alleged to have been made by the mother of said distributees to a doctor, some months prior to the birth of one of the children, "to the effect that she was 'in the family way' by one Smith, and that she desired to be rid of the child by an operation." Upholding the ruling of the trial court excluding said declarations, the court say: "This proposed evidence was properly excluded by the trial court. Alice was not a party to this proceeding, but only a witness on behalf of her children. Evidence of these declarations by her to the physician would have been pure hearsay, in no way binding on her children as evidence on the question of paternity. Being contrary to her evidence given on that question, the declarations, waiving other objections thereto, would have been admissible by way of impeachment of Alice as a witness, but a complete answer to appellants' claim in this regard is that no foundation was laid for any such impeachment on the examination of Alice."

There is, as we have declared, no express rule of evidence or principle of law which would authorize the proof of these declarations for any other purpose than as a matter of impeachment, except, of course, in those cases where the declarant is a party to the action. In addition to section 1850 of the Code of Civil Procedure, counsel for respondent refers to sections 1851 and 1854 of the same Code as authorizing this evidence. The sections so cited, as well as section 1870 of said Code, specifically point out the kinds of declarations that are competent to be proved and the conditions upon which they may be given in evidence. The declarations here do not come within any of the sections mentioned. They were, in other words, neither admissible as "against interest," within the purview of any section of the Code authorizing proof of extrajudicial declarations, nor as "prima facie evidence between the parties" to this action, within the meaning of section 1851 of the Code of Civil Procedure, nor as "a part of an act, declaration, conversation or writing" which had been given in evidence within the contemplation of section 1854 of said Code. That the effect of the rulings of the trial court admitting these declarations was to greatly prejudice the rights of plaintiff in the action cannot for a moment be doubted. The instrument which is the main subject of this controversy appears from its language to be nothing more than a mere option, or as involving only the bestowal upon Roach by Dicken of the right to accept or reject, within a certain time, the offer therein contained to buy the property mentioned at the price named. It is plainly apparent, therefore, that, in order to show that the transaction resulting in the execution of the instrument by Dicken constituted an executory contract of sale, parol testimony was absolutely necessary to be received. In fact, the rulings of the court admitting testimony aliunde the instrument itself for the ascertainment of its intent conclusively show that the court was in doubt as to the legal effect of the transaction as evidenced by the writing, for it may safely be assumed that, if the language of the instrument itself had been reasonably clear in the expression of the intent of the parties to the transaction, the court would have neither required nor allowed parol testimony to be introduced upon the subject, since, under such circumstances, testimony independent of the writing itself would not have been necessary to aid the court in the construction of the instrument. Clearly, then, the court, in forming its conclusion as to the nature in legal effect of the relations established between Dicken and Roach by the transaction, must have been influenced to a very great extent by the evidence of the declarations of Roach, not a party to the action, made after the completion of said transaction.

Of course, if, as we have in effect before observed, some competent evidence had been received showing that the transaction was of the nature claimed for it by respondent, a reviewing court would not perhaps feel justified in disturbing a finding based upon such testimony. But the situation here is that the court's general findings (there is no specific finding upon the point under consideration), which necessarily embrace a finding that the transaction between Dicken and Roach amounted to an executory contract of sale must rest, if at all, solely upon a construction of a writing whose language is apparently opposed to such construction. But, even if it could be said that there is some language in the instrument which lends some color to the construction which the court has given it, the evidence of the declarations of Roach must nevertheless be held to have been prejudicial.

In Estate of James, 124 Cal. 653, 57 Pac. 578, 1008, it was contended "that there is sufficient evidence in the record, which came before the court without objection, to support the findings of fact, and that, therefore, even conceding the admission of evidence under objection which should have been denied admission, still a new trial for the aforesaid reasons should not be ordered." In answer to that contention, the court said: "This position cannot be sustained. If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to appellants. This must of necessity be the rule wherever improper evidence has been admitted which upon its face *tends in any degree to affect the final conclusion of the court.*" (Italics ours.)

There can be no doubt, as previously suggested, that the evidence of Roach's declarations contributed in no small degree to the conclusion reached by the trial court with regard to the nature of the transaction between Dicken and Roach.

There are some other questions discussed by counsel in their briefs, but the point to which we have solely addressed our attention is conceded by counsel for the respondent to involve the pivotal proposition in the controversy, and therefore in view of our conclusion as to said point, others need not be noticed.

The order refusing plaintiff a new trial is reversed, and the cause remanded to the court below for trial de novo.

We concur: CHIPMAN, P. J.; BURNETT, J.

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13 Cal. App. 720

WHITLEY et al. v. BRADLEY. (Civ. 545.)

(Court of Appeal, Third District, California. July 5, 1910.)

1. APPEAL AND ERROR (§ 955*)—APPOINTMENT OF RECEIVER — REVIEW — DISCRETION OF COURT.

The power to appoint a receiver pendente lite is one resting in the sound judicial discretion of the trial court, which will not be disturbed on appeal, in the absence of a clear abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3822; Dec. Dig. § 955.*]

2. RECEIVERS (§ 16*)—GROUNDS FOR APPOINTMENT—PRESERVATION OF PROPERTY.

The power to appoint a receiver pendente lite will not be exercised, except on a satisfactory showing that it is necessary to preserve and protect the rights of the parties.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 24–28; Dec. Dig. § 16.*]

3. RECEIVERS (§ 16*)—GROUNDS FOR APPOINTMENT—INTEREST OF APPLICANT.

A party seeking the appointment of a receiver pendente lite must show at least a probable right or interest in the property involved in the suit, and that there is danger of its being lost or misappropriated, unless a receiver is appointed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 24–28; Dec. Dig. § 16.*]

4. APPEAL AND ERROR (§ 1024*)—QUESTIONS OF FACT—APPOINTMENT OF RECEIVER.

Where, on conflicting testimony, the right of a party seeking the appointment of a receiver in the property in litigation and the danger of the destruction or misappropriation thereof are found to exist, the court on appeal will not as a general rule disturb the appointment of a receiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4028; Dec. Dig. § 1024.*]

5. PARTNERSHIP (§ 329*) — FORMATION — EVIDENCE—SUFFICIENCY.

In a suit for the dissolution of a firm for an accounting and a receiver, evidence held to raise a question of fact as to the formation of a partnership.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 329.*]

6. PARTNERSHIP (§ 19*) — EXISTENCE — EVIDENCE.

That a partner has not put up his share of the capital pursuant to an agreement to form a firm does not prevent the existence of a firm, but is a circumstance merely tending to negative its existence.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 5; Dec. Dig. § 19.*]

7. PARTNERSHIP (§ 11*)—FIRM AGREEMENTS—SHARING IN PROFITS AND LOSSES.

Where partners agreed to share equally in the profits of the business, there was under Civ. Code, § 2404, an implied agreement that they would equally bear the losses; there being no stipulation to the contrary.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. § 11.*]

8. PARTNERSHIP (§ 325*)—ACTION FOR DISSOLUTION—RECEIVER—GROUNDS FOR APPOINTMENT.

Where, in a suit for the dissolution of a firm and for an accounting and a receiver, there was evidence of an original agreement and intention of the parties to form a firm to carry on a business until the same should be transferred to a corporation to be formed, and that the firm conducted the business for a time, and that the corporation which was formed never acquired the property and business, and that one of the parties denied the existence of the firm and excluded the others from participating therein, the court did not abuse its discretion in appointing a receiver.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 757–767; Dec. Dig. § 325.*]

9. PARTNERSHIP (§ 20*)—EXISTENCE OF RELATION.

F., W., and B. agreed to form a firm to carry on a business, and to form a corporation to which the firm property and business should be transferred, each of the parties to obtain a third of the capital stock. The firm carried on the business, but did not transfer the property and business to the corporation which was formed. F. transferred to B. the stock purported to have been issued to him in the corporation. B. violated the agreement by demanding 51 per cent. of the stock of the corporation. *Held*, that the transaction did not prevent F. from being a partner in the property and business, so that he could sue for the dissolution of the firm, and for an accounting, and a receiver.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 20.*]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Gerald S. Whitley and another against Alexander Bradley. From an order appointing a receiver pendente lite, defendant appeals. Affirmed.

Louis Boardman, for appellant. Richard C. Harrison and R. V. Whiting, for respondents.

HART, J. This is an appeal from an order appointing a receiver, pendente lite.

The complaint alleges that "on or about the 4th day of January, 1907, at the city of San Francisco, state of California, said plaintiffs and said defendant entered into an agreement wherein and whereby said parties agreed to form a copartnership for the purpose of carrying on the business of manufacturing and selling cement wash trays and doing a general cement construction business, said business to be conducted under the firm name of 'California Cement Tray Company,' and it was then and there agreed that each of said parties should furnish one-third of the necessary capital to carry on said business and each of said parties should receive one-third of the profits of said business and be liable for one-third of the debts of the same;" that said parties ever since entering into said agreement have conducted said business in pursuance of the terms of said agreement; that said copartnership has acquired and "now owns" valuable property consisting of a lease of land situated in the city of San Francisco and other property of different kinds of the approximate aggregate value of $18,850; that "said copartnership is largely indebted." It is further alleged that "on or about the 21st day of May, 1907, said defendant denied the existence of said copartnership, denied that said plaintiffs had any interest in said business, and then excluded, and ever since has continued to exclude, said plaintiffs from any participation in said business, and ever since the said last-mentioned date has taken sole charge of said business, and has retained the whole proceeds thereof and income therefrom"; that since said 21st day of May, 1907, said defendant has not kept up the manufacture of trays, so far as quantity is concerned, as theretofore, but has manufactured not more than one-fifth of the number of trays which had prior to that date been manufactured, and "has been, and is, selling the trays on hand at prices unreasonably low and turning the assets of said copartnership into cash and applying the proceeds thereof to his own use, and unless restrained by an order of this honorable court will continue to do so." It is additionally averred that "it is necessary that a receiver be appointed to take possession of the assets of said copartnership and manage the said business for the benefit of the said partners and of the creditors of said copartnership." An accounting of the business and the affairs of the alleged copartnership and a dissolution thereof constitute the ultimate relief demanded, and that in the meantime a receiver be appointed to take charge of the business and the defendant enjoined from "selling, incumbering or otherwise disposing of said property or any part thereof until the further order of" the court.

The answer specifically denies each and every material allegation of the complaint, and by way of an affirmative defense alleges that the defendant had for many years prior to the 4th day of January, 1907, been engaged in the manufacture of cement trays in the city of San Francisco; that on said date he made an agreement with the M. Fisher Company, a corporation, by which the latter was to construct the buildings "now situate on the premises described in plaintiffs' complaint herein"; that shortly thereafter "the plaintiffs herein proposed the formation of a corporation to be known as 'The California Cement Tray Company,' to conduct said business in which they should hold two-thirds of the capital stock thereof, and which should have the property described in plaintiffs' said complaint and conduct the business mentioned therein;" that accordingly said corporation was subsequently organized and "went into the possession of all the property described in plaintiffs' complaint, and has since remained in the possession of the same, and that the business mentioned in said plaintiffs' complaint has since been in the possession of and conducted in the name of said corporation; that all said property and said business is now in the possession of and being conducted by and in the name of said corporation." Defendant further alleges that plaintiff Fisher on the 7th day of May, 1907, "for a valuable consideration," assigned, transferred, and delivered to defendant all the capital stock held by him in said corporation, and, after such transfer, said plaintiff had no other stock or further interest whatever in said corporation; that plaintiff Whitley "has not contributed or paid any money whatever toward the capital stock of said corporation, and has not paid any money whatever for the construction of the said improvements on the premises described in plaintiffs' complaint, and has not contributed or paid any money whatever in or about the manufacture or purchase of the personal property described in said complaint"; that he has not paid or contributed any money whatever as capital of the alleged copartnership, and that said Whitley has no interest in or ownership of the said property described in the complaint "as a copartner therein or otherwise."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The application for the appointment of a receiver was heard on the 20th day of June, 1907, at which time evidence, oral and documentary, was introduced both in support and against the allowance of said application. The power to appoint a receiver is one of sound judicial discretion, and, unless we can say that there appears from the record here a clear abuse of such discretion in the action of the court below in making the order appealed from, the same must stand.

Equitable relief by way of the appointment of a receiver will be invoked only where the exigencies of the case clearly appear to absolutely require it for the conservation of the rights of all the parties concerned in the litigation giving rise to the application for such relief. The appointment of a receiver is justly regarded as an extraordinary or harsh remedy, and a court of equity will never exercise its discretion favorably to a motion invoking the aid of this remedy except upon a satisfactory showing that such relief is necessary in order to preserve and fully protect the rights of all the parties. Mead et al. v. Burk et al., 156 Ind. 577, 60 N. E. 338. It must, of course, be made to appear that the person seeking such relief has at least a probable right or interest in the property or fund involved in the litigation, and that there is danger of its being lost or destroyed or misappropriated unless a receiver be appointed pendente lite; and where, upon conflicting testimony, such right or interest and danger of the destruction or misappropriation of the property or fund are found to exist, a reviewing court is as a general rule in no position to say that a nisi prius court has abused its discretion in the appointment of a receiver. High on Receivers (3d Ed.) § 11; Mead et al. v. Burk et al., supra; Copper Hill Mining Co. v. Spencer, 25 Cal. 16; Gillett v. Higgins, 142 Ala. 444, 38 South. 664; Brown v. Vandermeulen, 41 Mich. 418, 49 N. W. 920; Bank, etc., v. Hardy (Miss.) 48 South. 731; Dawson v. Parsons, 137 N. Y. 605, 33 N. E. 482; Lyle v. Commercial Bank, 93 Va. 487, 25 S. E. 547; Nash v. Meggett, 89 Wis. 486, 61 N. W. 283; Naylor v. Sidener, 106 Ind. 179, 6 N. E. 345; Cone v. Paute, 12 Heisk. (Tenn.) 506; Cameron v. Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26. The determination of the question here must therefore of necessity rest upon the proposition whether the evidence upon which the order appealed from was made affirmatively discloses an abuse of discretion.

The contention of the appellant is that the evidence received at the hearing of the motion is insufficient to show that there ever was an agreement to organize a partnership, much less the organization of one, between the parties to this suit; that, on the contrary, it was understood and agreed among the parties that they would form a corporation, as alleged in the answer, for the purpose of manufacturing cement trays; that the property mentioned in the complaint was acquired for the benefit of such corporation; that, in accordance with this understanding, a corporation was formed. It is further contended by appellant that the lease mentioned and claimed as partnership property is shown to have been transferred to the corporation; that the plaintiff Fisher the evidence shows, sold and transferred whatever stock he owned in the corporation to the defendant, and that, according to the testimony, plaintiff Whitney never at any time contributed any money toward or for the benefit of either the alleged partnership or the corporation.

The claim of respondents is, as the allegations of the complaint in part show, that the original agreement between the parties was to form a copartnership, to thereafter incorporate and then to transfer the business and property of said partnership to the corporation so formed, that the property was owned and the business conducted by them as copartners, and that said property and said business have never been transferred to the corporation formed subsequently to the formation of the partnership. We cannot say that it affirmatively appears from the record that the court was not justified in appointing a receiver; or, in other words, that the court thus abused its discretion. Both Whitley and Fisher testified that in the early part of January, 1907, they and the defendant entered into an agreement to form a partnership for the purpose of carrying on the business of manufacturing and selling cement trays. Fisher testified that at the time now spoken of Bradley was not engaged in business. "Prior to the fire," continued Fisher (referring to the fire of 1906), "he had been in the cement wash tray business, but not since the fire. He claimed that he had promised Mr. Whitley that at any time he (Bradley) should go into the tray business he would have him act as partner, and I acquiesced in that, and said I would go into partnership with them under those conditions." The plaintiffs and defendant agreed that Bradley and Whitley should manage the business for which each was to receive a salary. The property upon which the building to be used for carrying on the business was erected was leased by the parties in the names of Bradley and Whitley. It was agreed that, after the business was started, a corporation should be organized for the purpose of conducting the business. Neither Whitley nor Fisher actually contributed any money toward establishing the business, but both testified that they were at all times ready and willing to put up their respective shares, but were told by Bradley to wait until the business was incorporated, when they would divide up the stock; the agreement being that the shares in and the profits of the business should be equally divided. Efforts were finally made to incorporate and a lawyer consulted with that view; but Bradley demanded 51 per cent. of the stock, "and," testied Fisher, "that broke this thing all to pieces, and, Mr. Whitley and myself not agreeing to that, we couldn't come to any conclusion at all." Whitley, as stated, corroborated Fisher on all important particulars as to the agreement between the parties. The parties were to be equal partners, he said, and share equally in the profits—that is, each was to have a one-third interest in the business and each to receive one-third of the profits. Whitley negotiated for the lease of the property upon which the building was erected, and he and Bradley were each to receive a monthly salary, while Fisher, not actively engaged in the management of the concern, was to receive his share of the profits only. "Before the building was completed," proceeded Whitley, "we were making trays. We carried on the business of manufacturing cement trays under the name of the 'California Cement Tray Company.' I took care of the books and handled the outside business and solicited business. Mr. Bradley took charge of the making of the trays and selling them. Mr. Fisher was the silent man, and had a great deal of prestige, and is connected with Levy Bros. who buy more material than anybody else in San Francisco." Referring to the fact that he had not put any money into the business, Whitley testified: "I had several conversations with Mr. Bradley about my putting up money. He always put it off. There was always some excuse, and we couldn't come to any agreement. I told him my money was lying in the bank any time he wanted it. * * * There was no arrangement or understanding had between me, Bradley, and Fisher as to the amount of money that any of us should put into the business, but I told Mr. Bradley my money was ready to be paid at any time. Mr. Bradley refused to take money on account. He said that he wanted all the bills to come in, and wanted the building and the plant to be put in operation, and that then we would divide up the business share and share alike, and repay him for the money that he had withdrawn from the bank with interest."

The attorney consulted by the parties with regard to the formation of a corporation prepared the papers for that purpose, and also prepared a draft of the minutes of what should take place at the preliminary meeting of the directors. McGrath, the secretary of the board of directors, testified that there was a meeting of the stockholders held on February 9, 1907, and that the business then transacted was the election of the directors of the corporation, after which, and on the same day, said directors held a meeting, at which the only business transacted was the adoption of a code of by-laws. He further testified that there were no other meetings of the directors after the 9th day of February, and that what purported in the "minute book" of the corporation to have been an offer on the part of Bradley, Whitley, and Fisher to transfer and assign to the corporation the business of cement tray making and the property used in connection therewith and an acceptance of said offer by the corporation through the directors, never took place. The attorney referred to corroborated these statements, saying, as before intimated, that that part of the "minute book" referred to was prepared by him not for the purpose of representing the fact of the transfer or the offer to do so and acceptance thereof, which had then not occurred, but merely as an exemplar to be followed for the proper preservation in the "minute book" of the record of the transaction as so carried out, in the event that at any future time such transaction should take place. Whitley also testified that the business and property of the partnership had never been transferred to the corporation.

It may be conceded that there is not an overwhelming amount of testimony in the record showing that the parties first formed themselves into a copartnership for the carrying on of the business referred to in the pleadings and the evidence, but there is some showing that such was the original arrangement and intention of the parties and that they actually formed a partnership and carried on the business, for a time at least, through that instrumentality; and this showing is of a character to make it impossible for this court to reverse the order appealed from without an unwarranted interference with the discretion vested in trial courts in such matters. The lease was taken in the names of Bradley and Whitley, and, so far as the record shows to the contrary, is still in their names. This of itself is a valuable asset. The property and the business were never transferred to the corporation, and the latter, although properly existing, it may be admitted, and brought into existence for the purpose of acquiring the property and business of the partnership and conducting the same, has never acquired the property and the business or either, and as such property and business must be owned by some one, ownership thereof has necessarily remained and still remains, so far as we are advised by the record before us, in the partnership.

The fact that neither Whitley nor Fisher has put any money into the business cannot change the situation in the least. This circumstance, as an evidentiary fact, tending, it may be, to negative the proposition of a partnership, was worthy only of such weight as the court deemed it entitled to, and no doubt was given proper consideration by the judge in determining whether there existed a partnership between the parties under the agreement, but it by no means follows that because one partner may not put up his share of the capital under an agreement to form a partnership the combination so formed is any the less a partnership.

The case of Brooke v. Tucker, 149 Ala. 96, 43 South. 141, is in many respects almost identical with the case at bar. There a partnership was formed with an understanding between the parties thereto that later on there would be organized by the partners a corporation to which said business would be transferred and through the agency of which the same would thereafter be carried on. We quote from the opinion in that case: "Whether complainant and Brooke are partners inter sese must be determined by their intention as the same is expressed in or may be gathered from the written agreement entered into by them. By the contract it is made to appear that complainant and Brooke associated themselves together for the publication of a newspaper. It also appears that at the time the contract was made Brooke was the sole owner of the newspaper plant, and it may be conceded that by the terms of the contract he was to remain the owner and possessor of the legal title, and in control, until the formation of the contemplated corporation provided for by the contract; yet this of itself would not prevent the contract from being one of partnership. To constitute a partnership, it is not necessary that there should be property forming its capital jointly owned by the partners. The property employed in the partnership business may be separate property of the partners; but, if they share in the profits and losses arising from its use, a partnership exists—[citing McCrary v. Slaughter, 58 Ala. 230, 234]. * * * While nothing is said specifically about the losses, or that complainant is to share in them, yet, construing all the terms of the contract together, it is our opinion that there is created a community of profits and loss, or, as it is expressed in one of our cases, 'a communion of profits and loss is created,'" citing a number of cases. The foregoing expressions harmonize with our Code definition of a partnership. Sections 2395, 2404, Civ. Code. The agreement here was that the parties should at all times participate in the profits in equal shares, and that they should equally bear the burden of the losses is implied from such agreement, there appearing no stipulation to the contrary. Section 2404, Civ. Code, supra. There can be no doubt that the ultimate purpose or intent of the parties was to form a corporation by and through the agency of which the business in which they had engaged was thereafter to be transacted. But there is evidence that they started to do business before a corporation was formed or before steps were taken to form one, and it is shown that they sustained some sort of relations with each other before the organization of the corporation. We think it clearly enough appears that the intention was to establish and fix as their status toward each other during their association together prior to the time at which the corporation was to be organized that of a copartnership.

Nor does the fact that Fisher transferred to Bradley stock purporting to have been issued to him in the corporation make him any the less a partner in said property and business, since the said property and business were never transferred to said corporation. Obviously no one can sell property and convey a valid title thereto which he does not own and to which he has no title. Even if it might be contended that, under the agreement to form a corporation at a certain time, pending which time the business and property acquired for the purposes of such a corporation were to be conducted by and owned as a partnership, the copartners would become trustees of the corporation as to such business and property upon the formation of such corporation, and that the latter upon its formation would have an equitable title to such business and property, such contention could not be successful here, since it appears from the evidence that the terms upon which the corporation here was to be formed were not kept by the defendant, who demanded, instead of one-third of the capital stock to which he was alone entitled, according to the agreement, 51 per cent. thereof. It is very clear that the stock issued to Fisher by the corporation could not affect the property involved here, and that Fisher's sale of said stock to Bradley conveyed nothing, so far as the property and the business of the partnership were concerned.

The cases cited by counsel for appellant to the effect that property acquired for the purposes of a corporation to be subsequently organized ipso facto inures, with all its rights and advantages, to such corporation upon its formation, and that, therefore, a formal transfer of the property so acquired to said corporation is not necessary, do not fit the facts of this case as found by the court and as are sufficiently shown by the evidence, and are therefore not in point here.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

13 Cal. App. 715

TUTT v. DAVIS et al. (Civ. 818.)

(Court of Appeal, Second District, California. July 5, 1910. Rehearing Denied by Supreme Court Sept. 1, 1910.)

1. Process (§ 86*)—Service—Publication—Suit for Specific Performance.

A suit to specifically perform a contract to convey being one to determine a right or interest in land, defendant may be summoned by publication service under Code Civ. Proc. § 412.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. § 86.*]

2. Appeal and Error (§ 1050*) — Review — Harmless Error—Admission of Evidence.

Error in admitting evidence is subject to complaint only so far as it injures.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

3. Specific Performance (§ 120*)—Contract to Convey—Evidence.

One suing to specifically perform a contract to convey could introduce a memorandum of the contract and a written assignment to him of the purchaser's rights thereunder.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 120.*]

4. Frauds, Statute of (§ 106*)—Contract to Convey—Sufficiency of Memorandum.

A memorandum, dated at a specified time and place, reciting receipt from a firm of $100 as a deposit and part payment on specified land, that certificate of clear title should be furnished, "also deed properly signed and executed. Price to be $3,500 net to seller; terms $1,500 cash, balance payable $1,000 in one year, $1,000 in two years with interest at seven per cent. on deferred payments"—signed by the vendor and attested, is sufficient and subject to specific performance as a contract to convey.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 210, 211; Dec. Dig. § 106.*]

5. Specific Performance (§ 32*) — Contract to Convey—Mutuality.

Under Civ. Code, § 3388, authorizing one to enforce specific performance of a contract assigned by him if he has performed or offered to perform on his part, mutuality of a contract to convey attached by the purchasers' assignee tendering performance and suing for specific performance, though the memorandum of agreement was signed by the vendor only.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89–99; Dec. Dig. § 32.*]

6. Vendor and Purchaser (§ 251*)—Contract to Convey—Payment—Security Implied.

In the absence of specific agreement whereby deferred payments are to be secured on a sale of land, the law fixes the security through vendor's lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 624; Dec. Dig. § 251.*]

7. Vendor and Purchaser (§ 75*)—Contract to Convey — Time for Delivering Deed Implied.

In the absence of specific agreement as to when the deed is to pass under a contract to convey, it should pass at the last payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 113; Dec. Dig. § 75.*]

8. Vendor and Purchaser (§ 214*) — Contract to Convey—Assignability.

Under Civ. Code, § 1458, making an obligee's rights assignable, a contract to convey can be assigned by the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 443; Dec. Dig. § 214.*]

9. Partnership (§ 66*)—Authority—Estoppel.

One who contracted with a partnership to convey land to it cannot question its authority to make the contract.

[Ed. Note.—For other cases, see Partnership Dec. Dig. § 66.*]

10. Partnership (§ 68*)—Settlement of Affairs—Character of Property.

In settling equities between members of a firm organized to deal in land, the firm assets must be regarded as personalty.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 108; Dec. Dig. § 68.*]

11. Partnership (§ 139*) — Authority of Partners—Assigning Land Contract.

One member of a firm of real estate dealers can assign in the firm name its rights as purchaser under a contract to convey.

[Ed. Note.—For other cases, see Partnership. Dec. Dig. § 139.*]

12. Specific Performance (§ 91*)—Contract to Convey—Demand Unnecessary.

Under a contract to convey, no demand by the purchaser for possession was necessary when final payment was tendered, since demand for a deed, if complied with, would confer right of possession.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 230–232; Dec. Dig. § 91.*]

13. Contracts (§ 266*)—Withdrawal—Restoration of Consideration.

One cannot withdraw from a contract by merely expressing desire or intent so to do while he retains the consideration paid him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.*]

14. Specific Performance (§ 105*) — Contracts to Convey—Laches.

A delay of little more than three months in suing to specifically perform a contract to convey does not show laches, especially where no fluctuation in value of the property in the meantime appears.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 328–331; Dec. Dig. § 105.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Suit by Edward S. Tutt against William J. Davis and another. From a decree for plaintiff, defendant William J. Davis appeals. Affirmed.

Bert F. Mull, for appellant. A. C. Lawson and Kendrick, Knott & Ardis, for respondent.

ALLEN, P. J. The action was one for a decree requiring defendant to specifically perform a contract for the conveyance of real property. It is based upon an agreement between defendant and plaintiff's assignor, which is in the words and figures following: "Long Beach, California, Oct. 26th, 1904. Received of Southern California Realty Co. one hundred ($100) dollars as deposit and part payment on the west 140 feet of lots 10, 12, in block 67 of the city of Long Beach, county of Los Angeles, state of California. Certificate of title to be furnished showing said property free of all incumbrances; also deed properly signed and executed. Price to be thirty-five hundred ($3,500) dollars net to seller; terms, fifteen hundred ($1,500) dollars cash, balance payable $1,000 in one year and $1,000 in two years, with interest at 7 per cent. on deferred payments. W. J. Davis. L. F. Oakes, Witness to Signature of W. J. Davis."

It is averred that Oakes subscribed his name as witness at the request of defendant Davis, and that the instrument, duly acknowledged so as to entitle it to record, was recorded in the records of Los Angeles county, state of California, on November 22, 1904; that on the date of the execution of the instrument L. F. Oakes and one Bixby were partners engaged in buying and selling real estate in Los Angeles county, and doing business under the firm name and style of the Southern California Realty Company. It is further averred that said firm paid the cash payment mentioned in the agreement; that the total consideration agreed to be paid for the property was the fair market value of the same at the time of the agreement, and was as to all parties fair, just, and equitable. It is further averred that on November 21, 1904, notwithstanding defendant's failure to provide the certificate of title as specified, the firm tendered to defendant the balance of the cash payment; that on the 13th of December following such firm assigned and transferred to plaintiff the agreement, with all their right, title, and interest to the property described, which said agreement is in the words and figures following: "For value received we have assigned and set over, and do hereby assign and set over, all our right and interest in, to and under the within agreement to Edward S. Tutt. Dated this 13th day of December, 1904. Southern California Realty Co., per L. F. Oakes."

This assignment was indorsed upon said agreement executed by defendant Davis. Thereafter, on the dates fixed in the agreement for making the deferred payments, plaintiff tendered the amounts thereof, with interest as specified in such agreement, and on the 26th of October, 1906, tendered to defendant the full sum of $3,400, with interest as specified, and demanded that defendant execute a deed conveying said property, which defendant has failed and refused to do. It is further averred that plaintiff is ready and willing, and has been at all times, to pay said purchase price, together with interest thereon, and the amount was brought into court and offered to defendant in payment thereof; that defendant Davis on August 14, 1906, made a pretended conveyance of said property to himself, in which he is designated as grantee therein under the name of Jasper Davis, but that said William J. Davis and Jasper Davis are one and the same person; that the deed was made without consideration and for the sole purpose of annoying plaintiff and hindering and delaying the enforcement of the agreement held by plaintiff.

Issue was made as to all the allegations of the complaint. Upon the trial the court found in favor of plaintiff, and that all the allegations of the complaint were true and the allegations of the answer untrue, and rendered a judgment and decree accordingly in plaintiff's favor, from which defendant William J. Davis appeals under the alternative method.

It is insisted by appellant that the substituted process shown to have been made in the action was insufficient to give the court jurisdiction. We think that in actions of this kind service of process may be made by publication. The action being one for the determination of a right or interest in real property (Grocers' Union v. Kern, etc., Co., 150 Cal. 473, 89 Pac. 120) brings the same within section 412 of the Code of Civil Procedure. The rule is laid down in Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565: "In cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract respecting the same," constructive notice is held sufficient. In Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 301, 5 Sup. Ct. 135, 28 L. Ed. 729, it is said that jurisdiction may be acquired "by the mere bringing of the suit in which the claim is sought to be enforced" against the property situate within the territorial jurisdiction; that this "may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit"—all of which is quoted with approval in Loaiza v. Superior

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Court, 85 Cal. 34, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197. We find no error in the action of the court denying the motion to vacate and set aside the order for publication of summons.

It is claimed that the trial court neglected to make a formal ruling upon objections to the admission in evidence of the memorandum and the written assignment. Conceding this to be true, the extent to which defendant could be prejudiced thereby is measured by the injury which would have resulted from their improper admission. The findings are conclusive that the instruments were received and considered in evidence, and we think that they were properly received. The memorandum was sufficient as a contract upon which to base the action. Bird v. Potter, 146 Cal. 288, 79 Pac. 970. Mutuality attached by the tender and subsequent suit. Section 3388, Civ. Code. It is claimed that the memorandum was uncertain, in that the manner of securing the deferred payments did not appear. In the absence of specific agreement by which deferred payments are to be secured in the sale of real property, the law fixes the security through a vendor's lien. The law also determines that the time for delivery of the deed under a contract of this kind is when the last payment is made or tendered. We regard the agreement as an assignable one (section 1458, Civ. Code), and the assignment sufficient to pass the interest of plaintiff's assignor. Defendant having dealt with the partnership is not in a position to question its authority to enter into the original contract. Fresno Canal Co. v. Warner, 72 Cal. 380, 14 Pac. 37; Yancy v. Morton, 94 Cal. 560, 29 Pac. 1111. The partnership being one for the purpose of dealing in real estate, as between the parties in the settlement of equities between themselves the assets of the firm must be regarded as personal property (Woodward v. McAdam, 101 Cal. 440, 35 Pac. 1016), and the agency of one of the partners a sufficient authority to execute the assignment in the firm name.

No demand of possession was requisite when final payment was tendered. The demand for a deed, if complied with, would confer right of possession without demand.

No withdrawal from the agreement based upon a tender of the money received thereunder is made to appear. One cannot be said to have withdrawn from an agreement by simply expressing a desire or intention so to do, while he retains the consideration paid him on account of its execution. The claim of appellant that he offered to refund the amount received by him is found by the court to be untrue.

Laches cannot be imputed to plaintiff in bringing the action, because of a delay of a little over three months after the cause of action arose before suit was brought, especially in view of the fact that there is nothing in the record indicating any fluctuations in value between those dates.

An examination of the record, or that portion thereof to which reference is made in the briefs, satisfies us that each and every finding of the court has support from the evidence.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

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13 Cal. App. 741

Ex parte DANFORD. (Cr. 177.)

(Court of Appeal, Second District, California. July 9, 1910.)

1. Indictment and Information (§ 132*)—Two Offenses—Election.

Where an information properly charged the offense of accused, who had been committed by the justice's court after hearing on a proper affidavit of complaint, and also charged another offense, the striking out of the latter offense was an election to proceed only on the former, which could in no way prejudice the accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 428; Dec. Dig. § 132.*]

2. Habeas Corpus (§ 4*)—Remedy by Appeal—Review.

Where an information, based upon a proper affidavit of complaint and commitment, purported to state an offense of which the court had jurisdiction, the same rule applies as in the case of an indictment, that all errors in the subsequent proceedings can be reviewed only by appeal, and not on application for a writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Application by W. J Danford for writ of habeas corpus. Writ denied.

W. J. Danford, in pro. per.

PER CURIAM. An affidavit of complaint was filed before a justice of the peace charging defendant with a violation of section 474 of the Penal Code. This affidavit of complaint is sufficient in every respect. The justice of the peace upon preliminary examination held the defendant to answer. Thereafter the district attorney filed an information charging defendant with the same offense specified in the affidavit of complaint, and, in addition thereto, included in said information a second and different offense than that for which defendant had been held to answer. Defendant moved to set aside the information because two separate and distinct offenses were charged, and also filed a demurrer to the information on the grounds, first, of the uncertainty thereof; and, second, that the information included an offense for the commission of which defendant had not been legally committed by a magistrate.

It is alleged in the petition for the writ that the court granted leave to the district attorney to strike out of the information the second offense, which was the one not embodied in the affidavit of complaint, and overruled the demurrer to the information. It is contended by petitioner that this action of the district attorney in striking out the second offense deprived the court of jurisdiction to hear and determine the action. Assuming that this second offense was included in the information without warrant, upon such theory the same was surplusage and was properly stricken from the information. The effect of striking the same from the information was an election to proceed only as to the offense properly charged. When a sufficient information charging the offense for which he stood committed remained, the accused could in no sense be injured by the action of the district attorney or the court in striking out such surplusage. It is alleged that subsequently the defendant was tried and convicted of the first offense. It will be assumed, nothing to the contrary appearing in the petition or exhibits attached thereto, that his plea was entered after the hearing of the motion and the demurrer. The affidavit of complaint being sufficient, no reason is apparent why the rule laid down in Ex parte Ruef, 150 Cal. 665, 89 Pac. 605, should not be applied, which is that: "Where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus." Such inquiry is only permissible where there is for review a proceeding in an inferior court. Ex parte Greenall, 153 Cal. 770, 96 Pac. 804. Here we are called upon to review a proceeding in a court of general jurisdiction, and a rule which would apply to an indictment should apply with equal force to an information filed in such court. In our opinion, therefore, the petitioner having been regularly held to answer, the affidavit of complaint and commitment being sufficient, and the information purporting to state an offense of a kind of which the court assuming to proceed has jurisdiction, that all subsequent irregularities or errors, if any occurred in the course of the proceedings, are matters for review upon appeal, and habeas corpus will not lie on account thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Writ denied.

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13 Cal. App. 736

In re MILLS SING. (Civ. 860.)

(Court of Appeal, Second District, California. July 9, 1910.)

1. INFANTS (§ 18*)—JUVENILE COURT PROCEEDINGS—JURISDICTION.

Though St. 1901, p. 95, gave the police court and the city justice's court of Los Angeles exclusive jurisdiction of misdemeanors, the juvenile court act (St. 1909, p. 213) divests them of exclusive jurisdiction of misdemeanors arising under that act.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 18.*]

2. STATUTES (§ 98*)—SPECIAL ACTS—JUVENILE COURT ACT.

The provisions of juvenile court act (St. 1909, p. 213) for jurisdiction of offenses under the act do not violate the constitutional prohibition against special or local laws affecting jurisdiction of justices of the peace, the punishment of offenses, or the practices of courts; the act being general in its application.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 98.*]

3. INDICTMENT AND INFORMATION (§ 3*)—OFFENSES UNDER JUVENILE COURT ACT—PRACTICE.

Since offenses under Juvenile Court Act, § 26 (St. 1909, p. 225), are triable in the superior court, they are governed by Pen. Code, § 888, which requires offenses so triable to be prosecuted by indictment or information excepting proceedings to remove officers.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 3.*]

4. INDICTMENT AND INFORMATION (§ 41*)—MISDEMEANORS—NECESSITY FOR PRELIMINARY EXAMINATION.

Under Pen. Code, § 809, directing the filing of an information after commitment of accused, and under section 950, specifying what an information must contain, a preliminary examination and commitment are precedent conditions to the information, upon which only the superior court can proceed to try one charged with a public offense, though it be a misdemeanor.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 41.*]

5. CRIMINAL LAW (§ 212*)—COMPLAINT—VERIFICATION.

Under Pen. Code, § 806, a complaint for an offense need not be verified, but, if verified and containing positive evidence of facts tending to show guilt, it may be treated by the examining magistrate as the supporting deposition required by section 812.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 212.*]

6. CRIMINAL LAW (§ 212*)—COMPLAINT—SUPPORTING DEPOSITION—VERIFICATION.

The deposition of a complaining witness taken by an examining magistrate, as provided for by section 812, Pen. Code, must be taken by the magistrate, as must all preliminary evidence introduced tending to show commission of an offense, and that there is a reasonable ground to believe that accused committed it.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 212.*]

7. OATH (§ 2*)—SUPERIOR COURT JUDGE ACTING AS MAGISTRATE—ADMINISTERING OATHS.

A superior judge acting as a magistrate cannot call in a clerk or any other officer to administer oaths, since the judge, in that capacity, has only such powers as are conferred upon justices of the peace or police judges.

[Ed. Note.—For other cases, see Oath, Dec. Dig. § 2.*]

8. CRIMINAL LAW (§ 212*)—OFFENSES UNDER JUVENILE COURT ACT—COMPLAINT.

A complaint charging an offense under Juvenile Court Act, § 26 (St. 1909, p. 225), verified before a deputy county clerk, cannot be used as a deposition on the preliminary hearing, and is insufficient as a deposition authorizing issuance of the warrant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 212.*]

9. PROHIBITION (§ 5*)—SCOPE OF RELIEF.

Since on application for prohibition against a superior judge holding a preliminary examination does not involve a question of illegal restraint, applicant cannot rely on insufficiency of the deposition on which the warrant issued.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 5.*]

10. INDICTMENT AND INFORMATION (§ 137*) — DEPOSITION SUPPORTING COMPLAINT — INSUFFICIENCY—EFFECT.

When an arrest has been made and accused is before a court having jurisdiction as a magistrate to hold a preliminary examination, the magistrate may proceed, and, if commitment issue, a foundation is laid for an information, and the information cannot be set aside because the depositions were insufficient to warrant the arrest.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 483-485; Dec. Dig. § 137.*]

Application of Mills Sing for a writ of prohibition. Writ denied.

George L. McKeeby and Paul W. Schenck, for petitioner. Curtis D. Wilbur, George Beebe, and J. D. Fredericks, for respondent.

PER CURIAM. The petitioner represents that heretofore an affidavit was signed by one McLaughlin before a deputy county clerk of Los Angeles county charging petitioner with a violation of section 26 of the act known as the "Juvenile Court Law" (Laws 1909, p. 225); that thereafter the probation officer of the juvenile court arrested petitioner, and he was taken before respondent, a judge of the superior court of said county; that said judge then and there set the cause for preliminary hearing and examination before himself sitting as a committing magistrate, said examination to be had at 9 o'clock a. m. of the 1st day of June, 1910; that, objection being made to the jurisdiction of respondent to conduct such preliminary examination, respondent continued the hearing thereof until the 2d day of June, at 9 o'clock a. m., for the purpose of hearing evidence and taking testimony; that, notwithstanding such continuance the respondent on the 1st day of June, made and indorsed on the affidavit of complaint an order in conformity to section 872 of the Penal Code. It is averred that this order was made and entered by the court without hearing any evidence or taking any testimony. It is further averred that respondent threatens to hold a preliminary examination on the 2d day of June, that respondent is without jurisdiction to hold such preliminary examination, the petitioner has no plain, speedy, and adequate remedy in the usual course of law, and asks that the respondent be prohibited from sitting as a magistrate and conducting the preliminary examination of petitioner "upon the said instrument designated 'Complaint-Criminal' on file in said court."

Respondent demurs to the petition as being insufficient to authorize the issuance of the writ, and at the same time a motion was made to strike out of the application that portion thereof which contained the order indorsed upon the affidavit of complaint, for the reason that the same was indorsed thereon through inadvertence, and the record shows that such preliminary examination has not been held. We are of opinion that it is so evident from the petition that the order of commitment was prematurely entered, and without authority, that it need not be considered. The fact that the preliminary examination is threatened, and that the order of commitment could only be entered after such a preliminary examination, sufficiently demonstrates its premature character, and that its entry is not of serious consequence in the consideration of the questions presented upon this application. It is contended by petitioner, the offense being a misdemeanor, that the police court and the city justice's court of Los Angeles city have exclusive jurisdiction. St. 1901, p. 95. The exclusive jurisdiction of misdemeanors committed within the city was by said act conferred upon such courts, but the juvenile court act (St. 1909, p. 213) divested such city courts of exclusive jurisdiction in misdemeanor cases of the class under consideration and conferred jurisdiction upon the superior court. Whether this jurisdiction so conferred upon the superior court is exclusive in such cases or concurrent is not material for the purposes of this decision.

It is next contended that the juvenile act violates those provisions of the Constitution which prohibits special or local laws as affecting jurisdiction of justices of the peace, or the punishment of criminal offenses, or the practice of courts of justice. This criticism is fully answered by the statement that such act is general in its nature, applying to every county in the state and to every superior court therein. In addition to this, the Constitution confers upon the superior court jurisdiction in all misdemeanors not otherwise provided for by law; and here we have a case where such jurisdiction is expressly conferred by a general law.

Next, it is claimed that the law contemplates no preliminary examinations in misdemeanor cases. The juvenile act making the offense under consideration triable in the superior court, section 888 of the Penal Code applies, which provides that all public offenses triable in the superior court must be prosecuted by indictment or information, except as to accusations for the removal of certain officers. Section 809 of the Penal Code directs the filing of an information after commitment by a magistrate, and section 950 of the Penal Code, specifies what such information must contain. It follows, therefore, that the preliminary examination and commitment are precedent conditions to the information upon which, and upon which only, can the superior court proceed to try one charged with a public offense, even though it be a misdemeanor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is finally contended that the court is without jurisdiction to conduct the preliminary examination threatened because the complaint was verified before a deputy county clerk, and not before the magistrate. The complaint which initiates a criminal proceeding need not be verified. Section 806, Pen. Code. If verified, however, and containing positive evidence of facts tending to show guilt, the same may be treated by the magistrate as the deposition required by section 812 of the Penal Code. Ex parte Dimmig, 74 Cal. 166, 15 Pac. 619. Such depositions, however, must be taken by the magistrate, as must all preliminary evidence introduced tending to show the commission of an offense, and that there is reasonable ground to believe the defendant has committed it. A superior judge assuming the duties of a magistrate has no right to call in the clerk or any other officer to administer oaths. He sits as a creature of the statute with such powers only as are conferred upon justices of the peace or police judges. People v. Cohen, 118 Cal. 78, 50 Pac. 20. It must be held, therefore, that the complaint verified before a deputy clerk cannot be used as a deposition upon a preliminary hearing, nor was it a deposition authorizing the issue of the warrant of arrest. The arrest, however, was made, and the petitioner is before the court for examination. No question of illegal restraint is here involved. We are called upon to determine only whether, having petitioner before him under a complaint in writing, the respondent can be prohibited from conducting the preliminary examination. The complaint and the depositions are only intended as a basis for the warrant of arrest. When the arrest has been actually made and the prisoner is before a court having jurisdiction as a magistrate to hold a preliminary examination, such magistrate may proceed to a preliminary examination, and, if commitment issue, a foundation is laid for the filing of an information, and the same cannot be set aside because the depositions were insufficient to warrant the arrest. People v. Lee Look, 143 Cal. 220, 76 Pac. 1028.

We are of opinion, therefore, that the petition herein does not state facts sufficient to authorize the issuance of the writ of prohibition.

Writ denied.

158 Cal. 226

RUSS v. TUTTLE. (S. F. 5,007.)

(Supreme Court of California. Aug. 25, 1910.)

1. Corporations (§ 116*)—Sale of Stock—Offer and Acceptance.

Where a party offered to sell certain stock to another party at any time within 30 days, there being no consideration for it, there was no contract to sell, but merely an offer, which became a binding contract on its acceptance and tender of payment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 116.*]

2. Corporations (§ 118*)—Sale of Stock—Contract—Offer and Acceptance.

Where a person offered to sell certain stock to either one of two parties, the sale to one relieved him of any obligation to the other, but the refusal of the one to purchase did not relieve him of his duty to sell to the other on his accepting the offer.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 118.*]

3. Appeal and Error (§ 1002*)—Questions of Fact—Conflicting Testimony.

Where, in a suit for the refusal to sell stock according to a written option to purchase, which was accepted, the testimony was conflicting whether such offer was procured through fraud, the finding that there was no fraud will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

4. Corporations (§ 121*)—Breach of Contract to Sell Stock—Action by Buyer—Damages.

In a suit for the refusal to sell certain stock as agreed, the purchase price not being paid, it was proper to instruct that the damages should be the excess, if any, of the value of the stock to the buyer over the purchase price under the contract, as provided by Civ. Code, § 3308, regardless of evidence that plaintiff had assigned his option to purchase, since that referred to who was the proper party to bring the suit, and had nothing to do with the question of damages.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 121.*]

5. Parties (§ 80*)—Defect in Parties Plaintiff—Waiver of Objection.

In the absence of a plea of defect of parties plaintiff, one of several parties jointly interested in a claim may recover the whole amount due.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123–131; Dec. Dig. § 80.*]

6. Judgment (§ 683*)—Res Judicata—Assignor and Assignee.

In a suit for damages for the refusal to sell certain stock, for which an option to purchase was given and accepted, defendant would be protected by a judgment for plaintiff against the claim of another, where plaintiff had assigned his option to purchase without the knowledge of defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. § 683.*]

In Bank. Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by Ira A. Russ against L. C. Tuttle. Judgment for plaintiff, and defendant appeals. Affirmed.

Mahan & Mahan and Geo. D. Murray, for appellant. L. F. Puter and Denver Sevier, for respondent.

SLOSS, J. This is an action to recover damages for the refusal of the defendant to perform an alleged agreement to sell and deliver to plaintiff certain shares of corporate stock. There was a trial by jury, and a verdict and judgment for plaintiff for the amount demanded. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The complaint alleges a written agreement by the defendant to sell the stock to plaintiff at any time within 30 days from August 2, 1906, at the price named in the writing; that on August 18, 1906, the plaintiff ratified and accepted the agreement, and tendered to the defendant the purchase price of said stock and demanded delivery of the same; that defendant failed and refused and still refuses to deliver to the plaintiff the stock or any part thereof; and that he thereafter sold and delivered said stock to other parties. It is further alleged that the plaintiff is wholly unable to purchase other shares of the capital stock of either of said corporations, and that by reason of the premises he has been damaged in the sum of $2,645. The complaint is not verified. The answer consisted of a general denial of all of its allegations and of various separate defenses.

The first defense was that within 30 days from August 2d the defendant had offered the stock in question to Z. Russ & Sons' Company, and that said Z. Russ & Sons' Company had refused to accept the same. The second defense was that the defendant had been induced to execute the writing by reason of fraudulent representations made to him by the plaintiff. The third defense was that there was no consideration for the writing. Each of the defenses set forth in hæc verba the terms of the contract, which reads as follows: "Eureka, Cal., August 2nd. 1906. For and in consideration of the sum of one dollar receipt whereof is hereby acknowledged, I hereby agree to sell and deliver to Ira A. Russ or Z. Russ & Sons' Company within thirty days from date one hundred ninety (190) shares of the capital stock of the Home Savings Bank at seventy-six 50-100 ($76.50) dollars per share, and three hundred thirty shares of the capital stock of the Humboldt County Bank at one hundred and fifty-four ($154) dollars per share. Said payments to be made in cash upon delivery of said shares of stock within said thirty days. L. C. Tuttle."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The first and third separate defenses did not allege matter constituting any real ground of answer to plaintiff's demand. So far as the want of consideration is concerned, it may be conceded that the agreement of defendant to sell his stock at a given price at any time within 30 days was not, if unsupported by a consideration, binding upon him. Until accepted by the plaintiff, it was a mere offer which might be revoked by the defendant at any time. When, however, the plaintiff accepted the offer and tendered payment, the contract became complete and both parties were bound by it. Keller v. Ybarru, 3 Cal. 147. The agreement or offer was to sell the stock either to the plaintiff or to Z. Russ & Sons' Company. No doubt a sale to either of these parties would have relieved the defendant of any obligation to transfer to the other, but we do not construe the contract as relieving the defendant from the obligation to sell to one of the parties if the other should decline to make the purchase. The court below instructed the jury in accordance with these views, and we are satisfied that it acted correctly in so ruling.

The second special defense—i. e., that of fraud—was the subject of considerable testimony. The issue so raised was submitted to the jury under proper instructions, and the verdict in favor of the plaintiff imports a finding against the allegations of the answer. The testimony was in conflict on this point, and we cannot interfere with the finding reached under such conflict. A motion for nonsuit was based on the ground that the testimony showed that plaintiff had taken the option as agent only, and that performance had been tendered to his principal. It is enough to say, in answer to the point that the court erred in denying this motion, that there was evidence admitted prior to the motion for nonsuit to the effect that plaintiff had stated to Tuttle that he was taking the option at least in part for himself.

The court gave an instruction defining the measure of damages in the words of section 3308 of the Civil Code, and directed the jury that, if they should come to the conclusion that the plaintiff should recover in this action, the verdict should be "for the amount of the excess, if any, of the value of the stock described in the agreement to the plaintiff, over the amount called for by the contract, if the contract had been fulfilled." These instructions are complained of by the appellant. The action being one for the breach of a seller's agreement to deliver personal property, the price of which had not been fully paid in advance, it would seem to have been entirely proper to charge the jury that the detriment to the plaintiff was to be determined according to the rule laid down by the Code for cases of this character. It is urged, however, that the jury might have found the damage to be less, because of the fact that there was testimony tending to show that the plaintiff, after taking the option, had assigned the whole or a part of it to one Buhne. Neither of these circumstances would affect the applicability of the Code section. The damage occasioned by the breach of the contract was defined by the statute. That damage was recoverable by the party or parties maintaining the action. Whether the plaintiff after recovery would be bound to account to Buhne for a part or all of the amount received by him was a question between him and Buhne. The defendant was in no way concerned in it. In fact, the point urged does not at all bear on the measure of damages, but goes rather to the question whether the plaintiff was the real or the sole party in interest, and as such authorized to bring the action in his own name. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. If he had assigned the contract to Buhne it might be claimed that the latter was the proper party plaintiff (Code Civ. Proc. § 367), or, if there had been an assignment of a part interest, that the plaintiff and Buhne should have sued jointly. These objections, however, could not be made by the defendant in the absence of some foundation for them in the pleadings. Where the complaint shows upon its face that the plaintiff has not legal capacity to sue, or that there is a defect of parties plaintiff, the defendant may demur (Code Civ. Proc. § 430), or, if the ground does not appear upon the face of the complaint, the objection may be taken by answer (Code Civ. Proc. § 433). But, if the objection is not taken either by demurrer or answer, the defendant is deemed to have waived it. Code Civ. Proc. § 434. In the absence of a plea of defect of necessary parties plaintiff, one of several parties jointly interested in a claim may recover the whole amount due. Wendt v. Ross, 33 Cal. 650; Trenor v. C. P. R. R. Co., 50 Cal. 222; Williams v. Southern Pac. R. R. Co., 110 Cal. 457, 42 Pac. 974; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 45 Pac. 7.

Furthermore, it may be doubted whether the defense that the plaintiff was not the real party in interest would have been available to the defendant even if properly pleaded. In Giselman v. Starr, 106 Cal. 651, 40 Pac. 8, it is held that "where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from future annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object." See, also, Price v. Dunlap, 5 Cal. 483; Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402. The plaintiff here was the apparent owner of the contract which had been made with him. The defendant could not be bound by any assignment which had not been brought to his notice, and there is nothing to show that he had any knowledge of the alleged assignment prior to the trial. A judgment in favor of plaintiff will, therefore, protect the defendant against any claim by Buhne. So far as such defendant is concerned, the question of who is the real party in interest as between Russ and Buhne is immaterial.

But whatever view might be taken of the propriety of Buhne bringing the action, either as sole plaintiff or as coplaintiff with Russ, it seems plain that, as we have stated, the question is not one that affects the measure of damages. It appearing that the action is one of the kind referred to in section 3308 of the Civil Code, the rule declared in that section for ascertaining the detriment occasioned by a breach must be applied.

Complaint is made of the refusal of the court to give an instruction defining the consent necessary to a contract. But the material part of the proposed instruction was embodied in a direction given by the court of its own motion.

We find no material error in the record.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

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158 Cal. 232

PASCOE v. BAKER. (L. A. 2,527.)

(Supreme Court of California. Aug. 26, 1910.)

1. VENUE (§ 81*) — MOTION TO REMAND — WHEN MADE.

In a suit for injuries, where the venue had been changed, a motion to remand on the ground of convenience of witnesses could not be made before the joining of issues of fact.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 143; Dec. Dig. § 81.]

2. VENUE (§ 81*)—MOTION TO CHANGE—DISCRETION OF THE COURT.

While, as a rule, motions for change of venue should be prosecuted with diligence, yet it is within the discretion of the court as to whether there has been undue delay, and, where the venue of a suit for injuries was changed, and the answer was filed on December 1, 1908, but the hearing was continued to March 5, 1909, at which time a motion to remand was made, the court's finding that such motion was made with reasonable promptness was not an abuse of its discretion.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 143; Dec. Dig. § 81.*]

3. VENUE (§ 81*)—MOTION TO REMAND—COMPLAINT—VERIFICATION—NECESSITY FOR.

The complaint in an action for injuries need not be verified nor an affidavit of merits filed as a prerequisite to plaintiff's motion for the remand of the case for convenience of witnesses, where the venue had been changed.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 81.*]

4. VENUE (§ 81*)—MOTION TO REMAND—AFFIDAVIT—SUFFICIENCY.

Where the venue of a suit for injuries had been changed, plaintiff's affidavit supporting his motion to remand for the convenience to witnesses was sufficient in stating the names of the witnesses that would be inconvenienced, and the testimony expected of them, without stating that she had been advised by counsel that such witnesses were material.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 81.*]

5. APPEAL AND ERROR (§ 965*)—CHANGE OF VENUE—CONVENIENCE OF WITNESSES—DISCRETION OF THE COURT.

A change of venue on the ground of convenience of witnesses is mostly within the discretion of the trial court, which the appellate court will not disturb unless it has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 965.*]

6. VENUE (§ 81*)—REMAND—DISCRETION OF THE COURT—ABUSE.

On the motion to remand a case for injuries to the county of San Francisco for the convenience of witnesses, the venue having been changed to the county of Los Angeles, on which it appeared that four of plaintiff's witnesses besides plaintiff himself resided in San Francisco where the injuries occurred, one being plaintiff's physician, and three being familiar with the place where the accident happened, and that defendant, while alleging in his affidavit that his two witnesses were the only eyewitnesses of the injury, not only did not aver that they resided in Los Angeles county, but declared that one of them resided in Kansas, the court did not abuse its discretion in remanding the case to San Francisco county; for, although defendant named other witnesses who were residents of Los Angeles, yet, they being able to testify only as to the place of the injury, other witnesses for that purpose could be easily procured in San Francisco.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 143; Dec. Dig. § 81.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action for injuries by Chester Pascoe against C. H. Baker. From an order changing the venue back to the county of San Francisco, defendant appeals. Affirmed.

Wilbur Bassett and Lynn Helm, for appellant. Johnstone Jones, Louis H. Brownstone, and R. P. Jennings, for respondent.

SLOSS, J. Appeal by defendant from an order changing the place of trial. The action is for damages for personal injuries. It was commenced in the city and county of San Francisco. The defendant appeared and demanded a transfer to the county of Los Angeles, in which he resided. His motion to that end was granted. Thereafter the plaintiff moved the superior court of Los Angeles county for an order retransferring the action to the city and county of San Francisco, basing his application on the ground of convenience of witnesses. The present appeal is from an order granting this motion. The appellant makes four points for reversal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1. It is urged that the plaintiff delayed the making of his motion for so long a period as to deprive him of the right to have the cause removed. A motion for retention or remand on the ground of convenience of witnesses could not be made before the joining of issues of fact. Heald v. Hendy, 65 Cal. 321, 4 Pac. 27; McSherry v. Penn. C. G. M. Co., 97 Cal. 637, 32 Pac. 711. It appears that the answer was filed on December 1, 1908, and that plaintiff's motion was presented on March 5, 1909. The hearing had, however, been continued to the last-named date, and had been noticed by notice dated February 9, 1909, for the 19th day of February, 1909. The delay was therefore a few days more than two months. It is, no doubt, the general rule that motions for change of venue should be prosecuted with diligence. 4 Ency. Pl. & Pr. 421; Cook v. Pendergast, 61 Cal. 72, 79; Smith v. Pelton W. W. Co., 151 Cal. 399, 90 Pac. 932, 1135. But whether or not there has been undue delay must be determined by the trial court upon the facts of the particular case. It certainly cannot be said that there was any abuse of discretion in the holding that, under the circumstances here disclosed, the plaintiff had moved with a reasonable degree of promptness.

2. The complaint was unverified, and the plaintiff filed no affidavit showing a meritorious cause of action. But we are cited to no authority in support of the appellant's claim that such affidavit is required. It is true that a defendant, asking a change on the ground that the county in which the action is commenced is not the proper county for the trial, must file an affidavit of merits. This is the express provision of section 396 of the Code of Civil Procedure. No such condition has, however, been imposed upon a party occupying the position of the respondent here.

3. In support of his motion, the plaintiff relied upon the affidavit of Mrs. Eva Pascoe, his mother and guardian ad litem. This affidavit discloses the names of a number of witnesses residing in the city and county of San Francisco, and sets forth the substance of the testimony that will be given by each of them. The affidavit does not allege that the plaintiff has stated to his counsel the facts which he expects to prove by his witnesses, and is advised by counsel that said witnesses are necessary and material. The appellant cites several New York cases holding that such allegations should be contained in an affidavit for change of venue on the ground of convenience of witnesses. We do not understand the rule to be without exception, even in New York. At any rate, there is no authority requiring this court to apply it with the strictness contended for. Nor do we see any good reason for viewing proceedings of this character in any but a liberal spirit. If the affidavit contains a statement of the matters to which the witnesses will testify, the court may determine for itself how far the desired testimony may be needed. In Cook v. Pendergast, supra, it is said that "the affidavits should state what is expected to be proved by the witnesses, that the court may judge (in view of the issues) of their materiality; otherwise they will be slightly regarded." The affidavit of plaintiff made a sufficient showing in this regard.

4. The appellant contends that an examination of the affidavits filed by the respective parties fails to show that the convenience of witnesses would be served by a change of venue. "Much is necessarily confided to the discretion of the trial court on motions for a change of place of trial on the ground of convenience of witnesses, and it is only where it is clear that there has been an abuse of such discretion that this court will interfere." Miller & Lux v. Kern County Land Co., 140 Cal. 132, 136, 73 Pac. 836, 838. The complaint avers that plaintiff, while lawfully in a store conducted by defendant in San Francisco, was injured by falling through a trapdoor which said defendant had negligently left open and unprotected. The answer denies every allegation of the complaint. The affidavit in support of the motion shows that four witnesses, in addition to plaintiff himself, reside in San Francisco. One of them is the physician who attended plaintiff from the time he received the injuries complained of. Three are familiar with the premises upon which plaintiff claimed to have been injured, with the situation of the trapdoor, and with the purposes of plaintiff in entering the premises. The defendant's affidavit alleges that W. C. Ingram and one Walters were the only eyewitnesses of plaintiff's accident, and that defendant expects to have them appear and testify in Los Angeles. It is not averred, however, that either is a resident of Los Angeles county. There is no suggestion that Walters could not as well appear in the one county as in the other. The affiant does state that "it would be highly inconvenient and expensive for said Ingram to go to the county of San Francisco," but, inasmuch as it is further declared that Ingram resides in Beloit, Kan., it is difficult to see how his convenience would be greatly affected by a change of the place of trial. Other witnesses, residents of Los Angeles, are named, but of them all that is stated is that they "are familiar with the situation, condition and circumstances surrounding said alleged happening." Since they were not eyewitnesses of the occurrence, this must be taken to mean that they can testify as to the physical conditions of the place of injury. But there can obviously be no great difficulty in obtaining in San Francisco, where the premises are located, other witnesses who can testify to these matters. Un-

der all the facts, no abuse of discretion appears.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

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158 Cal. 220

FROWLEY et al. v. SUPERIOR COURT OF MODOC COUNTY et al. (S. F. 5,333.)

(Supreme Court of California. Aug. 25, 1910.)

1. CONTEMPT (§ 2*) — "CONSTRUCTIVE CONTEMPT."

A "constructive contempt" is one committed beyond the presence of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 1, 35; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 2, pp. 1468–1469.]

2. CONTEMPT (§ 54*)—CONSTRUCTIVE CONTEMPT—REQUISITES OF AFFIDAVIT.

An affidavit on which constructive contempt proceedings are based must show on its face the acts constituting a contempt, since the affidavit constitutes the complaint, and, unless it states facts showing that a contempt has been committed, the court is without jurisdiction to proceed, and any judgment based thereon is void, and will be so declared on certiorari.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–146; Dec. Dig. § 54.*]

3. CONTEMPT (§ 54*)—CONSTRUCTIVE CONTEMPT—AFFIDAVITS—SUFFICIENCY.

An affidavit by the probation officer of a juvenile court that he has reason to believe, and believes, that one has committed a contempt against the court and an order of the court prohibiting any one to furnish a particular minor any intoxicating liquor by furnishing the minor intoxicating liquor as set forth in an affidavit by the minor, and referring to the minor's affidavit for a more complete statement of the contempt, which states that at a specified time and place the minor drank whisky with accused and others and that the minor procured several drinks and drank in the presence of and with the knowledge of such persons, and with their consent, and became intoxicated in their presence, are insufficient to show that accused "furnished" intoxicants to the minor in violation of the order.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–146; Dec. Dig. § 54.*]

4. CONTEMPT (§ 54*)—PLEADING—REQUISITES.

Proceedings in contempt being of a criminal nature, no intendments or presumptions are indulged in aid of the complaint.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–146; Dec. Dig. § 54.*]

5. CONTEMPT (§ 54*) — CONSTRUCTIVE CONTEMPT—REQUISITES OF AFFIDAVIT—NOTICE OF ORDER VIOLATED.

An affidavit for contempt of an order of a juvenile court prohibiting the furnishing of intoxicants to a minor was fatally defective where it failed to show that accused had any notice or knew of the order when he violated it; he being not party to the proceeding in which the order was made.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–146; Dec. Dig. § 54.*]

6. CONTEMPT (§ 55*)—VIOLATION OF COURT ORDER OR JUDGMENT—NECESSITY FOR NOTICE.

Generally, to punish for contempt of a court order or judgment, it must appear that the order or judgment was previously served on accused, or that he had actual notice of the order or judgment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 150–161; Dec. Dig. § 55.*]

7. CONTEMPT (§ 67*) — REVIEW — RECORD — STIPULATION NOT CONSIDERED BELOW.

On certiorari to review a conviction for contempt of a court order, a stipulation entered into after the judgment of conviction had become final, and constituting no part of the record, cannot be considered on certiorari to show that accused had notice of the order when he violated it.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 67.*]

8. CONTEMPT (§ 67*) — REVIEW — EFFECT OF STIPULATION.

On certiorari to review a conviction for contempt of a court order, a stipulation merely reciting that it was shown in the contempt proceedings that accused knew of the order when he violated it is of no force where the trial court found that fact.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 67.*]

9. CONTEMPT (§ 54*) — DEFECTIVE PLEADING NOT CURED.

Radical defects in an affidavit to punish for contempt, or the absence of facts essential to show jurisdiction, cannot be cured by proof on the hearing.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 54.*]

10. STIPULATIONS (§ 3*)—DEFECTIVE PLEADING NOT CURED BY STIPULATION.

Since the trial court in proceedings to punish for contempt of an order could not cure the jurisdictional defect existing through the affidavit's failure to show knowledge by accused of the order when he violated it, a stipulation entered into after the conviction could not have that effect.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 2; Dec. Dig. § 3.*]

11. ATTORNEY AND CLIENT (§ 76*)—AUTHORITY TO ENTER INTO.

The attorney of one accused of contempt of a court order had no authority to enter into a stipulation that accused had notice of the order when he violated it, after the contempt proceeding had terminated and the relation of attorney and client had ceased.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 129–130; Dec. Dig. § 76.*]

In Bank. Certiorari to Superior Court, Modoc County; John E. Raker, Judge.

Certiorari by Thomas Frowley and another against the Superior Court of the County of Modoc and others to review an adjudication in contempt proceedings. Proceedings and the judgment and order thereon annulled.

H. M. Anthony, for petitioners. U. S. Webb, Atty. Gen., Raymond Benjamin, Deputy Atty. Gen., and F. M. Jamison, Dist. Atty., for respondents.

LORIGAN, J. This is a proceeding in certiorari to review a judgment of the superior court adjudging the petitioner, Thomas Frowley, Jr., guilty of contempt of court and punishing him therefor, and also imposing certain duties and obligations upon the other petitioner, Thomas Frowley, with reference to said Thomas Frowley, Jr., his son.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The contempt with which the petitioner, Thomas Frowley, Jr., was charged, consisted of the alleged violation of an order made by the superior court of Modoc county, sitting as a juvenile court, in the matter of one James Forrest, a minor. In that matter a judgment was entered placing said James Forrest on probation, under the juvenile act, until he should attain his majority, and it was further provided in said judgment that it "should be a contempt of court for any person to furnish the said James Forrest or to cause to be furnished to him any intoxicating liquor." It was for an alleged violation of the order against furnishing liquor to said James Forrest, while still on probation, that the contempt proceeding against the petitioner, Thomas Frowley, Jr., was instituted. After a hearing he was adjudged guilty of contempt for violating said order and required to pay a fine of $250, payable at the rate of $5 a month until paid. It was further ordered that the other petitioner herein, the father of Thomas Frowley, Jr., should take control of him, in a probationary way, and was charged with certain duties relative to his conduct, and required to report to the court monthly concerning his behavior. In this present proceeding in certiorari various attacks are made on the validity of the contempt proceedings, but we think it only necessary to examine a couple of them.

It is familiar law that in proceedings for constructive contempts of court—that is, contempts committed without the presence of the court, and such as the petitioner Frowley, Jr., is claimed to have committed—the affidavit which is made the basis for the proceeding should show upon its face the acts which constitute a contempt. The affidavit constitutes the complaint, and, unless it contains a statement of facts which show that a contempt has been committed, the court is without jurisdiction to proceed in the matter, and any judgment of contempt based thereon is void, and will be so declared upon certiorari. It is hardly necessary to cite authorities upon a proposition so well settled, but reference may be had to the following cases: Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372; Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409; Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853; Ex parte McCarty, 154 Cal. 534, 98 Pac. 540.

Examining the affidavits which served as a basis for the contempt proceeding under review, we find that there are two. One was made by the probation officer of the juvenile court of the county of Modoc, and states "that he has reason to believe and does believe that Thomas Frowley, Jr. (and five others named), have committed a contempt against the juvenile court * * * and against the order of said court heretofore made in the matter of James Forrest, * * * which said contempt will more fully appear by reference to the affidavit of James Forrest hereunto attached and made a part hereof, by furnishing the said James Forrest intoxicating liquor as set forth in said affidavit." The other was the affidavit of James Forrest, referred to in the previous affidavit of the probation officer, which states that on May 9, 1909, "at a place * * * known as the Frowley slaughterhouse he drank certain intoxicating liquor, to wit, whisky, with Thomas Frowley, Jr. (and five others named). That said whisky was contained in a large bottle, and that this affiant procured a number of drinks and drank in the presence of and with the knowledge of the aforesaid parties and with their consent, * * * and that this affiant became intoxicated in the presence of the said parties." These excerpts from the affidavits constitute all the reference which is made to any order of court which petitioner Thomas Frowley, Jr., is charged with having contumaciously violated, and also contain a specification of the only acts which are charged to have been committed by him and claimed to constitute a contempt of court.

While the probation officer's affidavit states that the order of court was violated "by furnishing the said James Forrest intoxicating liquor as set forth in said (Forrest's) affidavit," that affidavit of Forrest, relied on as charging the specific acts constituting the violation, does not show any violation of the order by Thomas Frowley, Jr., or at all. The order prohibited the "furnishing liquor" to the probationary minor, and all the affidavit shows is that Forrest, Frowley, Jr., and the others, drank whisky together. Of course, when they drank together, it was with the knowledge of all, and doubtless no objection was urged by any member of the party against any other member of it doing so. But mere knowledge of and consent to Forrest's drinking the whisky was not a violation of the order. The affidavit nowhere states that the petitioner, Frowley, Jr., furnished the whisky, or that he gave it to Forrest or asked him to drink it. There is an entire absence of statement as to who procured the whisky, and for all the affidavit contains to the contrary, or on the subject at all, it may have been furnished by Forrest himself, or by some person not mentioned in the affidavit. There is certainly nothing in the affidavit showing that Frowley, Jr., furnished it, or procured it, or enticed Forrest to drink it, or did any other act violative of the terms of the order. Proceedings in contempt are of a criminal nature, and no intendments or presumptions are to be indulged in in aid of the sufficiency of a complaint. The affidavits (the complaint) must set forth acts showing in themselves the fact that a contempt has been committed by the party charged, and, failing to do so, the court is absolutely without jurisdiction in the matter.

Aside from this, however, these affidavits are radically defective as a basis for a contempt proceeding, in failing to show that the petitioner, Frowley, Jr., had any notice or knowledge whatever of the existence of the order of court at the time when it is claimed he violated it. He was not a party to the proceeding in which the order was made, and hence knowledge of it could not be imputed to him. The general rule is that "in order to punish a person for contempt of court for violation of an order, judgment or decree of court, it must appear that said order, judgment or decree, has been previously served on the one charged or that he has had actual notice of the making of such order or the rendition of such judgment or decree." 9 Ency. of L. & P. p. 12. The petitioner, Frowley, Jr., could not be adjudged guilty of contempt unless he had knowledge of the order. This being true, knowledge on his part was one of the essential facts to be stated in the affidavits, so that upon their face they would show a case of constructive contempt. Such knowledge not being charged, the affidavits were fatally defective. No case of contempt appeared therefrom, and hence the court had no jurisdiction in the matter, and its subsequent proceedings were void. The effect of the absence of this essential averment in the affidavits is sought to be obviated by calling the attention of the court on the hearing to a stipulation entered into between the district attorney who appeared in support of the contempt proceedings and the attorney who then represented the petitioner, Frowley, Jr., in which it was "stipulated and agreed * * * that * * * Thomas Frowley, Jr., did at the time of the alleged contempt have knowledge of the order * * * prohibiting any one from furnishing any intoxicating liquor" to Forrest, and "did know at the time of the said alleged contempt that it was a contempt of said court and of the said order of said court to furnish any intoxicating liquor to the said James Forrest, and these facts appeared in evidence and were proven in the hearing of the above proceeding before the aforesaid court."

But this stipulation cannot be considered, and has no legal force even if it could. It was entered into and filed months after the proceedings in contempt had terminated and the judgment therein had become final, and is no part of the record in the contempt proceedings. In fact, it was entered into months after this proceeding in certiorari had been commenced here by other counsel representing petitioner, and the attack thereby made on the contempt proceedings for want of jurisdiction in the lower court to entertain them, and doubtless to meet the attack on that ground. Nor, if the stipulation might be considered, would the matter stated therein affect the question of jurisdiction. It simply recites that it was shown in the contempt proceedings by evidence that Frowley, Jr., had knowledge of the order when he violated it. But, as far as showing that fact is concerned, the stipulation was unnecessary because the court in its findings found as a fact that the petitioner had such knowledge, and the stipulation is no broader than the finding. It is settled law, however, that radical defects in the affidavit, the absence of essential facts, the existence of which are necessary to be shown in the affidavit as a condition precedent to the exercise of jurisdiction to proceed in contempt, cannot be cured by proof upon the hearing. Having failed to acquire jurisdiction, the court had no authority to proceed to a hearing at all. In Hutton v. Superior Court, 147 Cal. 156, 159, 81 Pac. 409, 410, after reiterating the rule that as a basis for judicial action in contempt the essential facts constituting it must appear on the face of the affidavits or the court is wanting in jurisdiction to proceed, it is said: "In such a case, it is immaterial what may be shown to the court upon the hearing, or specified and found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void ab initio. The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint, and unless they, upon their face, charge facts constituting a contempt, the court is without jurisdiction to proceed." As the court could not by its finding cure the jurisdictional defect existing on account of a failure to allege knowledge by petitioner of the existence of the order when it is claimed he violated it, the stipulation could not have that effect.

Aside from this, we are satisfied that the attorney had no authority to enter into such a stipulation. There was no proceeding then pending in which he was attorney for petitioner. The contempt proceeding had terminated and the relation of attorney and client had ceased, and with it ceased any authority in the attorney to stipulate as to anything relative to that proceeding so as to bind petitioner.

It follows, for the reasons given, that the proceedings in contempt against Thomas Frowley, Jr., should be and the same are annulled, and, as far as the orders of the court imposed obligations and duties upon the other petitioner, Thomas Frowley, relative to Thomas Frowley, Jr., his son, to be discharged under the direction of the trial court, as they were only made and based upon the contempt proceedings, the judgment and order as to them are likewise annulled and set aside.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.

158 Cal. 218

In re SNYDER. (S. F. 5,672.)

(Supreme Court of California. Aug. 25, 1910.)

1. COURTS (§ 206*)—ELECTION CONTEST.

It was not a sufficient reason for commencing a primary election contest in the Supreme Court that, if commenced in the superior court, an appeal might be taken which could not be decided before the ballots were printed, so that justice would be defeated, because under St. 1909, p. 709, § 27, providing that the Supreme Court or District Courts of Appeal or the superior court of the proper county may entertain such contests, concurrent jurisdiction is given them, and no provision for appeals in such cases is made, and, if the Supreme Court should consider such cases, it would be overrun with them.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 206.*]

2. ELECTIONS (§ 277*)—ELECTION CONTESTS—COURTS — "PROPER COUNTY" — CONSTRUCTION.

Under St. 1909, p. 709, § 27, providing that the Supreme Court or District Courts of Appeal or the superior court of the proper county may entertain a primary election contest, by "proper county" is meant the county in which the election is held.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 277.*

For other definitions, see Words and Phrases, vol. 6, pp. 5689, 5690.]

In Bank. Contest by Charles P. Snyder of the right of John Hancock to be declared to be the nominee of the Republican Party for the office of district attorney of Calaveras county. Petition dismissed.

Geo. F. Snyder and J. P. Snyder, for contestant.

BEATTY, C. J. At the recent primary election, the petitioner and John Hancock were opposing candidates for the Republican nomination for the office of district attorney of Calaveras county. The result of the canvass as declared by the board of supervisors was that 612 votes had been cast for Hancock and only 610 for petitioner, and in consequence the clerk will print the name of Hancock on the official ballot to be voted at the approaching election unless restrained. The substance of the further allegations of the petition is that there are 34 election precincts in Calaveras county, and that, owing to misconduct of the precinct officers, one or more votes in every precinct were counted for Hancock that ought to have been counted for petitioner, wherefore he prays for a recount by this court of all the ballots cast in Calaveras county, and for all other orders necessary to secure for him the right to have his name instead of Hancock's printed on the official ballot as the Republican nominee for district attorney. The reason alleged for bringing the contest before the Supreme Court as an original proceeding is that, if it were heard by the superior court of Calaveras county and there determined in favor of the petitioner, the contestee might, by taking an appeal, which could not possibly be determined before the time for printing the ballots, cause a failure of justice.

In disposing of the petition we do not find it necessary to consider any other question than the sufficiency of the reason assigned for commencing the contest in this court. It is instituted, of course, in supposed conformity to the provisions of section 27 of the primary nomination law (St. 1909, p. 709), which in terms assumes to confer upon this court, the District Court of Appeal, and the superior court of the proper county a concurrent jurisdiction to correct in a summary proceeding all errors, omissions, misconduct, or neglect of duty of any of the officers concerned in the preparation of the official ballot. According to the terms of the act, the jurisdiction of the superior courts in their respective ("the proper") counties is just as extensive and complete as the jurisdiction of the Supreme Court, and, as there is no provision for an appeal in this class of contests, their judgments are final when entered. There is therefore nothing to justify the commencement of the proceeding in this court. Any other construction of the primary nomination law would involve the most absurd results. Every contest of a close election for any county, township, or municipal office throughout the state, to be effective, would have to be waged in this court, and probably very few could be determined between the canvass of the votes cast at the primary election and the date of the general election, and the time of the court which scarcely suffices for the due consideration of causes within our constitutional jurisdiction would be occupied for many weeks in the merely clerical task of counting ballots and tallying votes.

The petition is dismissed without prejudice to an original proceeding in the superior court of Calaveras county, which we hold to be the "proper county" within the meaning of the statute.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

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13 Cal. App. 760

BARNES v. BOARD OF SUPERVISORS OF COLUSA COUNTY et al.

(Civ. 723.)

(Court of Appeal, Third District, California. July 13, 1910. Rehearing Denied Aug. 13, 1910.)

1. LEVEES (§ 6*)—PROTECTION DISTRICTS—PROCEEDINGS TO ESTABLISH—PRESUMPTIONS.

In the absence of proof to the contrary, in a proceeding under Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, to establish a protection district, the board of supervisors will be presumed to have required evidence as to the genuineness of the signatures on the petition and that the signers were qualified as required by the act, especially where they find that the petition was signed by the proper number of property holders.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

2. LEVEES (§ 6*)—PROTECTION DISTRICTS—PROCEEDINGS TO ESTABLISH — VALIDITY — BURDEN OF PROOF.

The burden is on one attacking proceedings under Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, to establish a protection district to show invalidity of the proceedings.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

3. LEVEES (§ 6*)—PROTECTION DISTRICTS—PROCEEDINGS TO ESTABLISH.

In a proceeding under Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, to establish a protection district, the board of supervisors need not rehear evidence as to the sufficiency of the petition, on hearing objections of property owners to the improvement, especially when no such issue is raised by the property owners.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

4. LEVEES (§ 6*)—PROTECTION DISTRICTS—PROCEEDINGS TO ESTABLISH—NOTICE.

Proceedings under Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, to establish a protection district are not vitiated because affidavit of publication of notice of the supervisors' intent to proceed was not filed until after the order establishing the district, where it was found that the notice was actually published as required by law, and the complaining party had actual notice and was heard on his objection before the order was made.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

5. LEVEES (§ 6*)—PROTECTION DISTRICTS—PROCEEDINGS TO ESTABLISH — DESCRIPTION OF BOUNDARIES.

Proceedings under Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, to establish a protection district, were not vitiated because the order establishing the district described the boundaries more definitely than the petition and the resolution of intention, especially since the act authorizes the board to change the boundaries.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 6.*]

6. LEVEES (§ 2*)—PROTECTION DISTRICTS—CONSTITUTIONALITY OF LAW.

Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, authorizing the establishment of protection districts, is not unconstitutional because commissioners view the lands and the improvements affected, and determine in the first instance the value thereof and the damage thereto, and also estimate the cost of the work and assess the same on the lands in the district, since the supervisors need not adopt the report and they finally determine the assessment.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 2.*]

7. LEVEES (§ 22*) — PROTECTION DISTRICTS — CONSTITUTIONAL LAW.

Act March 27, 1895 (St. 1895, c. 201), as amended by St. 1909, c. 477, is not unconstitutional as involving double taxation.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 22.*]

8. QUO WARRANTO (§ 5*)—PROTECTION DISTRICTS.

The validity of the organization of a de facto protection district can be determined only through quo warranto by consent of the Attorney General.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 6; Dec. Dig. § 5.*]

Proceedings by Peter D. Barnes against the Board of Supervisors of Colusa County and others to review action of the Board establishing a protection district. Writ denied.

A. C. Huston and Ernest Weyand, for petitioner. Frank Freeman, for respondents.

BURNETT, J. This is a proceeding to review the action of the board of supervisors of Colusa county culminating in the establishment of what is known as "the Boggs protection district."

It is conceded that the warrant for the board's proceedings in the premises is found in the act of the Legislature approved March 27, 1895 (St. 1895, p. 247), entitled "An act to provide for the formation of protection districts in the various counties of this state, for the improvement and rectification of the channels of innavigable streams and water courses, for the prevention of the overflow thereof by widening, deepening and strengthening and otherwise improving the same, and to authorize the boards of supervisors to levy and collect assessments from the property benefited to pay the expenses of the same," and as amended in 1909. St. 1909, p. 807.

Petitioner bases his request and contention for an annulment of the proceedings of the board creating said district upon the grounds: (1) The board of supervisors had no jurisdiction of the subject-matter for the reason that there was no proof that the petition for the organization of the district was signed by ten property holders as required by the statute; (2) the board proceeded to establish the district without any proof that the notice of intention had been published as required by law; and (3) that the act itself providing for these protection districts is unconstitutional and therefore void.

The first contention of petitioner is supported—so it is claimed—by the testimony of W. J. King, the county clerk, who testified in this court that he was not present at the meetings of the said board of supervisors when the petition for the formation of the district and the resolution of intention "was up before the board but after that, at all sessions, I was." When the objections of Mr. Barnes were heard, the witness was present, and he declared as to what occurred: "My remembrance of it is that Mr. Weyand, on behalf of Mr. Barnes, objected or began talking to the board in regard to it, that there were not property owners that had signed the petition, and Mr. Freeman answered him that the question had been settled when the resolution of intention was published by the board; that that question had previously been settled; and the board proceeded with the other business of the formation of the protection district immediately after that without any further consideration. I do not remember of any testimony on the subject of the ownership of the land. The statements of Attorney Weyand and Attorney Freeman were all I remember." It is to be observed that the witness is somewhat uncertain as to what occurred. No doubt, however, he details the transaction as he remembers it and, probably, as it took place. We may, indeed, accept his testimony as sufficient to overcome the finding of the board of supervisors that "said petition having conformed to all requirements of the law, and being signed by the proper number of property holders of the district and landowners," and yet this effect must be limited to the particular time concerning which the county clerk testified. We must presume that when the petition was filed the board required and received evidence as to the genuineness of the signatures and that the signers were "property holders of the district." The presumption that the supervisors did their duty in that regard and the finding that the petition was signed by "the proper number of property holders" must certainly prevail, in the absence of any evidence to the contrary. It is not denied that the burden in this proceeding is upon the petitioner to show that the board of supervisors had no jurisdiction to form said district, and it would be singular if the board required no proof as to the signatures before passing a resolution of intention to organize the district. To require such proof is the natural order of procedure contemplated by the statute. And there seems no reason why the evidence should be repeated at the time of the hearing of the objections of the property owners, if any, to said work or improvement, especially when no such issue is raised by any property owner. The statute provides (section 3) that "any person interested, objecting to such work or improvement, or to the extent of the district of lands to be affected or benefited by such work or improvement and to be assessed to pay the costs and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice," and thereafter such objection shall be heard by said board. Petitioner herein, in accordance with the said provision of the statute, filed his written objection to the formation of said district to the effect that the work as contemplated would be an injury to his lands—specifying in what respect—and that the formation of said district as contemplated "would burden the general taxpayers of said county with an additional burden to keep up the said works contemplated to be constructed." The return shows that evidence was heard as to these specifications and the finding was against petitioner. The board was not required at that time to do more, assuming that its prior proceedings were regular.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The only additional adverse suggestion as to this refers to the filing of the affidavit of publication. It appears to have been filed subsequent to the order of the board establishing the district; but, as stated by respondents, this is of no consequence, "for in fact it shows that the notice was published and may be additional evidence of that fact. The record of the board shows that it was adjudicated that the notice was published as required by law in the Daily Colusa Sun. This finding is not disputed or any showing made that such publication was not made. The filing of this affidavit does not prove or tend to prove that the board did not have sufficient and proper evidence before them as to the publication of the notice." A sufficient answer to petitioner's contention would indeed seem to be that the statute does not require an affidavit of publication to be filed before the order is made, although this would be the usual course, that the publication was actually made as required, that the hearing was had at the proper time, and that petitioner had actual notice and was present with his objections at the appointed time and was duly heard by the board before the order was made establishing the district. Neither is there any merit in the contention that the supervisors were divested of jurisdiction by reason of a change in the boundaries of said district. It appears from the return that the description in the order establishing the district was made more definite and certain than in the said petition and resolution of intention, but the identity of the land seemed to be the same. At any rate, the statute authorizes a change as follows: "Such board may, in its discretion, sustain, in whole or in part, any or all of the objections made and filed, and may change or alter the boundaries of such district to conform to the needs of the district."

The objections made to the constitutionality of the act we think are equally untenable. The supervisors are not deprived of the power to levy and fix the amount of the assessment on the land. It is true that the commissioners view the lands and the improvements affected and determine in the first instance the value thereof and the damage to the same and also the estimated amount of the cost of the proposed work and the expenses incident thereto, and they assess the same upon the lands embraced within the exterior boundaries of such protection district and report the result of their investigations to the board of supervisors. The latter, however, are not bound to adopt the report. It is set for hearing and notice given thereof, and any objections that may be made by the landowners are considered, and the board of supervisors finally determine the assessment, being limited, however, as to the proportion they may impose upon the county.

The cases cited by petitioner are entirely different. For instance, in People v. Houston, 54 Cal. 536, as stated in the syllabus: "By a special act in relation to a swamp land reclamation district, the trustees were required to make up a sworn statement of the cost of the reclamation work 'based upon the books and vouchers thereof,' and the amount so reported was to be assessed upon the lands." The Supreme Court declared that: "It is, in effect, nothing more nor less than an attempt by the Legislature to levy an assessment upon the lands of the district; the amount being the sum total shown by the books and vouchers, without any reference to the nature or character of the charges on the books, and irrespective of any question as to whether the law authorizing and providing for the work has been complied with." So, in McCabe v. Carpenter, 102 Cal. 469, 36 Pac. 836, the legislation was condemned for the reason that the amount of the tax was left wholly to the discretion of an executive officer and thereby delegating legislative power to the county superintendent of schools.

Nor is the act open to the objection that it involves double taxation. The tax is manifestly for a particular purpose, a public improvement within a certain district, of especial benefit to the lands within said district, but incidentally of advantage to the county at large. The landowners within the district certainly cannot complain that a portion of the tax is assessed to the county, and the general scheme involves the same principle as is found in the reclamation and irrigation legislation which has been upheld by the higher courts.

Aside from the foregoing, there is much plausibility in the suggestion of respondents that we have the case of a de facto corporation, and that the only course open to petitioner to have its validity determined is through quo warranto by consent of the Attorney General. The decisions of the Supreme Court upon this question were recently reviewed by this court in the case of Reclamation District No. 765 v. McPhee, 109 Pac. 1106, and it is unnecessary to repeat the discussion. It may be said, though, that Keech v. Joplin, 106 Pac. 222, involved the validity of the organization of a protection district, and the Supreme Court therein declared that the doctrine applies to such districts as well as to irrigation and reclamation districts, and "the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in quo warranto at the suit of the state." The only controversy could be as to whether the record here discloses a de facto corporation. As to this point, quotation was made in the McPhee Case, supra, from Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151, as follows: "What is a corporation de facto? It exists where a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs, to some extent at least, by the methods and through the officers usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body."

The petition and return herein show that at a regular session of the board of supervisors of Colusa county a petition was presented and filed for the formation of a protection district; that said board passed a resolution to improve said Willow creek and to form said protection district; that said resolution was published as required by law; that a hearing of said petition was had by said board and an order made establishing said district and designating it as the "Boggs protection district"; that said board adopted plans for the work contemplated and appointed commissioners to assess damages and to proceed under said act with all matters by the said commissioners deemed necessary to the end that said Willow creek might be improved and controlled; that said commissioners qualified and were about to proceed with the work required of them when it was arrested by this proceeding. It is clear that the district established had the appearance of a legal corporate body. There was a complete organization of the district under color of title, with no step omitted that the statute makes a prerequisite for the beginning of the work by the commissioners, and it is difficult to perceive how the case would be different in principle if said commissioners had actually proceeded in the work which they contemplated. But it is unnecessary to decide this question, as upon the merits we think respondents should prevail.

The order to show cause is therefore discharged, and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

13 Cal. App. 770

PEOPLE v. FORTCH. (Cr. 258.)

(Court of Appeal, First District, California. July 19, 1910.)

1. Criminal Law (§ 84*)—"Police Court"—Creation.

The police court established by the charter of the city and county of San Francisco, as authorized by Const. art. 11, § 8½, authorizing cities to provide for the constitution and jurisdiction of police courts, is not the police court created by St. 1889, c. 66, as amended by St. 1893, c. 15, but is a new court created by a different authority, and the statutes of 1889 and 1893 are repealed by the charter, declaring that it supercedes inconsistent laws.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 84.*

For other definitions, see Words and Phrases, vol. 6, p. 5423.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CRIMINAL LAW (§ 84*)—POLICE COURTS—STATUTES—VALIDITY.

The provision of the charter of the city and county of San Francisco which gives concurrent jurisdiction of all misdemeanors to the superior and police courts is void, and under the charter the police court has jurisdiction of all prosecutions for violations of ordinances of the board of supervisors, and such jurisdiction as is possessed by justices of the peace, of misdemeanors under the general law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 84.*]

3. CRIMINAL LAW (§ 94*)—JURISDICTION OF OFFENSES—COURTS.

The superior court, vested by the Constitution with original jurisdiction of misdemeanors not otherwise provided for, has original jurisdiction of an offense committed in the city and county of San Francisco, punishable by a fine not exceeding $1,000 or imprisonment in the county jail for not more than a year, and the police court of the city and county of San Francisco, possessing only such jurisdiction as is possessed by justices of the peace of misdemeanors under the general law, is without jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 94.*]

4. PHYSICIANS AND SURGEONS (§ 6*) — PRACTICING DENTISTRY WITHOUT A LICENSE — BURDEN OF PROOF.

One charged with practicing dentistry without a license in violation of the dentistry act (St. 1901, c. 175), as amended by St. 1909, c. 476, has the burden of proving that he either had a license from the board of dental examiners, or at the time of the passage of the act had the right to practice dentistry.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 10; Dec. Dig. § 6.*]

5. PHYSICIANS AND SURGEONS (§ 1*)—REGULATING PRACTICE OF DENTISTRY—STATUTES.

The Legislature adopting a statute regulating the practice of dentistry may define the practice, and thus make it clear what acts it intends to make unlawful.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. CRIMINAL LAW (§ 772*)—INSTRUCTIONS.

An instruction on a trial for practicing dentistry without a license, which defines the practice of dentistry in the language of the statute, regulating the practice, is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1812; Dec. Dig. § 772.*]

Appeal from Superior Court of the City and County of San Francisco; William P. Lawlor, Judge.

O. J. Fortch was convicted of practicing dentistry without a license, and he appeals. Affirmed.

John T. Williams and Walter J. Thompson, for appellant. U. S. Webb, Atty. Gen. (Oliver Dibble, of counsel), for the State.

HALL, J. Defendant was charged, by information, filed in the superior court of the city and county of San Francisco, with practicing dentistry without a license in said city and county, in violation of the so-called "Dentistry Act," as amended in 1909. St. 1909, p. 800. Upon his trial, he was found guilty, and is now before this court upon his appeal from the judgment of conviction and the order denying his motion for a new trial.

The principal point relied on for a reversal of the judgment is that the superior court had no original jurisdiction of the offense charged. The offense is punishable by a fine of not exceeding $1,000, or imprisonment in the county jail for not more than one year. The Constitution gives to the superior court original jurisdiction of all "cases of misdemeanor not otherwise provided for." Therefore, unless jurisdiction of the class of misdemeanors to which this offense belongs is given by some law to some other court, jurisdiction thereof belongs to the superior court. Appellant's contention is that such jurisdiction is given by the act creating a police court in the city and county of San Francisco approved March 5, 1889 (St. 1889, p. 62), and the act amendatory of and supplemental thereto, approved February 23, 1893 (St. 1893, p. 9). These two acts may be read as one act, and did give jurisdiction in all cases of misdemeanor punishable by fine not exceeding $1,000, or by imprisonment not exceeding one year to the police court created by the act of 1889. This court continued in existence, and the law by which it was created remained in force, until the taking effect of the present charter of the city and county of San Francisco, on the first Monday in January, 1900. In accordance with the provisions of section 8½ of article 11 of the Constitution, adopted in 1896, the present charter creates a police court and defines its jurisdiction. The language of the charter is: "There is hereby created and established in and for the city and county of San Francisco a court to be known as the police court of the city and county of San Francisco." Section 1, c. 8, art. 5, Charter San Francisco. Then follow complete provisions defining the jurisdiction of such court, and providing for its regulation and government, and for the manner and time of the election of the judges thereof and its clerks and attaches. The police court established by the charter is not the same court referred to in the act of 1889 and in the supplemental act of 1893, but it is a new court created by a different authority. When the charter court was created, the police court created by the act of 1889 went out of existence, and the act of 1889 and the supplemental act of 1893 were repealed. This we understand to be the doctrine laid down in Graham v. Mayor, etc., of Fresno, 151 Cal. 465, 91 Pac. 147. It is there said: "The effect of subdivision 1 of section 8½ of article 11 was to make the matter of such police courts purely a municipal affair as to any freeholders' charter city which subsequently made appropriate provision in its charter for such court. It confided the matter of such courts, and the election and compensation of the judges thereof, to any such city desiring to assume, and assuming control thereof, just as by the same section the matter of fixing the compensation of county officers in consolidated cities and counties was confided to the city and county, to be provided for in its freeholders' charter. Such jurisdiction could not coexist in both the Legislature and the city, and the provision for the assumption of such jurisdiction by the city necessarily contemplated the removal of the same from the Legislature whenever the jurisdiction was assumed by the city. Any act of the Legislature relative to such subject-matter would necessarily be inconsistent with a charter provision in regard to the same subject-matter. As to such matters as the Constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are supreme superseding all laws inconsistent therewith (Const. art. 11, § 6) and being exempt from any control by any subsequent act of the Legislature." By the terms of the Constitution, the subject-matter of providing for the Constitution and jurisdiction of police courts is given to such cities and cities and counties if they so elect. In the case just cited it is said: "Any act of the Legislature relative to such subject-matter would necessarily be inconsistent with a charter provision in regard to the same subject-matter." The charter provides that it "shall supersede the existing charter of said city and county, and all amendments thereof, and all laws inconsistent with this charter."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is clear that the effect of the provisions of the charter creating a police court was to repeal the acts of 1889 and 1893, which are the only acts claimed to give jurisdiction of misdemeanors of the class to which the case at bar belongs to any court other than the superior court; for, while the charter attempts to give concurrent jurisdiction of all misdemeanors to the superior court and police court, such provision has been declared to be void. Robert v. Police Court, 148 Cal. 131, 82 Pac. 838. The charter, therefore, as is very properly conceded by appellant, does not give jurisdiction to the police court of the offense of which defendant was convicted. Under the charter, the police court has jurisdiction of all prosecutions for violations of ordinances of the board of supervisors, and such jurisdiction as is possessed by justices of the peace in cases of misdemeanors under the general laws (Robert v. Police Court, supra). But there is no general law giving to the justices of the peace jurisdiction over misdemeanors punishable by fine of $1,000 or imprisonment for one year. As we have shown, the only law relied on by appellant as giving jurisdiction of the offense to any court other than the superior court has been repealed by the adoption of the charter. Neither the act of 1889 nor the supplemental act of 1893 purports to define the jurisdiction of any police court other than the one created by the act of 1889. That such court is a different court from the one created by the freeholders' charter is quite plain. The two courts were created by different authorities, and the creation of the second abolished the first and repealed the acts for its creation. It is therefore plain that the superior court had original jurisdiction of the case at bar, and the contention of appellant upon this point cannot be sustained.

Appellant next contends that the trial court erred in instructing the jury to the effect that the burden was upon the defendant to prove that he either had a license from the board of dental examiners of California, or that at the time of the passage of the act regulating dentistry, approved March 23, 1901 (St. 1901, c. 175), he had the lawful right to practice dentistry in the state of California. The court followed the rule laid down in People v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402, and in so doing committed no error.

The only other point relied on by appellant is that the court erred in charging the jury "that any person shall be understood to be practicing dentistry who shall for a fee, salary, or reward, paid directly or indirectly, either to himself or some other person, perform an operation of any kind upon the human jaws or teeth." This instruction is in the exact language of the statute defining what shall constitute the practice of dentistry within the meaning of the act. The Legislature had the power to thus define what it meant by the terms "practicing dentistry," and to thus make clear what acts it intended to make unlawful. State v. Yegge, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504. The instruction was not erroneous.

No other grounds are urged for a reversal, and the judgment and order must be affirmed. It is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

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13 Cal. App. 743

PEOPLE v. SAUNDERS (Cr. 259.)

(Court of Appeal, First District, California. July 11, 1910.)

1. ARSON (§ 37*) — PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for arson, the evidence *held* to support the verdict for conviction.

[Ed. Note.—For other cases, see Arson, Dec. Dig. § 37.*]

2. CRIMINAL LAW (§ 1159*) — APPEAL — EVIDENCE—SUFFICIENCY.

It is only where there is an entire lack of evidence to support a conviction in a criminal case that the appellate court may disturb the verdict for such reason, and, if the incriminating evidence tends to support the verdict, it is final.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 409*) — PROSECUTION — ADMISSIONS.

The extrajudicial admissions of the accused are not sufficient of themselves to sustain a conviction for arson.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919; Dec. Dig. § 409.*]

4. Arson (§ 37*)—Corpus Delicti—Evidence—Sufficiency.

While the mere destruction of a building by fire is not enough to establish the corpus delicti of arson, yet evidence that the condition of the premises showed that three separate fires had been started, taken in connection with other evidence tending to show the improbability of the fire being the result of accident, was sufficient to establish it.

[Ed. Note.—For other cases, see Arson, Dec. Dig. § 37.*]

5. Criminal Law (§ 680*)—Corpus Delicti—Order of Proof—Discretion of the Court.

The order of proof in a prosecution for arson is in the discretion of the court, and, while the corpus delicti ordinarily should first be proved, yet evidence of a declaration of defendant before such proof will not warrant a reversal of the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609, 1610; Dec. Dig. § 680.*]

6. Criminal Law (§ 448*)—Trial—Cure of Error—Admission of Evidence.

In a prosecution for arson, a witness testified as an expert over defendant's objection that there had been three separate fires set in the basement which had formed into one conflagration. This was later stricken out on defendant's motion, and the jury were instructed not to consider it. The witness subsequently stated facts which showed that the fire originated in three places. *Held*, that there was no error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 448.*]

7. Criminal Law (§ 1044*)—Appeal—Objections Not Made Below.

Where in a criminal prosecution a certain question was permitted to be asked a witness the court being unable to anticipate the nature of the answer, the defendant could not complain on appeal of the admission of the answer, a part of which was admissible, where he failed to move to strike it out.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1044.*]

8. Witnesses (§ 306*)—Privilege—Tendency to Degrade — Persons Entitled to Privilege.

In a criminal prosecution, it is no objection to a question asked a witness calling for competent and material testimony that it may tend to degrade the character of the defendant, as it is only when the answer will tend to degrade the character of the witness that he is excused from answering under Code Civ. Proc. § 2065, providing that a witness need not give an answer that will tend to degrade his character unless it be to the fact in issue, or to a fact from which the fact in issue would be presumed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1058–1060; Dec. Dig. § 306.*]

9. Criminal Law (§ 1186*) — Appeal — Remarks of Prosecuting Attorney—Effect.

Where, in a criminal prosecution, defendant objected to certain questions as tending to degrade his character, the prosecuting attorney's remark that "the character of the defendant is being degraded as we go along, that is our object," while it were better left unsaid, was too trivial to be a ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

10. Criminal Law (§ 939*) — New Trial — Newly Discovered Evidence — Abuse of Discretion.

Where, in a prosecution for arson, the court had granted several continuances, its refusal to grant a new trial on the ground of newly discovered evidence showing his insanity at the time of the offense was not an abuse of its discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 939.*]

11. Criminal Law (§ 977*)—Continuance—Grounds — Discovered Evidence for New Trial.

Where, in a prosecution for arson, the court had granted several continuances, its refusal to continue the case for sentence, so that defendant could obtain certain affidavits proving his insanity at the time of the offense, was not an abuse of its discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 977.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Thomas Elliot Saunders was convicted of arson, and he appeals. Affirmed.

Clarence G. Atwood and Charles A. Strong, for appellant. Attorney General U. S. Webb, for the People.

KERRIGAN, J. The defendant was accused by information of the crime of arson of the first degree. He was tried and convicted as charged. He moved for a new trial, which was denied, and he was thereupon sentenced to imprisonment in the state prison for the term of 20 years. This appeal is prosecuted from the judgment and from the order denying defendant's motion for a new trial.

Defendant contends that the evidence is insufficient to support the verdict. The record is long, but the facts, very briefly, are as follows: The defendant had been in the employ of the St. Luke's Hospital as a porter for about two weeks when, on November 16, 1909, being under the influence of liquor, and being moreover generally unsatisfactory to the management of the hospital, he was discharged by the matron. Although discharged at about 5 o'clock in the afternoon of that day and repeatedly requested thereafter to leave the premises, he did not do so, and was arrested and removed by police officers at about 12 o'clock that night. On the way to the police station he abused the doctors and nurses of the hospital, and told the officer in charge of the patrol wagon that he would "get even." The next day, upon being released from custody, he went back to the hospital, and, after being ordered away, he called at the offices of two of the San Francisco daily morning newspapers and endeavored to have them publish a statement that the dead were being robbed at St. Luke's Hospital. On the way to these offices he met Rev. Dr. Shields, head of one of the departments of the hospital, and said: "I am sorry to have to do it, but you will see it all in the papers in the morning." His story was refused publication. He returned to the hospital that evening at about 11:30. The police department was again appealed to, but police officers did not arrive at the hospital until somewhere between 1 and 2 o'clock, whereupon they searched the premises, but did not find the defendant. At 3:45 a. m. of November 18, 1909, a fire occurred in the basement of that wing of the hospital called the Mills building, in which 18 patients were at that time confined, who all, however, fortunately escaped unharmed. Defendant was seen by several witnesses both just before and just after the fire in the neighborhood of the hospital. Yet in a letter to one of the nurses, and in a statement to the fire marshal in the presence of several police officers, he denied that he was in that vicinity at either of those times. In his statement to the fire marshal he attempted to account for his whereabouts on the night of the 17th of November, but we think the jury were fully justified in disbelieving him. The condition of the basement of the Mills building, shows that the fire in all probability was of incendiary origin. We think the evidence is sufficient to sustain the verdict of the jury. In criminal cases this court can pass only upon questions of law, and it is only where there is in effect an entire lack of evidence to support a verdict that a question of law is presented. The rule is stated thus in People v. Emerson, 130 Cal. 563, 62 Pac. 1069: If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is true, as contended by defendant, that the mere proof of the destruction of a building by fire is not enough to establish the corpus delicti, and the defendant's extrajudicial statements and admissions are not sufficient of themselves to sustain a judgment of conviction for arson. People v. Simonsen, 107 Cal. 345, 40 Pac. 440. But here the physical condition of the premises showed that three separate and distinct fires had been started; and this evidence, taken in connection with other evidence tending to show the improbability of the fire being the result of accident, was sufficient to show that the crime of arson had been committed. The extrajudicial statements of the defendant were adduced after the corpus delicti was disclosed; and, even if they had been admitted in evidence before the corpus delicti was established (as the defendant claims was the case), still no serious question would be presented. The usual order of proof would have been departed from; but the order of proof is in the discretion of the trial court, and, while the corpus delicti is ordinarily the first point to which the evidence should be directed, nevertheless the admission in evidence of a declaration by the defendant before such proof is made will not warrant a reversal of the judgment. People v. Jones, 31 Cal. 567; People v. Jones, 123 Cal. 65, 55 Pac. 698. Fire Marshal Towe gave his opinion as an expert that there had originally been three different and separate set fires which had formed into a small conflagration. This testimony went in over the objection of the defendant, and later, upon his motion, it was stricken from the record; and the jury was instructed to disregard it. Subsequently the witness stated facts which showed that the fire had three different places of origin. The assertion of the defendant that the court's action in this regard was error is entirely without merit.

On the way to the police station on the occasion of his first arrest the defendant made a remark to the police officer in charge of the patrol wagon in disparagement of the women attachés of the hospital, and that he would get even with the hospital authorities. The question which elicited this testimony was objected to upon general grounds, and also for the reason that it would tend to degrade the defendant. The deputy district attorney in reply said: "The character of the defendant is being degraded as we go along, that is our object." When the question was propounded, the court was unable to anticipate the nature of the answer, and as no motion was made to strike it out, and part of the answer being admissible, the defendant cannot be heard to complain. Moreover, if the question called for competent and material testimony, it was no objection to it that it might tend to degrade the character of the defendant. It is only when the answer to a material question will tend to degrade the character of the witness that he is excused from answering it (Code Civ. Proc. § 2065), and the question here was addressed to the police officer, and not to the defendant. Coming to the observation of the prosecuting officer, and conceding that it would have been better left unsaid, nevertheless it is too trivial a matter to be considered as a ground for reversal. Besides, what the district attorney meant, and what he was probably understood to mean, was that the defendant was being degraded by the evidence introduced tending to prove him guilty of the crime charged.

Defendant claims that "throughout the case the court took a very prominent part in the examination of the witnesses," at times taking the witnesses "out of the hands of the prosecuting attorney and conducting the examination." A reading of the record discloses that, whenever the court examined witnesses, the questions asked were not only pertinent, but they showed no leaning against the defendant. Therefore there is no occasion here, as there was in the case of People v. Bowers, 79 Cal. 415, 21 Pac. 752, for criticizing the conduct of the trial court. The defendant moved for a new trial upon the ground that subsequent to the trial he had discovered evidence showing that he was insane at the time of the commission of the act charged. At the hearing of the motion, five affidavits in support thereof were read and filed, whereupon defendant's counsel requested a continuance of the pronouncing of judgment to enable them to get affidavits from Denver concerning defendant's family record and of his confinement in an insane asylum in the state of Colorado. The court had granted several continuances of this matter, and refused this request, and also made its order denying the motion for a new trial. We cannot say that the court in either matter abused its discretion.

Having thus concluded that there is no error prejudicial to the defendant in the record, we deem it unnecessary to discuss the point made by the Attorney General that no proper appeal has been perfected.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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13 Cal. App. 786

In re CLARK'S ESTATE. (Civ. 744.)

(Court of Appeal, Third District, California. July 26, 1910.)

1. Evidence (§ 309*)—Declarations—Pedigree.

Declarations of the deceased father of claimants to the estate of an intestate that the intestate was his sister, made in the lifetime of the intestate, are admissible without extrinsic preliminary proof of the relationship of the father to the intestate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1162; Dec. Dig. § 309.*]

2. Evidence (§ 309*)—Declarations—Pedigree.

Before the declarations of a deceased person as to his relationship to another are admissible, the relationship of the claimant to the declarant must be shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1162; Dec. Dig. § 309.*]

3. Descent and Distribution (§ 71*)—Heirship—Evidence.

Evidence *held* to show that a decedent was a brother of an intestate, so that decedent's children were distributees of the intestate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 235; Dec. Dig. § 71.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings for the distribution of the estate of Eliza Clark, deceased. From a decree of distribution and an order denying a new trial, the State appeals. Affirmed.

U. S. Webb and Malcolm C. Glenn, for appellant. J. R. Hughes, for petitioner and respondent.

BURNETT, J. This is an appeal by the people of the state of California from a decree of distribution and the order denying a motion for a new trial. It is stated by appellant that these two questions are involved: "First. Were the rulings of the trial court correct in the admission of statements claimed to have been made by certain deceased persons, not shown by any independent proof to have been related by blood or marriage to Eliza Clark? Secondly. Assuming all the testimony admissible, was the same sufficient to establish relationship between petitioner and Eliza Clark?"

The distributees claimed through one Jackson Freeman, who was admitted to be the father of Alice Aiston, the petitioner for distribution. Her case rested upon the contention that her father was the brother of said Eliza Clark, deceased. It is conceded by appellant that if Jackson Freeman and Eliza Clark were brother and sister, and this fact was legally shown, then the decree must be affirmed. The objection of appellant to the admissibility of evidence is addressed particularly to the declarations of said Jackson Freeman, deceased, to the effect that said Eliza Clark was his sister. There are decisions of other jurisdictions in harmony with the contention that, before such declarations can be admitted, independent evidence of the relationship of the claimant to the testate or intestate must be introduced, but the question is set at rest in this state adversely to appellant's view by the recent decision of our Supreme Court in the case of In the Matter of the Estate of William Hartman, Deceased, 107 Pac. 105, where it is held, as stated in the syllabus, that "declarations made by the father of the contestant to her, during the lifetime of the testator, of his relationship to the testator are admissible in proof of the same without extrinsic preliminary proof of the relationship of such declarant to the testator and such declarations do not derive their evidentiary value or competency from their being admissions against the interest of the party making them, but from reasons of necessity, and the probability of their trustworthiness." In reviewing the authorities upon the subject it is said: "On the other hand, however, it seems absurd to require, as a foundation for the admission of the declaration, proof of the very fact which the declaration is offered to establish. The preliminary proof would render the main evidence unnecessary. There are statements in the cases which seem to recognize a rule thus rigid and absurd." As pointed out in said decision, the relationship that is required to be shown before said declarations can be admitted is the relationship of the claimant to said declarant. This was covered, as we have seen, by the admission that petitioner is a daughter of said Freeman, and his declarations are therefore not those of a stranger, but of a member of the family.

It is but fair to the Attorney General to say that the appeal herein was taken before the Hartman Case was decided by the Supreme Court, and he has not attempted to refute the logic of said decision or to question its conclusiveness as an authority in the case at bar. There is no more doubt as to the sufficiency of the evidence to support the conclusion of the trial court. We can do no better, perhaps, than to adopt the résumé of said evidence furnished by respondent. Among the effects of the intestate found by the administrator were several photographs, a stencil of the name "Eliza Clark," an album and some gold nuggets wrapped in a very old soiled cloth. The photographs were identified as those of the intestate and also of Eliza Clark, the sister of said Jackson Freeman. The intestate resided in Nevada county from 1860 to 1864 and so did the sister. It appears also that Freeman's sister always had a few gold nuggets in a little cloth when she visited him and had a stencil with which she marked her handkerchiefs; the stencil being similar to the one found by the administrator as aforesaid. The foregoing is sufficient to support the finding that Eliza Clark, the intestate, and Eliza Clark, the purported sister of Jackson Freeman, are one and the same person.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The relationship was shown (1) by the direct testimony of a member of Jackson Freeman's family; (2) by evidence of declarations of deceased members of the family of Alice Aiston, made during the lifetime of the intestate; (3) evidence of admissions and declarations of Eliza Clark herself. As to the first, Alice Aiston testified: "I do not think my father had any other relatives, only this sister, Eliza Clark. I knew Eliza Clark in her lifetime. She was a sister of my father. I am a niece of Eliza Clark. I have seen her on several occasions. We always called her 'Aunt Eliza Clark.'" As to declarations of members of the family, James Rowe testified that he knew Jackson Freeman and met a person at his home named Eliza Clark in 1857 and Freeman introduced her as his sister, and afterwards spoke to him about her several times. Alice Aiston testified that her father told her that Eliza Clark was his sister. There is testimony also of declarations of Jackson Freeman's wife to the same effect. As to the third point, the acquiescence of Eliza Clark when introduced on two separate occasions as the sister of Jackson Freeman is equivalent to an acknowledgment on her part of said relationship, and petitioner testified that the same person represented by the photographs spoke to her concerning this relationship and told her that she was her niece; that she, the said Eliza Clark, was a sister of her, Alice Aiston's, father; that she called her "niece" when she spoke to her, and when she wanted her told her to come to her "aunt."

It is unnecessary to discuss any other question, as the foregoing are the only points upon which appellant relies, and they furnish no reason for disturbing the judgment.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

158 Cal. 252

ITALIAN SWISS COLONY v. ITALIAN VINEYARD CO. (L. A. 2,407.)

(Supreme Court of California. Aug. 30, 1910. Rehearing Denied Sept. 29, 1910.)

1. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNFAIR COMPETITION—REMEDY.

The law will protect one against the unfair competition of another who seeks by imitation of label or package or other artifice to induce persons to deal with him in the belief that they are dealing with the former.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 75*)—UNFAIR COMPETITION—ELEMENTS.

To justify protection against the unfair competition by imitation of label or package or other artifice to induce persons to deal with one in the belief that they are dealing with another, there must be an intent to deceive or at least the doing of things reasonably likely to deceive, and, where one puts up his product with intent to palm it off as that of another, and his act in fact tends to mislead the purchasing public, a case is made out, though the latter has shown no exclusive right in any trademark or trade-name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 1*)—"TRADE-MARK."

A "trade-mark" is a form, symbol, or name appropriated by one who produces or deals in a particular thing or conducts a particular business to designate the origin or ownership thereof.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 8, pp. 7042-7048.]

4. TRADE-MARKS AND TRADE-NAMES (§ 81*)—INFRINGEMENT OF TRADE-MARK — UNFAIR COMPETITION.

A manufacturer of red and white wines put them up under the name of "Tipo Chianti." The wines became known to customers as "Tipo Red" and "Tipo White," and the word "Tipo" became known to consumers as indicating a wine manufactured by him. A rival manufacturer offered his product to the public as "Tipo Barbera" and "Tipo Puglia." The bottles and labels of the two manufacturers were different except in the use of the word "Tipo," an Italian word in common use signifying type or kind. *Held*, that the right of the manufacturer to restrain his rival from putting up his product in the way he did depended on his right to sue for an infringement of a trade-mark, and not on his right to protection against unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 91; Dec. Dig. § 81.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 81*)—PROTECTION OF TRADE-MARK.

One who has obtained the exclusive right to a trade-mark is entitled to restrain an infringement whatever the motive or intent of the infringer, and relief is granted not on the ground of fraud, but because a right of property has been invaded.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 91; Dec. Dig. § 81.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 3*)—NATURE OF TRADE-MARKS.

The rule that words or phrases in common use and indicating the character, kind, quality, and composition of the thing may not be appropriated by any one to his exclusive use as a trade-mark is recognized in Civ. Code, § 991, prohibiting the appropriation as a trade-mark of any designation relating only to the name, quality, or description of the thing or business or the place where the thing is produced or the business is carried on.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 3*)—NATURE OF TRADE-MARKS.

A descriptive term of a foreign language cannot be adopted as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

8. TRADE-MARKS AND TRADE-NAMES (§ 3*)—NATURE OF TRADE-MARKS.

Though the Italian word "Tipo," meaning "type," may be capable of adoption as a trademark, the use of the word by a manufacturer of wines as a part of the phrase "Tipo Chianti" is merely descriptive, and cannot be adopted as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

Angellotti, Henshaw, and Lorigan, JJ., dissenting in part.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Italian Swiss Colony against the Italian Vineyard Company. From an order granting a temporary injunction restraining the infringement of an alleged trademark, defendant appeals. Reversed.

O'Melveny, Stevens & Millikin and Frederick S. Lyon, for appellant. Naphtaly & Freidenrich and Shankland & Chandler, for respondent.

SLOSS, J. Appeal by defendant from an order granting a temporary injunction. The action is one to restrain the infringement of an alleged trade-mark.

The complaint avers that since December 8, 1900, the plaintiff has been engaged in the business of manufacturing wines from grapes grown in California, and of selling such wines in said state and elsewhere. Prior to 1900 the same business was conducted for more than 10 years by the Italian Swiss Agricultural Colony, to all of whose rights the plaintiff succeeded on said 8th day of December, 1900. During this period of 10 years preceding 1900, the Italian Swiss Agricultural Colony adopted and appropriated to its exclusive use, for the purpose of designating the origin and ownership of wine manufactured by it, the name of "Tipo," which had never theretofore been used by anyone in connection with the manufacture or sale of wine. During said 10 years the Italian Swiss Agricultural Colony, and since 1900, the plaintiff, as its successor, has used said name of Tipo and affixed it to packages containing wine manufactured by it, and said wine was during all said time known to the public, and to dealers and consumers, as wine manufactured by the said Italian Swiss Agricultural Colony or by the plaintiff, respectively. The registration of said trade-mark under the provisions of the act of Congress of February 20, 1905, is alleged. It is averred that the plaintiff's wines have become well and favorably known to the public and to the trade by the name of "Tipo." The defendant is engaged in business of the same character as that of plaintiff. The complaint charges that said defendant, knowing of plaintiff's appropriation of the word "Tipo" to its exclusive use as a trade-mark, and knowing that plaintiff's wines were generally known by said name, and with the intent of defrauding the plaintiff and acquiring the benefits of its reputation, did wrongfully affix upon barrels and packages of wine manufactured by it, and known as Barbera wine and Puglia wine, the word Tipo, with intent and purpose to palm off said wine for the wine of this plaintiff. The defendant threatening to continue such use of the word, the prayer of the complaint is for an injunction restraining the defendant from offering for sale or selling any wine under the name of Tipo, for an accounting of profits, and for other relief.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The application for an injunction pendente lite was heard upon this complaint, the answer of the defendant (both pleadings being verified), and certain affidavits and exhibits. The answer set up four separate defenses, but we think it will be sufficient to refer to the following denials and allegations contained in it. The defendant denies that the plaintiff or its predecessor used the word "Tipo" for the purpose of designating the origin or ownership of wine manufactured by it, and alleges that the word "Tipo" is an adjective of description, kind, and quality, and is a common word of the Italian language meaning "type" or "kind" or "having the properties or characteristics of" the thing with reference to which said word "Tipo" is used. It alleges that the word has been used by plaintiff as a descriptive term in connection with the word "Chianti," to designate that its wine was a type of the well-known Chianti wine manufactured in Italy. The defendant has been manufacturing wines having characteristics similar to those of other Italian wines, to wit, those known as "Barbera", "Puglia," and "Gragnano"—and has branded and marked them, as "Tipo Barbera," "Tipo Puglia," and 'Tipo Gragnano," in order to indicate that its said wines were, respectively, of the type of the said Italian wines.

An affidavit offered by defendant supported the averments of the answer to the effect that "Tipo" is an Italian word in common use signifying type or kind, and that, when used in connection with the name of a certain kind of wine, such as, for example, "Barbera," it signifies wine of the general characteristics or qualities of such kind of wine. In this regard there was no conflict in the evidence, the affidavits on behalf of plaintiff going no further than to allege that its wines, red and white, put up under the name of Tipo Chianti, had become known to customers as "Tipo Red" and "Tipo White," and that the word "Tipo" had become known to customers and consumers as indicating a wine manufactured by the Italian Swiss Colony. The exhibits, consisting of bottles of the wines manufactured and sold by the plaintiff and the defendant, respectively, have been brought here on this appeal. They bear out defendant's averments that plaintiff was putting up its wines under the name of "Tipo Chianti," and that defendant's product was offered to the public as "Tipo Barbera" and "Tipo Puglia." An inspection of the exhibits shows, further, the most marked differences of appearance between the respective packages and labels. The bottle of plaintiff is distinctive in shape and style. It is bulbous in form, tapering to a narrow neck. Its lower half is encased in a hemp or straw jacket. The defendant's packages are in the form of the ordinary straight-sided claret bottle. The respective labels are totally different in size, shape, color, and device. The sole point of resemblance between the two is in the use of the word "Tipo."

That the law will afford protection against the "unfair competition" of one who seeks, by imitation of label or package or by other artifice, to induce persons to deal with him in the belief that they are dealing with another, is, of course, well settled. Pierce v. Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1; Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; Dodge S. Co. v. Dodge, 145 Cal. 380, 78 Pac. 879; Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704. All of these cases rest upon the basis of fraud. There must be the intent to deceive, or, at least, the doing of things reasonably likely to deceive. 12 Ency. of Ev. 650; Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; Deering Harv. Co. v. Whitman Co., 91 Fed. 376, 33 C. C. A. 558. If the defendant can be shown to have put up his product with intent to palm it off as that of plaintiff, and if it does in fact tend to mislead the purchasing public, a case is made out, even though the plaintiff has shown no exclusive right in any trade-mark or trade-name.

But a technical trade-mark stands upon an entirely different ground. A trade-mark is a form, symbol, or name appropriated by one who produces or deals in a particular thing, or conducts a particular business, to designate the origin or ownership thereof. Civ. Code, § 991. If a plaintiff has obtained the exclusive right to such trade-mark, he is entitled to restrain an infringement, whatever the motive or intent of the infringer. 12

Ency. Ev. 638. In such cases the relief is granted, not on the ground of fraud, but because a right of property—i. e., plaintiff's exclusive right to the use of his trade-mark—has been invaded. It is clear on the facts shown by the record before us that this case must stand as one for the infringement of a trade-mark, and that the injunction cannot be supported as one directed against unfair competition. There is no attempt to allege, or to show, any simulation of plaintiff's goods with the intent or effect of deceiving the public, unless such intent and effect can be found in the use of the word "Tipo." And this word is used in a manner which absolutely disproves the existence of any fraudulent scheme to represent defendant's goods as those of plaintiff. The injunction does not purport to merely limit the use of the word "Tipo" to such extent as may be necessary to prevent deception, as it should in a case of unfair competition (Dodge S. Co. v. Dodge, supra), but absolutely prohibits the defendant from using the word at all. This order (which follows the prayer of the complaint) can be supported only upon the ground that plaintiff has the exclusive right to use the word "Tipo" in any manner as a name for wines. And such exclusive right can exist only if the word is a valid technical trade-mark.

As we have pointed out, the showing made on the hearing established beyond question that the word "Tipo" is an Italian word in common use, and that it signifies "type" or "kind." If it were a term of the English language, it would, as is at once apparent, not be available for appropriation as a trade-mark in the connection in which it was used by plaintiff and its predecessor. "There is no principle more firmly settled in the law of trade-marks than that words or phrases which have been in common use, and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by any one to his exclusive use." Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233; Amoskeag Mfg. Co. v. Spear, 2 Sandf. (N. Y.) 599; Col. Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76; Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Schmidt v. Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Spieker v. Lash, 102 Cal. 38, 36 Pac. 362. This rule, fundamental in the law of trade-marks, finds statutory recognition in section 991 of the Civil Code, which prohibits the appropriation as a trade-mark of "any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on." That such expressions as "Chianti Type," or "Barbera Type," or the like, would be descriptive of kinds of wine, is obvious.

Is the case taken out of the general rule by the fact that the descriptive term used is adopted from a foreign language? The authorities, virtually without conflict, answer this question in the negative. In Re Farbenfabriken's Trade-Mark, 63 L. J. Ch. 257, it was held by the English Court of Appeals that the word "Somatose," composed of the Greek word "Soma" and the suffix "tose," was not entitled to registration under a statute authorizing the registration as a trade-mark of "a word or words having no reference to the character or quality of the goods." So as to the word "Monobrut," a combination of foreign words applied to champagne, and found by the court to be descriptive. In re Vignier's Trade-Mark "Monobrut," 61 L. J. N. S. 495. In Davis v. Stribolt, 59 L. T., N. S., 854, the Norwegian term Bokol, meaning the same as the German "Bock Bier," was first used by the plaintiffs in England. It was held, however, that they could gain no exclusive right to the use of such a descriptive mark. In Eastman P. M. Co. v. Comptroller-General, 79 L. T., N. S., 195, the House of Lords overruled the Farbenfabriken Case on a point of statutory construction not here involved, but the Lord Chancellor took occasion to express the view that "where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language." In our own court a similar view was expressed in Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204. There the plaintiff sought to establish an exclusive right to use the word "Schnapps" as a trade-mark applied to gin. But it appeared that "schnapps" was a Dutch word which had been in common use in Holland, and to some extent in the United States, to designate gin. "That word, therefore," said the court, "could not be appropriated by the plaintiff as his trade-mark. Had it not been used in New York, or elsewhere in the United States, as the name of gin, prior to its adoption by the plaintiff, he still could not maintain his claim to it. Could he secure his claim to the word on the ground that it was not in use in the United States, prior to the time when he adopted it, the law for the protection of trade-marks would be shorn of most of its strength, for on the same principle other persons would be at liberty to adopt and use the word in other cities, states or countries, if at the time of its adoption by them it was not in use in such cities, states or countries." See, also, Bolander v. Peterson, 136 Ill. 215, 26 N. E. 603, 11 L. R. A. 350; Luyties v. Hollender (C. C.) 30 Fed. 632.

The respondent cites no authority questioning the rule as just stated. Indeed, it places its reliance upon the contention that defendant is guilty of "unfair competition" rather than upon infringement of trade-mark. We have already stated our reasons for holding this position to be untenable.

We are not called upon to decide, and do not undertake to decide, whether a valid trade-mark right could be based upon the use of the word "Tipo," standing alone. That term, not associated with the name of any kind of product, might perhaps be regarded as in itself meaningless, and therefore capable of adoption as a fancy name or symbol. The person first using it might be in a position to restrain a similarly restricted use by others. But, while the allegations of the complaint indicate such adoption and use, the evidence, and more particularly the exhibits, show clearly that the word was used by plaintiff as part of the phrase "Tipo Chianti." So used it was unquestionably descriptive.

Upon the whole case, we see no ground upon which an injunction can be sustained. The order appealed from is reversed.

We concur: BEATTY, C. J.; SHAW, J.; MELVIN, J.

ANGELLOTTI, J. I dissent. While I agree with Justice SLOSS to the effect that the word "Tipo" is not such a word as is available for appropriation by plaintiff as a trade-mark in the connection in which it is used, I am of the opinion that a sufficient showing was made to warrant the lower court in concluding that the case was within the rule against unfair competition, as declared in such cases as Pierce v. Guittard, 68 Cal. 68, 8 Pac. 645, 58 Am. Rep. 1; Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; Dodge S. Co. v. Dodge, 145 Cal. 380, 78 Pac. 879; Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704.

We concur: HENSHAW, J.; LORIGAN, J.

(158 Cal. 247)

FLOOD v. E. L. GOLDSTEIN CO. et al.
(S. F. 4,766.)

(Supreme Court of California. Aug. 27, 1910.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING AFFIDAVITS—PRESUMPTION.

On appeal from an order made on affidavits, if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3989; Dec. Dig. § 1011.*]

2. INJUNCTION (§ 135*)—PRELIMINARY INJUNCTIONS—JUDICIAL DISCRETION.

The issuance of a preliminary injunction rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

3. INJUNCTION (§ 161*)—PRELIMINARY INJUNCTIONS — DISSOLUTION — JUDICIAL DISCRETION.

The dissolution of a preliminary injunction on motion lies within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 347; Dec. Dig. § 161.*]

4. INJUNCTION (§ 136*)—PRELIMINARY INJUNCTIONS—SCOPE OF RELIEF—POSSESSION OF LAND.

Generally a preliminary injunction will not lie to change the possession of land, where the title is in dispute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

5. INJUNCTION (§§ 9, 12*)—SCOPE OF RELIEF—WRONGS COMPLETED.

Generally rights already lost and wrongs already committed cannot be corrected by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 8, 12; Dec. Dig. §§ 9, 12.*]

6. INJUNCTION (§§ 5, 37, 136*)—PRELIMINARY INJUNCTION—RIGHT TO.

A lessee entitled to possession for an unexpired portion of the term can enjoin destruction of the premises by one who has wrongfully ousted him until he can regain possession in a proper action or until the term has ended, but, where a building has been so far dismantled that it cannot be used by the lessee, he is not entitled to a preliminary injunction against the wrecking of the building, nor to a mandatory injunction compelling restoration of the premises to habitable condition, especially where the term of the lease would expire before the final hearing could be had.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 4, 85, 305, 306; Dec. Dig. §§ 5, 37, 136.*]

7. INJUNCTION (§ 35*)—CONSTRUCTIVE POSSESSION.

That the furniture of a subtenant of a room was not removed from the lot, but was temporarily placed in the basement, does not show a possession of the room by him which he can protect by injunction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 35.*]

8. INJUNCTION (§ 175*)—TEMPORARY INJUNCTION—DISSOLUTION—EVIDENCE.

On motion to dissolve a temporary injunction against lessors dismantling a building, the court could consider the fact that the building had been substantially dismantled, and that plaintiff tenant's term would probably expire before a final hearing could be had.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 175.*]

9. INJUNCTION (§ 170*)—TEMPORARY INJUNCTION—DISSOLUTION—NOTICE.

An order dissolving a temporary injunction issued against several defendants is not vitiated because the notice of motion to dissolve did not specify the particular defendant who purposed to present the motion, where it appears a particular defendant was the real party in interest, and that the appearance was on its behalf, if not for others.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 355, 356; Dec. Dig. § 170.*]

10. INJUNCTION (§ 170*)—TEMPORARY INJUNCTION — DISSOLUTION — NOTICE OF MOTION — DEFECTS—WAIVER.

Omission of a notice to dissolve a temporary injunction against several defendants, to specify the particular defendant who purposed to make the motion, and to state the grounds was waived by plaintiff appearing in response to the motion, and submitting affidavits in opposition thereto without objecton to the notice.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 355, 356; Dec. Dig. § 170.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Arthur M. Flood against the E. L. Goldstein Company and others. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

Knight & Heggerty, H. M. Owens, and Frank J. Hennessy, for appellant. Manson & Ackerman, for respondents.

SHAW, J. This is an appeal from an order dissolving a preliminary injunction. The order was made upon the complaint and affidavits filed in behalf of the defendants and counteraffidavits filed on behalf of the plaintiff. In the consideration of an appeal from an order made upon affidavits, "if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established." Doak v. Bruson, 152 Cal. 19, 91 Pac. 1002, and cases there cited.

The restraining order enjoined the defendants from wrecking and removing the building upon a certain lot described, and from excavating and removing the soil under and around the building and from removing the plaintiff's implements and furniture from the building. The lot belonged to the E. L. Goldstein Company. The defendant H. H. Yard was the lessee thereof under a lease extending to May 31, 1907. Plaintiff on July 7, 1906, became a subtenant of Yard of one room in the building, under an agreement which he claimed was a lease of that room from that date to May 31, 1907, at a rental of $50 per month, payable in advance on the 1st day of each month, and which Yard claimed created a tenancy from month to month only. Arrangements were made in September, 1906, by the Goldstein Company with other defendants, in pursuance of which it was proposed to cancel the lease to defendant Yard, remove the building from the lot, and erect a large hotel building thereon. Notice was given by Yard to the plaintiff on September 14, 1906, that from and after October 1, 1906, the rental of the room he occupied would be $1,000 per month. On October 1st, the plaintiff having refused to pay the increased rent, Yard served upon him a notice to quit and deliver up the possession of the room within three days. Plaintiff refused to yield possession. Thereafter, about November 1, 1906, the Goldstein Company began preparations for the erection of a new building and for the destruction and removal of the old building. Excavation was begun for the basement of the new building and continued until the ground was excavated in front of the old building to a depth of six to eight feet below the street level. About November 17th the destruction of the old building was commenced. The water pipes and gas pipes were disconnected, possession was taken of the entire building, the floors of nearly all the rooms were taken up, and the attic story of the house and a large part of the roof, and all the doors in the house were removed. The greater part of this destruction took place on November 18, 1906, and on that day all of the property of the plaintiff was removed from the room formerly occupied by plaintiff, the agents of said company took possession of that room, and took up and removed the floor and windows, leaving it obviously uninhabitable, and completely ousting the plaintiff from possession. The following day, November 19th, the plaintiff began the action for an injunction and obtained the aforesaid preliminary restraining order without notice to the defendants.

The issuance of a preliminary injunction and the dissolution thereof on motion are matters resting in the sound discretion of the superior court having jurisdiction of the action. Bigelow v. Los Angeles, 85 Cal. 618, 24 Pac. 778; Patterson v. Supervisors, 50 Cal. 344. "As a general rule courts of equity will not interfere by preliminary injunctions to change the possession of real property, the title being in dispute." San Antonio W. Co. v. Bodenhamer, 133 Cal. 251, 65 Pac. 472; Richter v. Kabat, 114 Mich. 579, 72 N. W. 600. In Delger v. Johnson, 44 Cal. 184, the plaintiff sued to obtain an injunction to prevent a threatened waste, consisting of the opening of a public street through his property. A preliminary injunction was held to have been properly dissolved upon a showing that the opening of the street had been fully completed one day before the order of injunction was made. "No court can, by a preliminary ex parte order or process, turn even a wrongdoer out of possession." People v. Simonson, 10 Mich. 337; Tawas v. Iosco, C. J., 44 Mich. 482, 7 N. W. 65; Toledo, etc., Co. v. Detroit, etc., Co., 61 Mich. 11, 27 N. W. 715. See, also, Felton v. Justice, 51 Cal. 529; Raffetto v. Fiori, 50 Cal. 363; Williams v. Long, 129 Cal. 229, 61 Pac. 1087; Gardner v. Stroever, 81 Cal. 151, 22 Pac. 483, 6 L. R. A. 90. "It is a general rule that rights already lost and wrongs already perpetrated cannot be corrected by injunction, and that the party aggrieved must seek some other remedy for redress." 16 Am. & Eng. Ency of Law, 362; Gardner v. Stroever, supra.

From these authorities it is clear that the preliminary injunction should not be used to restore the possession of the room to the plaintiff. If, under the lease he claimed to have taken, he was entitled to possession for the remainder of the alleged term, he would have the right to enjoin the destruction of the premises by a person who had wrongfully ousted him until he could regain possession in a proper action, or until his term ended. But it is plain that this right, under the circumstances here shown, could be of no substantial benefit to him. The house was completely dismantled, the roof was gone, the doors, windows, and floors removed, and access to it was rendered difficult, if not dangerous, by the excavation. The injury was done. The house, so far as its use for his purposes, that of a dental office, was concerned, was already practically destroyed. The plaintiff's term, if he had any, would run but six months longer. It does not appear that he had begun or was about to begin any suit for possession. Indeed, one of the main points made in his behalf in the present case is that the plaintiff still held partial possession, and that the injunction is maintainable to protect his possession; this point being based on the fact that the defendants did not remove the plaintiff's furniture entirely away from the lot, but placed it temporarily in a room in the basement, thus, as counsel's theory goes, leaving him partly in possession. This theory is wholly untenable. The plaintiff neither had nor claimed a right to any part of the house except the one room, and the place where his property was deposited was as entirely out of his possession and control as if it had been in a remote part of the city. With regard to the continuance of the injunction to prevent waste, or to maintain the house and the plaintiff's property in the condition it was in when the order was made, until he could establish his right in that or some other action, it is easily seen that this would assuredly not benefit him. His term would expire before he could obtain a final judgment establishing his right. In the meantime the maintenance of the property in the condition in which it was at the time the action was begun would be of no benefit to any one, it being left utterly uninhabitable, and the delay would injure the defendants, preventing them from erecting the contemplated building and depriving them of any beneficial use of the property while the litigation was in progress. The issuance of a mandatory injunction compelling the defendant to restore the plaintiff's room to a habitable condition or to give him undisturbed possession and access thereto would have been equally injurious to the defendants, and it would amount to an adjudication of the rights of the parties in advance of a trial and without a hearing. Furthermore, no such relief as this was demanded nor did the order of injunction which was vacated contain any such mandate. All these conditions were proper matters for the consideration of the trial court in the exercise of its discretion in the decision of the motion to dissolve the order. We are of the opinion that, under all the circumstances, the granting of the motion was not an abuse of discretion.

There is no merit in the point that the notice of motion to dissolve the injunction did not specify the particular defendant who proposed to present the motion. It sufficiently appears that the defendant, E. L. Goldstein Company, was the real party in interest, and that the appearance was on its behalf, if not for the others. The plaintiff appeared by counsel in response to the motion, and submitted his own affidavit in opposition thereto, without making any objection to the hearing of the motion on the ground that the notice was defective or irregular. This was a waiver of the irregularity complained of. It was also a waiver of the additional objection that the grounds of the motion were not set forth in the notice. They were clearly disclosed in the affidavits filed in support of the motion.

The order is affirmed.

We concur: **ANGELLOTTI, J.; HENSHAW J.; LORIGAN, J.**

158 Cal. 284

VESTNER v. NORTHERN CALIFORNIA POWER CO. (Sac. 1,719.)

(Supreme Court of California. Aug. 31, 1910.)

1. MASTER AND SERVANT (§ 190*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

An experienced workman employed as a lineman in constructing a power line was ordered by the foreman in charge of the men to ascend a tree to do an act within the line of his duty. The place was not inherently dangerous. He knew that men were cutting on a neighboring tree, and could see the extent of the cutting, and knew that, if the work continued, the tree would fall and might injure him. The foreman assured him that there was no danger. *Held*, that under Civ. Code, § 1970, providing that an employer need not indemnify his employé for losses suffered in consequence of the ordinary risks of the business or of the negligence of another person employed in the same general business unless committed in the performance of a duty the employer owes to the employé, the master was not liable; the negligent act of the foreman in permitting the tree to be cut down being the act of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 466-469; Dec. Dig. § 190.*]

2. MASTER AND SERVANT (§ 206*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The workman assumed the risk under the rule that, where an employment is accompanied with risks of which those who enter into it have notice, they cannot, if they are injured by exposure to such risks, recover compensation from their employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.*]

Department 2. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Charles O. Vestner against the Northern California Power Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles L. Donohoe and Frank Freeman, for appellant. Samuel Rosenheim, H. B. M. Miller, and B. F. Geis, for respondent.

MELVIN, J. Plaintiff appeals from a judgment in favor of defendant in an action for damages for personal injuries. The appeal is on the judgment roll alone. Plaintiff was employed by the defendant corporation as a lineman, and was engaged with other workmen constructing a power line from Orland to Hamilton in Glenn county. The complaint alleged that plaintiff was directed by defendant to ascend a tree for the purpose of placing certain wires therein; that he climbed the tree as directed, and while there was caught and injured by the falling of another tree which defendant negligently and carelessly cut without warning to plaintiff; that plaintiff was not familiar with the handling of wires in trees, such work being outside of his regular employment; that defendant failed to warn him of the dangers attendant upon the performance of his work, and particularly of the peril arising from the cutting of a tree near the one in which he was at work; and that by reason of defendant's negligence he was injured.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found, however, that plaintiff was experienced in the kind of work he was performing, and that, indeed, he was a man of varied experience in several employments. There were also findings to the effect that plaintiff was ordered to ascend the tree by defendant's field foreman Stark for the purpose of fastening a rope therein; that before he climbed it, while he was climbing it, and after he had ascended it, some of plaintiff's fellow servants were removing trees; and that said fellow servants were also under the direction of foreman Stark. There was an additional finding to the effect that before going up into the tree plaintiff had requested Stark to have the work of cutting the other tree cease, but that Stark assured plaintiff that there was no danger. There was also a finding that there would have been no danger if the chopping had ceased at the time plaintiff made his request that Stark should order the other men to discontinue the work of cutting down the tree that afterwards fell and injured plaintiff. Additionally the court found that plaintiff went into the tree to tie a rope, and that this was within the scope of his employment, and that said tree was not a place of danger to plaintiff except as it was made so by the careless and negligent act of plaintiff's fellow servants in cutting down the tree that did the damage in its fall.

At the time of the occurrence of the unfortunate accident which was the basis of this action, section 1970 of the Civil Code was as follows: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé." Appellant maintains that under the duty enjoined by law upon respondent to provide a safe place for the prosecution of the work of its employés, the corporation was bound to insure Vestner against injury arising from the negligence of his fellow servants in cutting the tree near the one into which he was directed by the foreman to go; and that Stark, the foreman, acted as a vice principal in putting Vestner to work in a place made perilous by the operations of the other workmen.

We are unable to agree with this view of the case. Vestner, an experienced workman, was sent into a place not inherently dangerous. He knew that men were at work cutting on a neighboring tree. Of course, he knew as a matter of common experience, that, if their work was continued sufficiently, the tree would fall, and might injure him. While the foreman assured him that there was no danger, he was in a position to see the extent of the cut which the woodchoppers had made. Seeing that, and estimating the probabilities, it is clear that he took the chance of finishing the particular duty of the moment before the tree should fall. The sole question in this case is this: Was the injury caused by defendant's failure to perform a personal duty which it owed to plaintiff? Stark had control of the men engaged in the construction of the work, and it was the duty of plaintiff to obey his orders. There was no contention that he was incompetent, or that the corporation had not exercised due care in selecting and employing him as a foreman. The place which he had chosen for the plaintiff's work was, as we have said, in itself a reasonably safe one. He was negligent in permitting the other tree to be cut down so that it fell upon and injured the plaintiff, but in this he was a fellow servant of Vestner. Under the statute and authorities as they existed at the time plaintiff was injured, we can see no other conclusion. Since that time section 1970 of the Civil Code has been amended, but such amendment has no application to this case. The learned judge of the superior court filed an opinion in which he discussed some of the Californian cases upon this question, as follows: "The defendant was engaged in mining gold at Sucker Flat, county of Yuba. The plaintiff was in its employ, and was engaged in picking dirt and gravel into the defendant's ground sluice. The defendant was engaged in blasting rock on the mine. One Kegan was the foreman of all the work, and had the authority to employ and discharge hands. The plaintiff was struck by a rock thrown from a blast a distance of 300 feet. He was exposed to injury by the blast, and it was by means of Kegan's negligence that he was not notified that the blast was to be fired. It was held that the defendant was not liable. McLean v. Blue Point Gravel Co., 51 Cal. 255. That case was very much like the one at bar. In each case the foreman ought to have warned the plaintiff of the danger, and failed to do so. Another similar case is that of Daves v. S. P. Co., 98 Cal. 19, 32 Pac. 708, 35 Am. St. Rep. 133. The section foreman, who had the power to employ and discharge men, and had employed the deceased, opened a switch and ran a hand car thereon, negligently leaving the switch open. The deceased was engaged in doing something about the hand car, and was under the end thereof when a train coming up ran into the open switch, colliding with the hand car and killing the deceased. It was held that the death of deceased resulted from the negligence of a fellow servant and that the defendant was not liable; that the place provided by the defendant was a safe place to work in the first instance, and was rendered unsafe only by the negligent act of a fellow employé. So it would appear in this case, if it was the duty of the defendant to furnish the place to work, that it was reasonably safe, and was rendered dangerous only by reason of the negligence of the fellow employés of the plaintiff in the act of cutting down the tree which injured him. In the case of Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 Pac. 559, the facts were as follows: A pile had been driven too deep, and the plaintiff, with other men, was sent by the superintendent to lay a foundation for a jackscrew to raise the pile. This required the plaintiff to work under the pile driver. Plaintiff was engaged in carrying and arranging blocks upon which to place the jack. The blocks were supplied from a place 10 or 12 feet above, from which height they were thrown down to the workmen below. M. B. Stone, the superintendent, was supervising the work. Plaintiff, while stooping down to pick up a block, was struck by one thrown from above. The man above asked before he threw the block if all was clear below, and was answered in the affirmative by the superintendent and others, and the block was allowed to fall. The superintendent, when he gave his answer, was standing within a few feet of the plaintiff, and there was nothing to obstruct his view of him. The superintendent was held guilty of negligence, but the defendant company was held not to be negligent. The following language of the court is applicable to this case: 'Under the facts of the case at bar, it is quite apparent that Stone, in answering to the call of the workmen that all was clear below, was not performing on behalf of the defendant corporation any duty by law imposed upon it. The employés were engaged in a task within the scope of their employment. It cannot be successfully contended that the appliances were not suitable, the place of labor not reasonably safe for the character of the work, or the fellow employés not fairly competent and careful.'"

In none of the cases cited by the court were the facts so strongly against the contention of the plaintiff as those found in the case at bar. In those cases the persons injured did not know of the operation of the dangerous agencies near the places where they worked. Here the plaintiff knew that the chopping by his fellow workmen was in progress after he climbed the tree. By thus assuming the risk he brought himself clearly within the well-known rule so well expressed by Wharton in his work on Negligence (section 200): "Where an employment is accompanied with risks of which those who enter into it have notice, they cannot, if they are injured by exposure to such risks, recover compensation from their employer." In Nofsinger v. Goldman, 122 Cal. 617, 55 Pac. 429, this language was used: "Defendant's proposed instruction 9 was to the effect that when an employé assents to occupy a place prepared for him, and to incur the dangers to which he will be exposed thereby, if the employé have sufficient intelligence and knowledge to enable him to comprehend the risks and dangers, his assent dispenses with the performance upon the part of the employer of the duty of making the place reasonably safe. If an employé agree with his employer to undertake the performance of a specific task, either working in an unsafe place, or with unsafe and inadequate appliances, and in so contracting the employé knows and understands the danger of the situation, and knows and understands that the appliances are unsafe, and further appreciates the risks which may follow the use of such inadequate appliances, it is truly said that in these respects he has by his contract and by his assent relieved his employer from duty in these particulars. So far as the proposed instruction bears upon this proposition of law, it is unobjectionable."

In view of the fact that the law has been changed and that under the present statute perhaps there might have been a liability on defendant's part, we have carefully examined the authorities cited, and have considered the case in all of its aspects which have been presented to us. After such consideration, we are constrained to agree with the learned judge of the superior court who, after a very clear exposition of the law, summed up as follows: "At the time of the accident the employés were engaged in cutting down a few trees which happened to be in the way of the power line, and it was their duty to exercise such care in cutting them as to avoid injury to any of their number, and the injury to the plaintiff occurred by reason of the negligent manner in which his fellow employés did their work, and not by reason of any act or omission of the defendant. The foreman, Stark, was a fellow employé of the plaintiff, and not in the discharge of a personal duty which the defendant owed to the plaintiff, and the injury was due to the negligence of plaintiff's fellow employés."

From the foregoing discussion, it follows that the judgment must be sustained; and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

158 Cal. 259

DEITER v. KISER et al.

KISER et al. v. DEITER et al. (S. F. 5,443.)

(Supreme Court of California. Aug. 30, 1910.)

1. Attorney and Client (§ 76*)—Authority of Attorney—Termination by Death of Client.

The death of a party terminates the authority of his attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 127; Dec. Dig. § 76.*]

2. Attorney and Client (§ 76*)—Authority of Attorney—Termination by Death of Client.

Where plaintiff died after judgment against him, and an administrator was appointed, but there was no substitution of the administrator or application therefor, the attorney was without authority to give notice of appeal in the absence of any direction from the administrator.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 127; Dec. Dig. § 76.*]

3. Attorney and Client (§ 76*)—Authority of Attorney—Termination by Death of Client.

The right of an attorney to appeal under Code Civ. Proc. § 941b, as added by St. 1907, c. 410, providing that, on the death of any person having a right of appeal, his attorney of record may appeal at any time before the appointment of an administrator or executor, is limited to the period prior to the appointment of a personal representative.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 76.*]

4. Appeal and Error (§ 412*)—Notice of Appeal—Validating Invalid Notice.

An order directing the continuance of the cause in the name of the administrator of the deceased party, does not validate a prior notice of appeal given by one without authority to do so.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 412.*]

5. Appeal and Error (§ 429*)—Notice of Appeal—Want of Authority to Give—Estoppel.

A motion for a new trial was properly made and notices of appeal were properly given by cross-defendants other than a cross-defendant and original plaintiff, who died subsequent to the rendition of the judgment, and whose attorney gave notice of appeal. Respondents did not mislead the opposing counsel or the administratrix of the deceased party. *Held*, that respondents, though participating in the proceedings for new trial and accepting service of the notice of appeal without objection, were not estopped from moving for the dismissal of the appeal of the deceased party for want of authority of the attorney to give notice thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168–2172; Dec. Dig. § 429.*]

6. Appeal and Error (§ 801*)—Motion to Dismiss—Time to Hear.

A motion to dismiss an appeal on the ground that appellant who was made a cross-defendant has no interest in the action will not be considered in advance of a hearing on the merits where the determination thereof requires an examination of the entire record and of the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3164; Dec. Dig. § 801.*]

In Bank. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by George A. Deiter against J. N. Kiser and others, who filed a cross-complaint against George A. Deiter and others. From a judgment for defendants on the cross-complaint, plaintiff and the cross-defendants appeal. Motion to dismiss the appeals of George A. Deiter granted, and the motion to dismiss the appeals of E. E. Bray and another denied.

W. M. Gardner, W. C. Kennedy, and A. D. Shaw, for appellants. Briggs & Hudner and H. W. Scott, for respondents.

SLOSS, J. Motion to dismiss appeals. The complaint alleged that a deed of certain mining property was made by defendants to E. E. Bray, and deposited in escrow; that the deed was thereafter fraudulently altered at the instance of defendants, and was, after its delivery, filed for record on behalf of the grantee, who was ignorant of the alteration. The plaintiff, claiming as successor in interest of E. E. Bray, sought a reformation of the deed. The defendants answered, denying the allegations of the complaint, and filed a cross-complaint by which they sought, as against Deiter, E. E. Bray, and F. W. Bray, a decree that the deed and agreement under which it was executed be declared null and void, and that the title of defendants to the property described in the deed be quieted. The court ordered the Brays brought in as parties. Judgment went in favor of defendants in accordance with their prayer. This judgment was entered on May 8, 1909. Motion for new trial was denied on November 13, 1909. On November 5, 1909, there was filed a notice of appeal from the judgment, and on November 19, 1909, a notice of appeal from the order denying a new trial. Each purported to be given in behalf of the plaintiff and the cross-defendants, and each was signed by the attorneys who had appeared for said plaintiff and cross-defendants in the action; the signatures being followed by the words "attorneys for plaintiff and cross-defendants." The respondents move to dismiss both appeals as to all parties appellant.

The motion to dismiss the appeals of Deiter, the original plaintiff, is based on the ground that the attorneys giving the notices had no authority so to do. It appears from the showing made that said plaintiff died on the 27th day of August, 1909, and that on the 17th day of September, 1909, Mabel L. Deiter was, by an order of the superior court of Santa Cruz county, appointed administratrix of his estate. Letters of administration were issued to her four days later. No substitution of the administratrix has been made in the action, and none was applied for prior to the giving of notice of the motions now before us. The notices of appeal do not appear to have been given in pursuance of any order, authority or direction from her, or in her behalf.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon this state of facts, it seems clear that this court is without jurisdiction to entertain the appeals purporting to have been taken by Deiter. His death terminated the authority of his attorneys to act for him. Applying this rule, it has frequently been held that, where the respondent dies after judgment, a service of notice of appeal on the attorney who has represented him is entirely ineffectual. Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Cal. 93; Sheldon v. Dalton, 57 Cal. 19; Pedlar v. Stroud, 116 Cal. 462, 48 Pac. 371; Estate of Turner, 139 Cal. 85, 72 Pac. 718; Bell v. S. F. Sav. Union, 153 Cal. 64, 94 Pac. 225. If death of the client deprives the attorney of authority to receive service of notice of appeal, it must, of course, end his authority to give such notice.

It is true, as claimed by counsel seeking to support the appeal, that this rule has been modified by the enactment in 1907 (St. 1907, c. 410), of section 941b of the Code of Civil Procedure. That section provides that "in the event of the death of any person having at his death a right of appeal the attorney of record representing the decedent in the court in which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or an administrator of the decedent." But the facts do not bring the case within the operation of this enactment. The right given is limited to the period prior to the appointment of a personal representative of the decedent. It is here shown that the administratrix was appointed and letters issued before the filing of either notice.

No importance is to be attached to the circumstance that on February 4, 1910, the court below denied a motion that the cause be continued in the name of the administratrix in place of the deceased plaintiff. If such order had been made, it could not have operated to validate a prior notice of appeal given by persons who were without authority to give it. We cannot assent to the proposition that the respondents by participating in the proceedings for new trial, and by accepting service of the notices of appeal, all without objection, are estopped to ask for a dismissal. The motion for new trial was properly made, and the notices of appeal properly given, by the cross-defendants other than Deiter, and the respondents were in no position to ignore either proceeding or to object to it. Futhermore, their action in no way misled the opposing counsel or the administratrix. In Moyle v. Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22, the death of the respondent had been fraudulently concealed from the adverse party for the purpose of preventing an appeal. But there was nothing of the kind here. Deiter's administratrix and his attorneys were as well aware of the fact of his death as were the opposing counsel.

The motion to dismiss the appeals of the Brays is based on the ground that they have no interest in the action. The determination of this motion would require an examination of the entire record and of the merits of said appeals. We are not disposed to make such examination on a motion to dismiss presented in advance of a hearing on the merits. The motion may be renewed when the cause comes on for such hearing.

The motion to dismiss the appeals of Deiter from the judgment and from the order denying a new trial is granted.

The motion to dismiss the appeals of E. E. Bray and F. W. Bray is denied.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.

158 Cal. 236

OLD SETTLERS' INV. CO. v. WHITE.

(L. A. 2,553.)

(Supreme Court of California. Aug. 27, 1910. Rehearing Denied Sept. 28, 1910.)

1. Sales (§ 240*)—Bona Fide Purchasers.

Though one buys property with notice of a latent equity in a third person, he is entitled to avail himself of the rights of his vendor, if the vendor was a bona fide holder without notice, and takes the property free from such equity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 678; Dec. Dig. § 240.*]

2. Chattel Mortgages (§ 181*)—Property Subject of Mortgage—Creditors.

Mortgages of personal property which the statute does not authorize to be mortgaged are invalid against attaching creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 181.*]

3. Chattel Mortgages (§ 197*)—Rights of Third Persons.

Under Civ. Code, § 2973, as added by St. 1905, c. 460, making certain chattel mortgages valid as to persons having actual notice thereof before parting with value, and section 2957, avoiding chattel mortgages as to creditors and bona fide purchasers, unless accompanied by a specified affidavit and acknowledged and recorded as required for grants of real property, a creditor who has no actual notice of a mortgage is not bound thereby and may levy thereon for his debt, unless it is made and recorded in compliance with the statute, and is upon property which section 2955 permits to be mortgaged.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 430-433; Dec. Dig. § 197.*]

4. Chattel Mortgages (§ 197*)—Rights of Third Persons.

Civ. Code, § 2973, as added by St. 1905, c. 460, making certain chattel mortgages valid as to persons with actual notice thereof, so far as applicable to creditors, applies only to subsequent creditors who have actual notice of the mortgage before parting with the consideration on which their debts were founded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 430–433; Dec. Dig. § 197.*]

5. Chattel Mortgages (§ 14*) — Property Subject To—Furniture, Etc.

Under St. 1905, c. 40, amending Civ. Code, § 2955, by adding subdivision 8, permitting upholstery and furniture and household goods to be mortgaged, applies to property stored in a warehouse, or not devoted to any use, as well as property in actual use in a dwelling, lodging house, or hotel.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 14.*]

6. Chattel Mortgages (§ 14*) — Property Subject to—Effect of Amendatory Statute.

The amendment of Civ. Code, § 2955, by St. 1905, c. 40, by adding subdivision 22, so as to permit furniture and equipment usually found in a hotel to be mortgaged, did not affect subdivision 8, permitting upholstery, furniture, and household goods generally to be mortgaged.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 14.*]

7. Chattel Mortgages (§ 74*) — Property Partly Subject to Mortgage.

That a chattel mortgage included some articles not subject to mortgage with articles which Civ. Code, § 2955, as amended by St. 1905, c. 40, allows to be mortgaged, *held* not to invalidate it as to the articles properly included.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 145; Dec. Dig. § 74.*]

8. Execution (§ 37*)—Rights of Third Persons — Property Not Subject to Mortgage.

An execution creditor can levy on property described in a mortgage to a third person so far as such property is not subject to mortgage under the statute without paying or tendering the amount of the mortgage debt, but he can levy on the part lawfully mortgaged only by paying the debt.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 95–97, 101, 103; Dec. Dig. § 37.*]

9. Sheriffs and Constables (§ 98*)—Execution—Justification.

Ordinarily, when property at the time of levy under execution is in possession of defendants, an officer can justify himself by producing the writ without establishing the judgment on which it was founded, but the rule does not apply when he is infringing the rights of third persons.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 143–157; Dec. Dig. § 98.*]

10. Fraudulent Conveyances (§ 226*) — Rights of Creditor.

A creditor who desires to impeach a transaction between a debtor and a third person, and takes property of the debtor to satisfy his own debt, to the prejudice of such third person, must show either that he has a lien on the property, or that he has a judgment and execution and a return of nulla bona, or a levy on the property itself.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 658; Dec. Dig. § 226.*]

11. Sheriffs and Constables (§ 98*) — Wrongful Execution—Justification.

The rule allowing an officer to justify an execution by producing the writ alone operates solely for his protection, and cannot be used by him for affirmative attack.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 143–157; Dec. Dig. § 98.*]

12. Sheriffs and Constables (§ 98*)—Mortgaged Property—Justification by Officer.

An officer who levies on mortgaged property without performing his statutory duty to pay the mortgage debt cannot justify under the writ alone, but must show that it is founded on a judgment.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 143–152; Dec. Dig. § 98.*]

13. Judgment (§ 284*)—Entry—Sufficiency.

Under Code Civ. Proc. § 668, requiring judgments to be entered in the judgment book, a judgment is improperly entered in the docket.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 559; Dec. Dig. § 284.*]

14. Judgment (§ 87*) — Instruments Not Constituting.

A document signed by defendants, consenting to entry of judgment against them, is not a judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 87.*]

15. Judgment (§ 88*)—Judgment by Confession — Entry — Nature of Clerk's Duty.

A clerk entering judgment under Code Civ. Proc. § 997, pursuant to plaintiff's offer to allow judgment to be taken, acts in a ministerial capacity, and must follow closely the forms provided by law, or his acts will be invalid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 142, 146; Dec. Dig. § 88.*]

16. Judgment (§ 88*) — Judgment by Confession—Sufficiency.

Under Code Civ. Proc. § 997, authorizing judgment by consent, the act of recording in a judgment docket of a document signed by the parties consenting that judgment be entered is not an entry of judgment by the clerk.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 142, 146; Dec. Dig. § 88.*]

17. Corporations (§ 370*)—Power to Take Oath.

Corporations cannot take oaths.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 370.*]

18. Affidavits (§ 2*)—Corporate Affidavits —Who May Make.

When an affidavit is required of a corporation and no particular officer is designated in the statute to make it, it may be made by any one of its officers or agents.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. § 14; Dec. Dig. § 2.*]

19. Chattel Mortgages (§ 63*)—Affidavits —Corporations.

Since Civ. Code, § 2957, requiring a chattel mortgage to be accompanied by an affidavit to be valid as against third persons, does not provide who shall make the affidavit, when a corporation is a party to a mortgage, and does not require the person who makes it for the corporation to state his official position or relation, it is sufficient if he declares it in an introductory statement describing the persons who make the affidavit.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125–135; Dec. Dig. § 63.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Old Settlers' Investment

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Company against W. A. White. Judgment for defendant, and plaintiff appeals. Transferred to the Supreme Court from the District Court of Appeal for the Second District. Judgment reversed.

Louis W. Myers and F. A. Stephenson, for appellant. W. R. Bacon and G. P. Adams, for respondent.

SHAW, J. This appeal was originally taken to the District Court of Appeal for the Second District. Judgment in the trial court was for the defendant and the plaintiff appeals upon the judgment roll alone. The decision of the district court was vacated, and the cause transferred to the Supreme Court for reconsideration. The action was to recover damages from the defendant, as sheriff, for levying an execution upon certain personal property upon which the plaintiff held a mortgage, without paying the mortgage debt. The mortgage was executed to plaintiff by J. H. Scales and C. P. Halfhill on September 11, 1906, and was recorded on the same day. The trial court found that the property mortgaged consisted of furniture, tables, stoves, ranges, cooking utensils, and equipment contained and used in a certain restaurant, but that it was not in any manner connected with a hotel, although it was property of a kind usually found in hotels. The mortgage is set forth in the record, and the description of the property therein shows that it consists principally of tables, chairs, dishes, and other household and kitchen furniture of various kinds. The so-called judgment upon which the execution in question was issued was based on a complaint filed in the superior court on September 12, 1906, stating a cause of action in favor of James T. Cleary and against J. H. Scales and C. P. Halfhill upon a promissory note dated July 2, 1906, payable to W. R. Bacon, due 30 days after date, for $575, executed by J. H. Scales and C. P. Halfhill and assigned by Bacon to Cleary. Execution was issued to the defendant on September 12, 1906, and immediately levied upon the mortgaged property. No payment or offer to pay the mortgage debt was made. On September 13, 1906, the plaintiff served upon the defendant a demand that he either pay the amount of the mortgage debt or release the property from the levy.

The plaintiff claims that Cleary, the holder of the judgment, is bound by the mortgage, even if it was not executed as prescribed in the Civil Code, and even if the property is not of a class which, by the provisions of the code, was subject to mortgage at the time it was executed. This claim is based upon the provisions of section 2973 of the Civil Code. This section was added to the Code in 1905. St. 1905, p. 617. It reads as follows: "Mortgages of personal property, other than that mentioned in section 2955, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees and personal representatives, and persons who, before parting with value, have actual notice thereof." The court found that Cleary had actual notice of the plaintiff's mortgage before he parted with value. From this it is claimed that the mortgage was valid as against him under the provisions of the aforesaid section. The contention of the respondent on this point is that Cleary is entitled to all the rights of his assignor, Bacon, and that Bacon did not have actual notice of the mortgage at the time he accepted the note and parted with the consideration thereof. Manifestly he could not have had such notice, since the note was given on July 2, 1906, and the mortgage was not executed until September 11th. It is a well-settled proposition that if one person purchase property, with notice of a latent equity in some third person, and his vendor is a bona fide holder without notice, such purchaser is entitled to avail himself of the rights of his vendor and takes the property free from the equities of the third person. This doctrine, we think, is applicable to cases like the one before us. The question thus presented is whether or not, under section 2973 aforesaid, a mortgage not made in accordance with the statute is valid as against previous creditors of the mortgagor. Section 2957 provides that mortgages on personal property are void "as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value," unless it is accompanied by the affidavit therein specified and is acknowledged and recorded as therein stated. Creditors are here placed in the class of persons who are protected against mortgages not made and recorded in accordance with the statute. It is also settled by the decisions that attaching creditors are classed among the persons who are protected against mortgages upon personal property which the statute does not authorize to be mortgaged. Glenn v. Arnold, 56 Cal. 631; Lemon v. Wolff, 121 Cal. 275, 53 Pac. 801. The provisions of section 2973 must be considered in connection with those of section 2957. The creditors, therefore, stand in the same category with reference to the validity of chattel mortgages as subsequent bona fide purchasers and incumbrancers. Mortgages not valid against the latter are not valid against the creditor, except under the same circumstances. It would follow, therefore, that a creditor who has no actual notice of the mortgage is not bound thereby, and may levy thereon for his debt, unless it is made and recorded in compliance with the statute and is upon property which the statute declares may be mortgaged. The result is that creditors whose debts existed prior to the execution of the mortgage are not affected by the provisions of section 2973. So far as the creditors are concerned, the provision regarding persons with actual notice can apply only to subsequent creditors who have actual notice of the mortgage before parting with the consideration upon which their debts are founded. Cleary is therefore not estopped by the provisions of section 2973.

Judgment in the court below was given for the defendant upon the theory that the property described was not subject to be mortgaged under the provisions of section 2955 of the Civil Code, as it existed at the time the mortgage was executed. St. 1905, p. 36. By that amendment three new clauses numbered 20, 21, and 22 were added to the section. So far as material here the section as amended in 1905 was as follows: "Mortgages may be made upon the following personal property and none other: * * * (8) Upholstery, furniture and household goods. * * * (22) The bedroom furniture, carpets, tables, stoves, ranges, cooking utensils, and all furniture and equipment usually found in a hotel." The court below was evidently of the opinion that clause 22 of the section was the only clause applicable to the case, and that as the property was contained and used in a restaurant, and was not in any manner connected with a hotel, it was not of a character which the statute allowed to be mortgaged. In Blaisdell v. McDowell, 91 Cal. 287, 27 Pac. 656 (25 Am. St. Rep. 178), the court referring to this section said: "The section of the Code in question should have a reasonable construction, with a view of executing the evident design of the Legislature in enacting it. While the language used should not be strained to include cases not clearly embraced by it, the meaning to be given to it should not be so narrowly circumscribed as to exclude cases clearly within it." Inasmuch as the amendment of 1905, re-enacted subdivision 8, without change, it could not reasonably be supposed that the Legislature intended that subdivision 22 should entirely supersede subdivision 8. As the section stood prior to that amendment, the right to mortgage upholstery, furniture, and household goods, under subdivision 8, was without qualification or limitation. A mortgage upon property of that description would be valid, if properly executed and recorded, as well where the property was stored in a warehouse or not devoted to any use, as where it was in actual use in a dwelling, lodging house, or hotel. We are of the opinion that no change was intended to be made in this particular, and that notwithstanding the addition of subdivision 22 property of the kind specified in subdivision 8 could be mortgaged under the amendment of 1905, regardless of its situation or its use, to the same extent as before that amendment was made. The purpose to be served by subdivision 22 was not to supersede subdivision 8, but to favor the hotel business by allowing the equipment of a hotel to be mortgaged as chattels, although not embraced in the classes described in subdivision 8. Its purpose was to extend the right so as to include other property, rather than to take away the right previously existing. This is shown by clauses 20 and 21 which allowed mortgages of chattels used in apiaries and oil refineries, a right not previously given. It is also well illustrated by the present case. The mortgaged property here consisted of a large number of articles of property which, as above stated, consisted principally of household goods, such as tables, chairs, and dishes. They were used in a restaurant, and in connection therewith were a number of other articles, constituting a part of the equipment of the restaurant. All of these articles were described as part of the property mortgaged. Among them were gas fixtures, moldings on the wall, an awning, some shelving in the pantry and kitchen, a large boiler and smokestack, and certain plumbing fixtures. These articles, if used in a hotel, would form a part of its equipment, and, if so, they could be mortgaged under subdivision 22, although some of them are clearly not furniture or household goods, and could not be mortgaged under subdivision 8. The fact that this mortgage included some articles which were not subject to be mortgaged in connection with other articles which the statute allows to be mortgaged does not make the mortgage invalid as to those which come within the statute. In re Fischer, 94 Cal. 523, 29 Pac. 961; San Francisco Breweries v. Schurtz, 104 Cal. 426, 38 Pac. 92. The effect of these rules is that the mortgage was good with respect to property included therein which the statute allows to be mortgaged, and that an execution creditor would be at liberty to levy upon the property described therein which did not come within the provisions of the statute, without paying or tendering the amount of the mortgage debt, but that he could not levy upon that part of the property lawfully mortgaged, except on condition that he paid the debt.

It is contended on behalf of the defendant that, as the property at the time of the levy was in possession of Scales and Halfhill, the defendants in the execution, he could justify under his writ by producing the writ alone, without establishing the existence of the judgment upon which it was founded. That this is the general rule cannot be disputed. The rule does not apply, however, when the officer executing the writ is infringing upon the rights of third persons in the property. Usually this exception to the rule consists of cases where the levy is made when the property is in the possession of a third person claiming title. But, in view of the principles upon which the exception is founded, we think it must apply also to any case in which third persons have an interest in the property levied upon which will be affected or destroyed by the levy. In Knox v. Marshall, 19 Cal. 622, it was held that the pledgee of the property was a third person within the exception, and that an officer levying upon such property could not justify without proving the existence of a judgment to support the writ. In Bickerstaff v. Doub, 19 Cal. 112, 79 Am. Dec. 204, the same principle was applied to a purchaser in possession who had not paid the price under a contract of purchase which provided that the title should remain in the vendor until the price was paid. The leading case on the subject in this state is Thornburgh v. Hand, 7 Cal. 562. In that case, referring to a levy upon property which had been sold to a third person, the court quotes the following from Noble v. Holmes, 5 Hill (N. Y.) 195: "The sale could not be impeached by a creditor at large. It must be a creditor having a judgment and execution, or some other process which authorized a seizure of the goods. As a general rule, process regular on its face is sufficient for the protection of the officer, although it may have been issued without authority. But when the officer attempts to overthrow a sale by the debtor, on the ground of fraud, he must go back of his process, and show authority for issuing it. If he act under an execution, he must show a judgment." And upon rehearing the court added: "It requires something more than a mere indebtedness between the parties to justify the taking of property from the possession of a third person. A mere creditor cannot, as before remarked, impeach the sale until he shows that he has a judgment or a lien. Neither can the officer who represents him do so. The debt of itself gives no right to seize the property, but the attachment, and it is essential for its validity that it should have been issued in conformity with the law. If the officer seizes the property of the debtor, and the writ be regular on its face, it is a sufficient justification to him; for the defendant may, if the attachment has been improvidently issued, move to have it quashed, or bring a suit upon the undertaking, but a third party, a stranger to the record, could not interfere, and therefore it would seem but justice that before any right could be established against him, by reason of a proceeding to which he was not a party that its regularity should be shown." This is based on substantially the same considerations of sound policy as the well-settled principle that a creditor who desires to impeach a transaction between the debtor and a third person, and take property of the debtor to satisfy his own debt to the prejudice of such third person, must show either that he has a lien upon the property, or that he has a judgment and execution and a return of nulla bona, or a levy upon the property itself. Castle v. Bader, 23 Cal. 75; Massey v. Gorton, 12 Minn. 145 (Gil. 83) 90 Am. Dec. 288, note. It is also in line with the proposition that the rule allowing an officer to justify by the production of the writ alone is one which operates solely for his protection, and that it cannot be used by him as a weapon of attack. Dunlap v. Hunting, 2 Denio (N. Y.) 643, 43 Am. Dec. 763; Earl v. Camp, 16 Wend. (N. Y.) 566; Horton v. Hendershot, 1 Hill (N. Y.) 119; 1 Freeman on Executions, § 101. From these doctrines, we think it necessarily follows that when the officer is attempting to make a levy upon mortgaged property, and intends to so far disregard the rights of the mortgagee as to undertake to levy upon the property without performing the statutory duty of making a previous payment of the mortgage debt, he is to that extent using his writ for the purpose of attack and not of defense, and that, when he seeks to justify under the writ and disregard the mortgagee's claims, he must support his execution by proving that it is founded upon a judgment.

In the case at bar the defendant failed to show the existence of any judgment. According to the findings, the complaint of Cleary against Scales and Halfhill was filed on September 12, 1906, and on the same day the defendants, Scales and Halfhill, signed and delivered to Cleary, and Cleary filed with the clerk, a document entitled in the cause, in which they admitted all the allegations of the complaint, entered their appearance to the action, consented and requested that the clerk should enter a judgment against them for the amount demanded in the complaint, and waived the right to answer. The finding is that this document was filed and recorded by the county clerk in the "judgment docket" of the records of his office, and that no other judgment was ever entered in the cause. The law requires that judgments be entered in the judgment book (Code Civ. Proc. § 668). Thereupon the judgment roll must be made up as provided in section 670, Code Civ. Proc., and immediately after filing such roll the clerk makes the proper entries of the judgment in the "docket kept by him" (section 671). This docket is described in section 672 (Code Civ. Proc.), as a book divided into columns in one of which under the head of "Judgment" the amount must be stated, if it is a money judgment; if not, "a memorandum of the general character of the relief granted" must be stated therein. This "docket" is not the book in which judgments are to be entered. Even if it were, the paper said to be recorded therein was not a judgment. The recording in this "docket" of a document, signed by the defendants, declaring their consent to the entry of a judgment, could not constitute a judgment, and, as no other judgment was entered in the cause, we must conclude that no judgment existed. The proceeding there attempted to be followed was that provided in section 997 of the Code of Civil Procedure. Under that section, the defendant at any time before trial may serve upon the plaintiff an offer to allow judgment to be taken against him for a specified sum. If the plaintiff accepts this offer, he may file the same and the clerk "must thereupon enter judgment accordingly." The rule as settled by the decisions in this state, with respect to such judgments, is that the clerk in entering them acts in a ministerial capacity only, and that he must follow closely the forms provided by law for the exercise of the power conferred upon him, otherwise his acts will be invalid. In Crane v. Hirshfelder, 17 Cal. 585, in considering this section, the court says: "The clerk has no general jurisdiction or power to render, or of his own motion, and as his act, to enter, judgments; and when in a few exceptional cases the statute confers a power of this sort, as he looks to the statute for the source of his authority, so he must pursue, at least substantially, the directions of the statute, in order to impart validity to his acts." In Kelly v. Van Austin, 17 Cal. 565, speaking of the power of a clerk to enter a judgment by default, the court says: "The clerk in entering judgments by default acts in a mere ministerial capacity. He exercises no judicial functions. The statute authorizes the judgment, and the clerk is only an agent by whom it is written out and placed upon the records of the court. He must, therefore, conform strictly to the provisions of the statute, or his proceedings will be without any binding force." See, also, Stearns v. Aguirre, 7 Cal. 449; Long v. Serrano, 55 Cal. 21; County of Sacramento v. C. P. R. R. Co., 61 Cal. 255. By the strict rules here required to be followed it is obvious that there is no judgment under section 997 if the clerk does not enter any judgment, but merely records in the judgment docket, in a place where the statute does not provide for the entry of judgments, a document signed by the parties to the action and consenting that a judgment may be entered.

As the judgment is to be reversed and a new trial may show different facts, it is proper to consider here the alleged defect in the affidavit of the parties to the mortgage. On behalf of the plaintiff the affidavit was made by J. F. Reynolds, its secretary. A corporation cannot take an oath. When an affidavit is required of a corporation, and no particular officer is designated in the statute as the person who shall make it, it may be made by any one of its officers or agents in its behalf. The affidavit of Reynolds, Scales and Halfhill was as follows: "J. H. Scales and C. P. Halfhill, mortgagors in the foregoing mortgage named, and J. F. Reynolds, secretary of Old Settlers' Investment Company, a corporation, the mortgagee in said mortgage named, each being duly sworn, each for himself doth depose and say that the aforesaid mortgage is made in good faith and without any design to hinder, delay, or defraud any creditor or creditors." It was duly signed and sworn to. The criticism is that Reynolds does not make oath to the fact that he was then the secretary of the corporation, but merely recites the fact in the preliminary statement which does not purport to have been made under oath. The statute makes no provision as to who shall make the affidavit when a corporation is a party to a chattel mortgage, and it does not require the person who makes it for the corporation to declare on oath his official position or relation. We think it is clearly sufficient if he declares it in the introductory statement describing the persons who make the affidavit. On the principle contended for by the defendant, it would be necessary for Scales and Halfhill to declare on oath that they are the mortgagors. True, the identity of names raises a disputable presumption to that effect, but it is mere evidence not having the sanction of an oath. The declaration, signed by Reynolds, that he is the secretary of the corporation mortgagee, is a similar decree of proof, and is sufficient to satisfy the law in this particular. See Modesto Bank v. Owens, 121 Cal. 226, 53 Pac. 552; Yost v. Bank, 94 Cal. 496, 29 Pac. 858.

For these reasons we are of the opinion that, if the defendant had been acting under a valid execution, he could not have lawfully levied upon all the property without previous payment of the mortgage debt, and that he was acting without authority in making the levy upon an execution not supported by any judgment.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

158 Cal. 206

DUCKWORTH et al. v. WATSONVILLE WATER & LIGHT CO. et al.

(S. F. 5,258.)

(Supreme Court of California. Aug. 25, 1910. Rehearing Denied Sept. 24, 1910.)

1. Appeal and Error (§ 1041*)—Harmless Error—Erroneous Allowance of Amendments to Pleadings.

Where, in a suit involving the right to the water of a lake, the answer to the cross-complaint, setting up an exclusive ownership and right to the water, admitted the cross-complaint only so far as it was not inconsistent with the affirmative allegations of the answer that plaintiff had a right to and an interest in the water as an appropriator, and plaintiff claimed only as such appropriator, the error, if any, in allowing plaintiff to amend the answer by denying specifically the allegation of the cross-complaint, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

2. Evidence (§ 506*)—Opinion Evidence—Admissibility.

The question whether in the opinion of an expert a body of water is a lake is objectionable as calling for testimony on a matter not properly the subject of expert testimony, where the conditions observed by the expert are fully described, so that the jury, on proper instructions, may determine the fact.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

3. WATERS AND WATER COURSES (§ 142*)—APPROPRIATION — NONCOMPLIANCE WITH STATUTES.

Actual appropriation of water without compliance with the Code gives to the appropriator a right as against any one who did not have at the time of his diversion a superior right, and, though it cannot devest prior rights, it is good as against a subsequent appropriator.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. § 142.*]

4. WATERS AND WATER COURSES (§ 139*)—APPROPRIATION—COMPLIANCE WITH STATUTES.

Compliance with the Code as to the appropriation of water are important only in so far as the appropriator seeks to have his right relate back to the date of the posting of the notice of appropriation, as authorized by Civ. Code, § 1418, providing that by a compliance with the Code the appropriator's right to the water relates back to the time of the posting of the notice.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 139.*]

5. WATERS AND WATER COURSES (§ 127*)—APPROPRIATION—COMPLIANCE WITH STATUTES.

Compliance with the Code by an appropriator of water cuts off rights accruing between the date of the posting of notice of appropriation and the actual diversion for beneficial purposes; but, where no such rights have intervened, an actual appropriation may be made without following the Code.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 127.*]

6. WATERS AND WATER COURSES (§ 152*)—RIGHTS OF APPROPRIATORS—ISSUES.

Where, in a suit involving the right to the water of a lake, defendant alleged the diversion of 40 inches through a 15-inch pipe for the irrigation of lands and for an emergency supply, an amended pleading, alleging that it had connected the pipe with a reservoir connected with its system of pipes supplying a city for the purpose of appropriating the water for a reserve for emergency uses, did not show that it had a right to anything in excess of the 40 inches.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

7. WATERS AND WATER COURSES (§ 158½*)—ISSUES—FINDINGS.

Where, in a suit involving the right to the water of a lake, defendant, a corporation, alleged a conveyance by the former owner of plaintiff's land of riparian and water rights to third persons who conveyed such rights to defendant, it was entitled to a finding on the issue whether the third persons had conveyed such water rights to it.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 158½.*]

8. WATERS AND WATER COURSES (§ 156*)—RIPARIAN RIGHTS—CONVEYANCES.

A conveyance by an owner of land of his riparian and water rights and privileges belonging to the land, except necessary water for domestic purposes, transfers to the grantee not only riparian rights, but all water rights which belong to the land, except the rights reserved, and transfers the right of the grantor to apply the waters to his land, except for the reserved uses.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

9. WATERS AND WATER COURSES (§ 156*)—RIPARIAN RIGHTS—CONVEYANCES.

Where an owner of land conveyed his riparian and water rights and privileges belonging to the land, except necessary water for domestic uses, and subsequently conveyed the land to a third person, the latter was estopped from asserting any right in conflict with the right of the grantees of the riparian and water rights, and the fact that the third person based a claim to water on an appropriation made subsequent to the deed was immaterial.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

10. WATERS AND WATER COURSES (§ 142*)—APPROPRIATION—RIGHTS ACQUIRED.

An appropriation of water under the statute gives the appropriator a right superior to that of any subsequent appropriator on the same stream; but he does not acquire a right as against existing rights in the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. § 142.*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by S. J. Duckworth and another, substituted for Flora McKinley Duckworth, against the Watsonville Water & Light Company and others. From a judgment granting relief to both parties, defendants appeal. Reversed.

Charles A. Shurtleff and H. C. Wyckoff, for appellants. Netherton & Torchiana, for respondents.

SLOSS, J. The first trial of this action, which involves the rights of the parties to the waters of Pinto Lake, in Santa Cruz county, resulted in a judgment declaring that the plaintiffs had a prior right to take as much water as they could benefically use upon their land, not exceeding a continuous flow of 250 miners' inches. Upon an appeal to this court, the judgment was reversed for reasons stated in an opinion reported in 150 Cal. 520, 89 Pac. 338. The facts giving rise to the controversy, and the relative situations of the parties and their property, are set forth in that opinion, and need not be restated here. Upon a second trial, the superior court gave judgment declaring that the Watsonville Water & Light Company has the right, as riparian owner, to divert and apply on its land riparian to said lake 10 miners' inches of water; that it has the right, by virtue of appropriation, to divert 40 miners' inches for a beneficial purpose or use; and that, subject to these rights of the said water and light company, the plaintiff S. J. Duckworth has the right to divert 142 miners' inches of water from Pinto Lake for beneficial purposes. Each of the said parties is enjoined from interfering with the rights of the other as above defined. The defendants now appeal from this judgment and from an order denying their motion for a new trial.

A preliminary question should be disposed of before proceeding to a consideration of the merits. In its cross-complaint, the Watsonville Water & Light Company alleged that it was the owner and entitled to the exclusive use of all the waters contained and flowing in Pinto Lake. The plaintiff answered this allegation in a form that was declared by this court, on the former appeal, to be, to a certain extent, evasive. The appellants now complain of the action of the court below in making an ex parte order, after the reversal of the first judgment by this court, permitting the plaintiffs to amend their answer to the cross-complaint by denying specifically the aforesaid allegation. It is unnecessary to consider whether this order was erroneous. The amendment made no material change in the issues. Under the original answer, the allegation that the cross-complainant owned all the water of the lake was, as is pointed out in the former opinion, admitted only in so far as such allegation was not "inconsistent with the affirmative allegations of the answer." See 150 Cal. 530, 89 Pac. 343. One of these allegations was that plaintiff S. J. Duckworth "has a right to and an interest in said waters * * * as an appropriator." He claims here only as such appropriator, and the order permitting him to amend was, therefore, if error, harmless.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellants attack the sufficiency of the evidence to sustain a finding "that Pinto Lake, its tributaries and outlet, is part of a running stream." This finding followed the verdict of an advisory jury to which certain special issues had been submitted. A similar finding had been made at the first trial. Upon the former appeal we said, in answer to an objection like the one now made, that we could not "agree with the appellant in his contention that the finding that the lake, or its tributaries, constituted a running stream, is not sustained by the evidence." The showing in support of the finding contained in the present record is quite as strong as that before this court on the earlier appeal. Without giving to the view heretofore expressed by us binding force as the "law of the case" (see Allen v. Bryant, 155 Cal. 256, 100 Pac. 704, and cases cited), we are, after reconsideration, satisfied with that view, and shall apply it to the present appeal.

In disposing of this point, it may be well to advert to the alleged error of the trial court in declining to permit appellants' witnesses to state whether, in their opinions, "Pinto Lake is a lake." We think that the objection that the question called for expert testimony on a matter not properly the subject of expert testimony was well taken. The facts and conditions observed by the witnesses had been fully described. Whether the subject of their observation and testimony constituted a water course or a body of standing water was a question which could be answered by any one who was properly informed regarding the definitions of the respective terms. The distinction between a stream and a lake was, presumably, correctly declared to the jury as matter of law. The ultimate question whether or not there was a running stream was to be answered by the jury, acting under proper instructions, or by the court itself.

The court found that the Watsonville Water & Light Company is the riparian owner of a strip of land bordering the lake; that 5½ acres of said land is capable of cultivation; and that not more than 10 inches of water could be used for the irrigation of this land. It found, further, that since 1901 the said company has diverted 40 inches of water from Pinto Lake, and that this water has been sold by the company and applied to lands nonriparian to Pinto Lake. The plaintiff S. J. Duckworth has succeeded to the interest of his wife, Flora McKinley Duckworth, who was originally joined with him as plaintiff. It is found that, prior to the commencement of the action, said S. J. Duckworth posted on the bank of the lake a notice of appropriation, giving notice that he proposed to appropriate 250 inches of water from said lake. The recording of the notice and the commencement and prosecution of the necessary work are found. There is a finding that plaintiff has actually appropriated and diverted from the lake 142 inches of water, and applied it to the beneficial purpose of irrigating a portion of his land, and that this diversion has not materially increased the cost to the water and light company of taking water from the lake.

If these findings stood alone, and if all of them were sustained by the evidence, the judgment establishing the rights of the parties as hereinabove stated would appear to be free from objection. The appellants question the sufficiency of the evidence to support some of these findings. It is claimed, in the first place, that there is no evidence that the plaintiff's notice of appropriation was ever recorded. This claim appears to be well founded. An examination of the bill of exceptions fails to disclose any showing on this point. A further attack on the sufficiency of plaintiff's appropriation is that the notice designated a 6-inch pipe as the means of diversion; whereas, the diversion was in fact made through a 12-inch pipe. On the former appeal the question whether the use of a larger conduit than the one specified would vitiate a notice of appropriation was expressly left open for the reason that it was not presented by the record. We do not think a decision of this question is required by the state of the case as it now appears. Let us assume that no rights can be founded on the notice, whether for want of recording or for failure to state correctly the size of the pipe through which water was to be diverted. Civ. Code, § 1415. The plaintiff did, however, actually divert and apply to a beneficial use 142 inches of water, as is found by the court on sufficient evidence. Such actual appropriation, without compliance with the Code provisions, is enough to give him a right as against any one who did not have, at the time of the diversion, a superior right. It cannot divest prior rights, but it will be good as against a subsequent appropriator. Wells v. Mantes, 99 Cal. 583, 34 Pac. 324; Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 432. Compliance with the sections of the Code relative to appropriation are important only in so far as the claimant seeks to have his right relate back to the date of posting. Civ. Code, § 1418. Such compliance will cut off rights accruing between the date of posting and the actual diversion for beneficial purposes. If no such rights have intervened, the actual appropriation may be made without following the provisions of the Code. De Necochea v. Curtis, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. 146; Wells v. Mantes, supra. In the case at bar the prior rights of the water company as riparian owner and senior appropriator, so far as it was found to have such rights, were fully recognized and preserved by the decree. The company claimed no right accruing between the posting of the notice and the actual diversion and use by Duckworth. The failure to follow the Code provisions is therefore immaterial.

The appellant water company claims, however, that under its prior appropriation it was entitled, not only to the 40 inches of water which it had actually diverted and applied to beneficial uses, but to a further quantity as a reserve or emergency supply for the city of Watsonville to be drawn on in case of accident to the pipe line from which said city is usually supplied. By an amendment to the answer the defendants alleged that the water company had connected the pipe leading from the lake with a reservoir connecting with its system of pipes supplying the city of Watsonville for the purpose of appropriating the waters of the lake for the furnishing a reserve for such emergency uses. We do not see that this fact in and of itself could give the company a right to anything in excess of the 40 inches. The only diversion alleged was one of 40 inches through a 15-inch pipe, and the water taken through such pipe was applied, as the answer states, to two beneficial purposes, i. e., the irrigation of lands and a reserve or emergency supply. But the total amount claimed to have been diverted for both purposes was 40 inches, and the company's prior right to take this amount is recognized by the decree.

The appellant water company claims further that it had, by virtue of certain deeds, rights which were prior and superior to any right of Duckworth to use the waters of Pinto Lake on his land except for domestic purposes and the watering of stock. The answer avers that in 1885, while Carmen Amesti De McKinley was the owner of the land now owned by plaintiff and upon which he is applying the water claimed by him as appropriator, she conveyed to the defendants Smith and Montague all and singular the water and riparian rights and water rights and privileges of every kind, character, and description, which belong or in any manner pertain to said land, save and except the necessary water for domestic and culinary purposes and the watering of stock. The court made a finding in support of this allegation. There is, however, no finding upon the further averment of the answer that in January, 1897, Smith and Montague conveyed to the Watsonville Water & Light Company all the rights so conveyed to them by Mrs. McKinley. The defendant corporation was entitled to a finding on this issue, and, if the finding was in its favor, to have the rights vested in it under said deed protected by the decree. The plaintiff claims title as successor in interest to Mrs. McKinley, and, as owner of the land, is bound by her deed to the same extent that she was. The purpose and effect of the conveyance was to transfer to the grantees whatever right the grantor had to apply the waters of Pinto Lake to the land of the grantor, except for domestic uses and irrigation of stock. The instrument conveys not only riparian rights, but all water and water rights and privileges of every kind, character, and description which belong or in any manner pertain to said land. The right, or one of the rights, now asserted by Duckworth, is to apply the waters of Pinto Lake to the irrigation of the same land. This is a right which has been transferred by his predecessor in interest to the defendant, and he is, by virtue of her deed, estopped from asserting it in antagonism to her grantees. It is of no consequence that he bases his claim upon a so-called "appropriation," made subsequent to the deed. An appropriation, under our statute, has only the effect of giving the appropriator "a right superior to that of any subsequent appropriator on the same stream. But he acquires thereby no right whatever as against rights existing in the water at the time his appropriation was begun. An appropriation does not of itself deprive any private person of his rights; it merely vests in the appropriator such rights as have not previously become vested in private ownership. * * *" Duckworth v. Watsonville, etc., Co., 150 Cal. 520, 531, 89 Pac. 338, 343. But if Duckworth, in applying waters for the benefit of his lands, were to be given priority over the use of the same waters by the Watsonville Water & Light Company, his appropriation would have the effect of taking away from said company a part of the very right which had been transferred by plaintiff's predecessor, so far as she was capable of transferring it. That grant was, of course, not effective to convey any right not owned by the grantor or owned by third parties. It was, however, effective as an estoppel on the grantor and her successors, preventing them from objecting to any use by the water company of water which might, in the absence of the deed, have been applied for the benefit of the McKinley land. That it operated as such estoppel, so far as plaintiff's riparian right is concerned, was expressly held on the former appeal, where we said that, because of said deeds, "the water company can use the water for any purpose, at any place, and in any quantity which leaves plaintiffs enough for stock and domestic purposes." It is true that in the same opinion we said that "Duckworth claims a right to a part of the water by appropriation, and with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company. His privity with the McKinley deed does not estop him from making an appropriation of any water in the lake that may be subject to appropriation, nor from demanding that the water company shall not make a greater use of the water than it is authorized to do by the rights which it is shown to have, if such use interferes with an appropriative right by him." But in this passage we were speaking of the general right to appropriate water for use upon land, other than that owned by the grantor of the deeds. It was intended to declare merely that the making of the deeds did not prevent the maker or her successors from appropriating water. Whether Duckworth had any right as appropriator was not decided, nor was it decided that he could, notwithstanding the grant of all water and water rights belonging or pertaining to certain land, make an appropriation for use upon that very land, which should be good as against the grantees or their successors. For the reasons above stated, we think it must be held that he could not appropriate for that purpose. The right which he claims is the right to take water and use it upon his land. That right has been conveyed to the defendant, and the plaintiff cannot, in the face of his predecessor's deed, be permitted to revive it, or retake it by the mere device of entitling his taking an "appropriation."

If, upon another trial, it should be found that the rights conveyed to Smith and Montague are now vested in the water company, the latter is entitled to a decree declaring that it has a right, superior to any claim of plaintiff to use water on the land mentioned in the deeds, to take water from the lake in any quantity and for any purpose, provided enough is left for domestic purposes and stock on plaintiff's land. This right extends not only to the water actually heretofore taken by the water company, but to all which it may hereafter divert and apply to beneficial use.

As a new trial will be necessary, we express no opinion upon the sufficiency of the evidence to support the finding that the cost to the water company of taking water has not materially increased since the diversion of 142 inches of water by plaintiff. The issue will have to be tried again, and the evidence relating to it may differ from that now before us.

It may, perhaps, be unnecessary to add that the foregoing discussion has reference simply to the rights of the parties inter se. The right of third parties to take a part of the water of the lake, or to complain of a diversion by any of the parties to this action, is not here involved, and cannot be affected by anything here decided.

Under the views herein expressed, the further points made by appellants do not, we think, require attention.

The judgment and order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; LORIGAN, J.

SHAW, J. I concur. There appears to have been some misapprehension by counsel concerning the passage in the opinion upon the former appeal in this case relating to the status of Duckworth as an appropriator or user of water not taken under any claim of riparian rights. Having written that opinion, I take this occasion to state more fully what I conceive to be the true doctrine on that point.

Duckworth was not, at the time of the first trial, the owner of the McKinley lands, but held a lease thereon. The notices of appropriation posted by him stated that he proposed to use the water upon other lands, as well as upon that land. This reference to other lands may have been insufficient, under the Code, as a designation of the place of intended use, and for that reason his notice of appropriation may have been void, as to use on such other lands, or in toto, as a proceeding under the statute; but it was sufficient to show that he was claiming a right to divert water for use on lands other than the McKinley lands, which might ripen into a right by prescription, and as to these other lands he would not be estopped by the McKinley deeds to Smith and Montague. Now if Duckworth was at the time actually diverting water from the lake and using it on such other lands, not riparian, and the defendant company was also diverting water therefrom for use on nonriparian land, which, for the purposes of the discussion to which the passage from the former opinion was devoted, might have been the case as between them, in such a case the law is thoroughly settled that the one first in time is first in right. With respect to these possible antagonistic claims, therefore, Duckworth had the right to show, if he could, that his diversion and use on such other lands antedated that of the defendant, or any recent enlargement of its use by the defendant. We were then considering, not the actual case, but the case as it might possibly develop under the pleadings, and it was this claim of right which was referred to in the former opinion in the expression, "with respect to the right thus claimed he has a status which entitles him to challenge the right of the water company." We did not say that he was entitled to prevail over the water company, but that he was in a position, with regard to or by virtue of the pleadings, to attack or to challenge the alleged right of the defendant, a position which made their alleged rights as users of water on nonriparian lands a material issue in the case, as presented in the pleadings. It seems from the record before the court on the present appeal that he does not now claim the right to use the water, except on the McKinley lands. This being the case, all that was said on this subject on the previous appeal is inapplicable to the present case.

Perhaps something more should be said regarding the effect of a conveyance, by the owner of riparian land, of his riparian right therein, to another for nonriparian use. The court below seems to have been of the opinion that the riparian right consisted of the ownership of a definite quantity of the water of the lake, a quantity equal only to the amount which could be beneficially used on the riparian land concerned, and that the conveyance merely transferred to the grantees that quantity from the lake, leaving the riparian grantor free to take thereafter an equal or greater quantity therefrom and use it on the identical land, provided only that he must leave enough to furnish to the grantees the definite quantity which, by this theory, was conveyed, or, if the grantees were using less, then enough to provide for their actual use from time to time. This was not the legal effect of the conveyance. The riparian right exists solely because the land abuts upon the water. It is parcel of the land. It extends to all the water which may be reached from the land, and not to any specific particles or definite quantity or area of it. It is the right to make reasonable use and consumption of the water on the adjoining land and to a reasonable use of the water, in place, in connection with and for the benefit of the land. The water cannot be severed from the land and transferred to a third person so as to give him the title and right to remove it, as against other riparian owners. The grantor alone will be estopped by such a conveyance. The estoppel against him, with respect to the use and consumption of the water, or diversion from its natural position, must be as complete and extensive as was the right he conveyed. The McKinley deeds conveyed the entire right to use this water for irrigation on these lands to the defendant's predecessors, and it now belongs to the defendant, and not to Duckworth. A man may not eat his cake and have it. A man who sells a right to do a thing cannot thereafter exercise the right himself, except by permission of the buyer, and it is immaterial that the buyer may not be using or exercising it. If the water company had obtained similar deeds from the owners of all the lands abutting upon the lake and its tributaries, it would have obtained a complete estoppel against such landowners which would have prevented them from interfering with any use it saw fit to make of the water, and such estoppel would undoubtedly extend to all the water of the lake. If, having this right of estoppel, it chose to use only a part of the water, or none of it, this neglect to use it would not give any of the owners the right to take that which the company suffered to remain unused. A judgment which purported to give such owners the unqualified right to use the water on their respective tracts, as against the company, would operate to deprive the company of the property which it had bought and paid for and to return that property to the person who sold it and received payment of the price. The same principle must apply when the estoppel has been obtained as to one, only, of the riparian owners. He is absolutely estopped to use any part of the water on the land, except as specified in the deed by which he is bound. These propositions are fully established by the following authorities: Alhambra, etc., Co. v. Mayberry, 88 Cal. 74, 25 Pac. 1101; Gould v. Stafford, 91 Cal. 155, 27 Pac. 543; Gould v. Eaton, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181; Yocco v. Conroy, 104 Cal. 471, 38 Pac. 107; Lux v. Haggin, 69 Cal. 300, 310, 392, 4 Pac. 919, 10 Pac. 674; St. Helena W. Co. v. Forbes, 62 Cal. 184, 45 Am. Rep. 659; Zimmler v. San Luis W. Co., 57 Cal. 222; Farnham on Waters, §§ 462, 463; Gould on Waters, §§ 207, 215.

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158 Cal. 282

CASCI v. OZALLI et al. (Sac. 1,829.)

(Supreme Court of California. Aug. 31, 1910.)

1. Quieting Title (§ 44*)—Burden of Proof—Ownership and Possession.

In a suit to set aside a deed and to quiet title, plaintiff must establish his ownership and possession of the property.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 89; Dec. Dig. § 44.*]

2. Pleading (§ 345*)—Judgment On—Effect of Denial of Allegations.

Where the complaint in a suit to quiet title alleged ownership and possession, and the answer denied this allegation, judgment for plaintiff on the pleadings should not have been given.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1056; Dec. Dig. § 345;* Quieting Title, Cent. Dig. § 88.]

Department 1. Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Suit to quiet title by Orlinto Casci against Pelligrini Ozalli and another. From a judgment for plaintiff on the pleadings, defendants appeal. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Thomas S. Ford and Ed. V. Henley, for appellants. J. M. Walling, for respondent.

SHAW, J. In the court below, upon motion of the plaintiff, judgment was entered upon the pleadings in favor of the plaintiff and against the defendants with respect to the mining claim designated as the "Gold Ridge Gravel mine." Defendants appeal from this part of the judgment. The complaint asserted title to another mining claim known as the Gold Ridge Extension Gravel mine, but plaintiff afterwards disclaimed any interest therein, and judgment was given in favor of the defendants with respect to that mine. As to that part of the judgment no controversy arises; the appeal being solely from the other part thereof.

The complaint was in two counts; the first count alleging that the plaintiff was the owner of an undivided one-fourth interest in the Gold Ridge Gravel mine described therein, and that the defendants claimed and asserted an interest therein adverse to the plaintiffs, which claims of the defendants were without right. The second count averred that the plaintiff was the owner and in possession of the same interest in the same mining claim; that the defendant Pelligrini Ozalli, claiming to act under an invalid power of attorney from the plaintiff, had executed to his codefendant, Teluida Ozalli, a deed purporting to convey the plaintiff's interest therein to said Teluida Ozalli; and that this deed was ineffective to convey the plaintiff's interest, but that, nevertheless, the said defendant claims title thereunder. The prayer was that the deed be declared invalid, and that the plaintiff's title be quieted against the claims of the defendants. The answer, with respect to the first count, denied that the plaintiff is or ever was the owner of the mining claim described. As to the second count, it denied that the plaintiff is or ever was the owner, or in possession, or entitled to the possession of the mining claim, or any interest therein, or any portion thereof.

The allegation that the plaintiff was the owner and in possession of the interest in the mining claim described was an allegation of facts material to the cause of action of the plaintiff. Payne v. Treadwell. 16 Cal. 243; McCarthy v. Yale, 39 Cal. 586; Johnson v. Vance, 86 Cal. 130, 24 Pac. 863. It was necessary for the plaintiff to establish ownership or possession, either by proof or admission, in order to entitle him to recover. The denial in the answer that he was either the owner or in possession of this, or of any, interest in the mining claim, put these facts directly in issue and made it necessary for the plaintiff to introduce evidence thereof before he could become entitled to judgment. In this condition of the pleadings it was error to grant a motion for judgment on the pleadings. Nudd v. Thompson, 34 Cal. 47; Prost v. More, 40 Cal. 347; Amador Co. v. Butterfield, 51 Cal. 526; Hicks v. Lovell, 64 Cal. 17, 27 Pac. 942, 49 Am. Rep. 679; Botto v. Vandament, 67 Cal. 333, 7 Pac. 753; Martin v. Porter, 84 Cal. 479, 24 Pac. 109; Derby v. Jackman, 89 Cal. 3, 26 Pac. 610; Norris v. Lilly, 147 Cal. 757, 82 Pac. 425, 109 Am. St. Rep. 188. Because of this error, it is necessary that the part of the judgment involved in the appeal be reversed. The portion thereof declaring the defendants the owners of the undivided one-fourth interest in the Gold Ridge Extension Gravel mine will not be affected by this reversal.

The judgment in favor of the plaintiff with respect to the Gold Ridge Gravel mine is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

158 Cal. 308

CITY STREET IMPROVEMENT CO. v. KROH, County Auditor. (S. F. 5,477.)

(Supreme Court of California. Sept. 2, 1910.)

1. Highways (§ 113*) — Improvement — Report of Highway Commissioners—Sufficiency.

The preliminary report of the highway commission required by St. 1907, c. 349, to ascertain the kind of improvement to be made on a road, and to make a report describing generally the kind of improvements, need not go into detail, and a reasonable departure therefrom in the final specifications for the doing of the work does not render the contract therefor void, though the improvement described in the report must be adhered to.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

2. Highways (§ 113*) — Improvement — Report of Highway Commissioners—Sufficiency.

The variance between the preliminary report of the highway commission for the improvement of roads under St. 1907, c. 349, which stated that, where an asphaltic macadam pavement was to be made, it should be composed of a mixture of the best grade of hard, tough crushed stone, the best asphalt and other materials which would insure a pavement capable of sustaining heavy traffic, and the specifications for the work which allowed either gravel or crushed rock to be used in the composition of the asphaltic macadam at the option of the contractor, subject to requirements as to the quality and to the approval of the engineer of the commission, was not fatal to the contract for the work called for by the specifications.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

3. Highways (§ 113*) — Improvement — Report of Highway Commissioners—Sufficiency.

The specifications for public work to be let to the lowest bidder must be sufficiently definite on all the details materially affecting the cost of the work to apprise bidders of the essential and substantial parts of the work and enable them to know with reasonable accuracy the cost of the work.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. HIGHWAYS (§ 113*) — IMPROVEMENT — REPORT OF HIGHWAY COMMISSIONERS—SUFFICIENCY.

This rule as to definiteness applies where the cost is to be paid with money already raised by taxation or by the sale of bonds, as well as where the cost is to be raised after the work is done by assessment on property benefited.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

5. HIGHWAYS (§ 113*) — IMPROVEMENT — REPORT OF HIGHWAY COMMISSIONERS—SUFFICIENCY.

But the rule does not apply in the case of details of construction which do not appear and cannot with reasonable diligence and cost be ascertained in advance or which will be disclosed only by the doing of the work, or any contingency which reasonable care will not foresee, and such things must be left to be adjusted in accordance with the general provisions of the contract for the work, or by the discretion of the person supervising its performance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

6. HIGHWAYS (§ 113*)—IMPROVEMENT—CONTRACTS—VALIDITY.

Provisions in a contract for the construction of a road which requires the contractor to grade the connections with intersecting roads to the satisfaction of the engineer of the highway commission, which allows the contractor to take water from the county wells along the road, and, when that is insufficient, to obtain the necessary quantity from other sources at his own expense, and which recommends a method of mixing the asphaltic cement, but which permits any other method, provided it will result in coating every particle of the stone, sand, and dust, and which requires the contractor, in case he is compelled to cease work temporarily, to leave in a passable condition the part of the road on which he has worked, etc., do not make the contract void because the specifications do not include such provisions, since they relate to details of construction which do not appear, and cannot with reasonable diligence be ascertained in advance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

7. HIGHWAYS (§ 113*)—CONSTRUCTION—CONTRACTS.

The strictness of construction against the validity of contracts made in proceedings in invitum will not be observed in proceedings for the construction of a public road where the property owners have consented to the raising of the money by taxation to pay the cost thereof, and the officers are charged with the duty of expending it lawfully and in good faith for the purposes designated.

[Ed. Note.—For other cases, see Highways. Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

8. HIGHWAYS (§ 113*) — PUBLIC IMPROVEMENTS—CONTRACTS—VALIDITY.

A provision in a contract to construct a road that the fills and approaches to bridges, culverts, and drains are to be graded to the elevations shown on the plans or to elevations which may be given by the engineer, and which reserves to the county board of supervisors power to change the plans for the cuts, fills, slopes, etc., does not give the engineer authority to change the elevations of his own motion, but requires the contractor to take the engineer's elevations so far as they apply to changes made by the supervisors under the reserved power, and the provision so construed is valid.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

9. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—COMPETITIVE BIDDING.

A provision in the specifications for the construction of a road that crushed rock or gravel at the option of the contractor may be used in the composition of asphaltic macadam, when considered in connection with the accompanying conditions prescribing the qualities and characteristics necessary to each kind of material to make it fit for the purpose, and authorizing the engineer of the highway commission to see that the material used is up to the standard specified, tends to favor competition in bidding rather than to hinder it, as the bidders are informed of the requirements in either case.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

10. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—COMPETITIVE BIDDING.

A provision requiring the contractor to give a bond to secure the county against loss by reason of suits which may be brought by any person claiming patent rights covering the class of pavements specified, unless the contractor proves that he has a license from such patentee. is within the discretion of the county board of supervisors, and is not invalid as hindering competitive bidding, in the absence of a showing that the license to use the patent is not available to any person who will pay the royalty.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

11. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—COMPETITIVE BIDDING.

A provision that the pavement shall in general have a uniform thickness of four inches and that the contractor shall not reduce it without the consent of the engineer does not affect the validity of the contract for the work, in the absence of any claim that there is any material difference in the profits of the contractor in laying macadam of one thickness over that to be made in the other.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

12. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—COMPETITIVE BIDDING.

A provision directing the liquid surface coating to be applied on the whole road or any part of it as the engineer may decide is not unlawful where the contract for the work provides that the payment is to be made by the square foot for the amount actually applied.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

13. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—COMPETITIVE BIDDING.

Profile and cross-sections for the pavement of a road showed that the gravel foundation or the pavement itself, where gravel foundations were not required, was to be laid, in general, on the existing surface of the road. It was to be rolled with a heavy roller, and, where a subgrade was to be made by excavation, that was also to be rolled. Soft spots developed under the rolling were to be excavated to a depth of two feet, and then filled with clean dry earth or gravel. The foundation was to be of gravel wherever directed by the engineer, and was to be not less than three inches thick after compacting, or thicker, if so directed by the engineer. *Held*, that the provisions in the specifications for extra work in excavating the soft spots which might be developed by rolling were within the rule regarding unforeseen contingencies in the construction of a public work, and were valid.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348-350; Dec. Dig. § 113.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—COMPETITIVE BIDDING.

A provision in specifications for the pavement of a road that the engineer shall decide where the gravel foundation shall be laid, and its thickness is not objectionable where by the contract the contractor is to be paid for laying such foundation at a fixed price per ton for the amount of gravel used therein.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

15. HIGHWAYS (§ 113*)—IMPROVEMENT—CONTRACTS—EXTRA WORK.

Under St. 1907, c. 349, providing for the improvement of roads, giving the county supervisors power to authorize the highway commission to contract for any work without letting it to bidders where the cost does not exceed $1,000, and empowering the board in their discretion to authorize the highway commission to purchase the necessary material, purchase or hire tools and appliances, and hire labor and do the work without letting any contract, the board may agree for the performance of extra work in paving a road without the formality of letting it to bidders where it does not exceed $1,000 in cost, and for that purpose the board may agree in advance with a contractor that he shall do the extra work at a price to be agreed on where it does not exceed $1,000, or the board may authorize the commission to agree with the contractor to do the extra work under the supervision of the commission, though it costs more than $1,000.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

16. EVIDENCE (§ 83*)—PRESUMPTIONS—REGULARITY OF OFFICIAL PROCEEDINGS.

The court cannot assume that the board of supervisors of a county by the provision in the specifications for the pavement of a road, as authorized by St. 1907, c. 349, reserving the power to change, at the recommendation of the highway commission, any cuts, fills, slopes, etc., from those specified on the plans, etc., contemplated the doing of extra work in any unlawful manner, as the statute gives the board power to accomplish it lawfully in a specified mode, and the court must presume that the board intended to proceed lawfully and within their powers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

17. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—VALIDITY.

A provision in the specifications for the pavement of a road that reserves the power to change the cuts, fills, dimensions, and alignments, and which provides that the county board of supervisors and the highway commission shall have power to agree with the contractor on a price over that named in the contract for such additional work where the changes entail an additional expense on the contractor of that contemplated by him, does not tend to prevent competition in bidding, because, if an alteration in the plans causes a material reduction in the amount of the work, the contractor is not entitled to the full price, but the county is entitled to a reduction in the price in proportion to the decrease of the work computed at the contract rate as far as possible, while, if an alteration causes additional work, the contractor is entitled to the reasonable value thereof.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

18. WORK AND LABOR (§ 13*)—BUILDING CONTRACTS—EXTRA WORK—COMPENSATION.

Where extra work is caused by authorized deviations from a building contract and no agreement is made regarding the price thereof or payment therefor, the law implies an agreement by the owner to pay the reasonable value of the extra work.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 28; Dec. Dig. § 13.*]

19. CONTRACTS (§ 234*)—BUILDING CONTRACTS—COMPENSATION—DEDUCTIONS.

Where the consent of the parties to an alteration in the work contracted for is secured by a reservation of power in the employer to make such changes inserted in the contract, the employer may make a reasonable deduction from the contract price if the changes made materially lessen the cost of the work required by the contract, and such deduction is properly made at the contract rate for the work omitted as far as practicable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1099, 1100; Dec. Dig. § 234.*]

20. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—VALIDITY.

Under Const. art. 1, §§ 1, 17, giving foreigners who are bona fide residents the same right to acquire property as native-born citizens, etc., and under St. 1907, c. 349, providing for the improvement of roads, requiring the county board of supervisors to administer the scheme for building roads, without conferring power to enforce a provision that unnaturalized aliens shall not be employed in the work, a provision in the specifications for the pavement of a road that no unnaturalized alien shall be employed in the work is invalid, and a violation thereof by the contractor does not defeat his right to recover the contract price on performance of the work.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

21. HIGHWAYS (§ 113*)—IMPROVEMENT—SPECIFICATIONS—VALIDITY.

Where the void provision in the specifications for a public work that no unnaturalized alien should be employed on the work did not have any effect on the bids for the work, and it did not appear that alien laborers were at hand to do the work at less expense than naturalized or native-born laborers, and the contractor performed the work in good faith, he was entitled to his compensation notwithstanding the void provision.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348–350; Dec. Dig. § 113.*]

In Bank. Mandamus by the City Street Improvement Company against James H. Kroh, County Auditor of San Joaquin County, to compel respondent to draw a warrant in favor of petitioner. Writ issued.

J. A. Plummer, Bishop, Hoefler, Cook & Harwood, and Clary & Louttit, for petitioner. Arthur L. Levinsky, for respondent.

SHAW, J. The defendant is the county auditor of San Joaquin county. The petition prays that a writ of mandate issue from this court directing the defendant, as such auditor, to draw a warrant on the county treasurer in favor of petitioner for the amount of a certain claim allowed by the board of supervisors of the county payable out of the "highway improvement fund" for work done in the construction of a road in said county in performing a contract made by the board of supervisors with the petitioner under the provisions of the statute of March 19, 1907, known as the "Good Roads Law." St. 1907, p. 666. Sections 4, 10, and 11 of the act were amended in 1909. St. 1909, p. 154. These proceedings were begun before the amendments took effect, and were concluded afterwards, but the changes made in the law do not affect the validity of the contract in question.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant claims that the proceedings upon which the contract rests were defective in particulars of such substantial importance that the contract is thereby rendered invalid. The force of the objections to the validity of the proceedings will be better understood by a preliminary statement of the provisions of the act. It provides for the appointment by the county board of supervisors of a "highway commission" of three members. This commission is empowered to ascertain which of the main public highways of the county should be improved and to determine what new highways are necessary and the kind of improvement to be made thereon, and to estimate the cost of the respective improvements and new roads and make maps thereof showing the connecting roads. It must thereupon make a report to the supervisors showing the roads to be improved or made "describing generally the kind of improvements to be made thereon" stating the estimated cost and the amount to be raised by bonds thereon, and praying the supervisors "to call an election for the issuance of bonds of the county therefor, for the estimated amount." The supervisors, if they adopt the report, are required to call an election to determine whether bonds shall be issued. Any defect or irregularity in the proceedings prior to calling the election shall not affect the validity of the bonds. The money derived from the sale of the bonds is denominated the "highway improvement fund," and must be used solely for the purposes authorized by the act. The work for which the bonds are voted is to be done under the direction of the highway commission, but final acceptance is committed to the supervisors. These provisions are contained in the first eight sections of the act. The remaining sections provide for the actual work of construction or improvement.

If the bonds are authorized and sold, the commission is required to prepare detailed specifications, plans, and profiles for the work, or such part as it deems it desirable to have done separately, and present the same to the supervisors who shall either adopt or reject the same as presented. If adopted, the supervisors may then advertise for bids for the work in accordance with the plans, profiles, and specifications, and the contract shall be let to the lowest bidder who will give a good bond. The supervisors may authorize the highway commission to buy the material, hire the labor, and have the work done without a general contract, but in that case all contracts for the purchase of materials, tools, or appliances, amounting to more than $1,000, shall be let to the lowest bidder upon due notice. Any part of the work which does not cost more than $1,000 the board of supervisors may authorize the commission to do by contract without advertisement for bids. Section 9. The board of supervisors of San Joaquin county appointed a highway commission for that county as provided in the act. On February 11, 1909, the commission made and filed a report to the supervisors recommending the improvement of 23 roads, designated as main public highways and described by their termini and general courses, and stating generally the kind of improvements to be made thereon. The supervisors adopted the report. The estimated cost of the proposed improvements was $1,890,000. An election was duly called and held and bonds to that amount were thereby authorized. Sales of part of these bonds were made for the sum of $320,512, which was placed in the county treasury and set apart as the "highway improvement fund." The commission thereupon decided to have the work on one of the roads, known as the lower Sacramento road, done separately, and prepared and presented to the supervisors detailed plans, profiles, and specifications thereof. On September 20, 1909, the supervisors adopted the same. Notices were duly given for bids and the contract for that work was duly let to the plaintiff, and on October 11, 1909, the same was executed, and the plaintiff gave the required bond. The plaintiff proceeded to do the work, and on December 30, 1909, there became due to it, by the terms of the contract, for work done thereunder, the sum of $4,969.03, for which the claim in question was made and allowed. The preliminary report made by the commission on February 11th and adopted by the supervisors in "describing generally the kind of improvement to be made" on the roads mentioned stated that, where an asphaltic macadam pavement was made, it should be "composed of a mixture of the best grade of hard, tough crushed stone, the best asphalt and other materials which will insure a pavement capable of sustaining in satisfactory manner the exceedingly heavy traffic to which it will be subjected." Also that "in general" the macadam would not exceed seven inches nor be less than four inches in thickness on soil which furnished a good foundation. The specifications afterwards made by the commission and adopted by the supervisors for the work to be done on the lower Sacramento road, as provided in section 9 of the act, allows either gravel or crushed rock to be used in the composition of the asphaltic macadam, at the option of the contractor, subject, however, to certain requirements as to quality and to the approval of the engineer employed by the commission. Other slight deviations from the preliminary report were made, but it is not necessary to state them further.

The defendant contends that these discrepancies between the preliminary report and estimate on which the bonds were voted and the detailed specifications for the particular road improved, as afterwards prepared and adopted before letting the contract, made the entire proceeding void. We do not so understand the law. The preliminary investigation, statement of improvements to be made and estimate of the cost are intended to be general in terms; the purpose being merely to give information to the supervisors and the voters as to the general character of the work for which bonds were supposed to be necessary. The commission is required to ascertain "the kind of improvement to be made" (section 4), and, having done so, to make a report "describing generally the kind of improvements to be made." Section 6. It was never intended that this report should go into detail, or that a slight or reasonable departure therefrom in the final specifications for the doing of the work, not destructive of the general plan proposed, should render the contract void. The main purpose of this report is served when the election is called and held. If the bonds are authorized and the money obtained thereon, the supervisors and the commission have power to expend it for the improvement of the roads mentioned in the report. They must adhere to the improvement mentioned in the general plan recommended and described in the report, but it would require a radical departure from that description to invalidate a contract thereafter made in good faith. No mere variation in the details constituting the same kind of an improvement would produce that result. We have nothing more serious here.

It is contended that the contract is invalid because of certain provisions incorporated in it, and because it was not let in the manner required in the act. The statute gives the supervisors power, where the cost exceeds $1,000, to have the improvement made in either one of two modes—either by letting it on contract to the lowest bidder, or by authorizing the commission to do it directly without a general contract, in which case, however, contracts for materials to an amount exceeding $1,000 must be let to bidders after due notice. The contract method was adopted. The statute requires an advertisement for proposals to do the work in accordance with the plans, profiles, and specifications adopted by the supervisors. It is a general principle of law applying to the letting of contracts for public work to the lowest bidder, upon plans and specifications previously adopted, that they must be sufficiently certain and definite, upon all the details of the work which materially affect its cost, to apprise bidders of all the essential and substantial parts of the work and enable them to know with reasonable accuracy the outlay they will have to make in performing the work to be contracted for. This is thoroughly established in the case of public improvements of streets, where the cost is raised by assessment upon the property of owners within the district specially benefited thereby. Piedmont P. Co. v. Allman, 136 Cal. 89, 68 Pac. 493; California I. Co. v. Reynolds, 123 Cal. 92, 55 Pac. 802; Grant v. Barber, 135 Cal. 191, 67 Pac. 127; Stansbury v. White, 121 Cal. 437, 53 Pac. 940; Chase v. Scheerer, 136 Cal. 251, 66 Pac. 768; Perine v. Pasadena, 116 Cal. 9, 47 Pac. 777; Warren v. Chandos, 115 Cal. 385, 47 Pac. 132. The reason for the rule, as applied to such work, is in part because such uncertainty deprives the property owners of the knowledge necessary to enable them to undertake the work themselves, as the statute provides they may, and in part because it deprives bidders of like knowledge, and thereby tends to prevent the fair competition and resulting low cost of the work, which is the principal object of the provision.

The latter reason is as persuasive as the first, it is sufficient to support the rule, and it applies as well where the cost is to be paid with money already raised by taxation or by the sale of bonds, as where it is to be raised after the work is done by assessment upon the benefited property. Santa Cruz, etc., Co. v. Broderick, 113 Cal. 631, 45 Pac. 863; Ertle v. Leary, 114 Cal. 241, 46 Pac. 1; American C. Co. v. Licking Co., 31 Ohio St. 415; Detroit v. Hosmer, 79 Mich. 388, 44 N. W. 622; Fones Bros. Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353; Andrews v. Board, 7 Idaho, 457, 63 Pac. 592; Gage v. New York, 110 App. Div. 403, 97 N. Y. Supp. 157; McBrian v. Grand Rapids, 56 Mich. 99, 22 N. W. 206; 11 Cyc. 481; 20 Am. & Eng. Ency. of Law, 1167. There is a well-recognized exception to this rule in the case of details of construction which do not appear and cannot with reasonable diligence and cost be ascertained in advance, or which will be disclosed only by the doing of the work, or any contingency which reasonable care and consideration would not foresee. Such things may occur in every work of any considerable magnitude, and they must be left to be adjusted in accordance with general provisions of the contract, or by the discretion of the person or board supervising its performance. Examples of such details, and of lawful provisions for their determination, were considered in Haughawout v. Hubbard, 131 Cal. 679, 63 Pac. 1078; Belser v. Allman, 134 Cal. 400, 66 Pac. 492; Banaz v. Smith, 133 Cal. 106, 65 Pac. 309; Haughawout v. Raymond, 148 Cal. 311, 83 Pac. 53; Chase v. Scheerer, supra, and McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924. Of the provisions objected to in this case, the following come within this class, and do not invalidate the contract. The contractor must grade the connections with intersecting roads to the satisfaction of the engineer employed by the commission. He was allowed to take water from the county wells and tanks along the road, but, if that was insufficient, he was required to obtain the necessary quantity from other sources at his own expense. A method of mixing the asphaltic cement was recommended, but any other method was permitted, provided it would result in coating every particle of the stone, sand, and dust with the asphaltic cement. If compelled to cease work temporarily, the contractor was required to leave in a passable condition during the winter the part of the road upon which he had worked. The statute limits the width of the roadway made with these funds to 16 feet. Public roads must be at least 40 feet wide. The sole purpose of this clause is to secure a way for public travel, and it would be substantially complied with if the portion of the public road not occupied by the pavement was made fit for that purpose. During the progress of the work he must maintain a roadway for traffic, either alongside the pavement on the highway, or on private land adjoining, "unless in the judgment of the engineer it is a physical impossibility to do so." Soft material encountered was to be removed as directed by the engineer. The earth for embankments and shoulders was to be of a quality satisfactory to the engineer. All of these provisions come within the exception above stated. They do not make the contract void.

In connection with the provisions to be now considered, it is to be observed that the rules for the interpretation of contracts declare that "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other," and that "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intentions of the parties." Civ. Code, §§ 1641, 1643. Another consideration applicable to this case is that it is not, strictly speaking, a proceeding in invitum. The property owners have been consulted and have by their votes sanctioned and approved the proposed improvement. It is not being made without their previous consent or against their will. The extreme strictness of construction against the validity of contracts made in proceedings in invitum, whether in all cases justifiable or not, is not to be observed in proceedings of this character, where the property owners have already consented to the raising of the money by taxation of their property and the officers are simply charged with the duty of expending it lawfully and in good faith for the purposes designated. The fills and approaches to all bridges, culverts, and drains were to be graded to the elevations shown upon the plans, "or to elevations which may be given by the engineer." Another clause reserves to the supervisors power to change the plans for the cuts, fills, slopes, and dimensions. If a change was made under this authority, the engineer would necessarily have to furnish the new elevations required by the change. The provision quoted does not give the engineer authority to change the elevations of his own motion, but requires the contractor to take the engineer's elevations so far as they apply to changes made by the supervisors under this reservation of power. Thus understood, the provision is within the law. The provision that crushed rock, or gravel, at the option of the contractor, may be used in the composition of the asphaltic macadam, must be considered in connection with the accompanying conditions prescribing the qualities and characteristics necessary to each kind of material to make it fit for the purpose, and authorizing the engineer of the commission to see that the material used is up to the standard specified. The bidders were thus informed of the requirements in either case. The provision tended to favor competition, rather than to hinder it.

In addition to the bond for the faithful performance of the contract, which the statute requires, the specifications provided that the contractor should give a bond in a sum equal to 50 cents for each square yard of asphaltic macadam to be laid, to secure the county against loss by reason of suits which might be brought within two years after final payment for the work, by any person claiming patent rights covering the class of pavements specified. The bond was not to be required if the contractor satisfactorily proved that he had a license from such patentee. It is not shown or suggested that the license to use such patent, if there was any, was not available to any person who would pay the royalty. It was within the discretion of the supervisors to take such precautions for the protection of the county, and it does not appear that the provision would favor one bidder above another, or tend to prevent fair competition. The bidders were required to submit bids specifying separately the prices for which they would do separate parts of the work, as follows: "I. Grading in lump sum for the whole work. II. Gravel in place—per ton. III. Asphaltic macadam pavement, per square foot: (1) Three inches in thickness; (2) four inches in thickness; (3) five inches in thickness. IV. Surface coating, per square foot." The specifications also gave estimates of the respective amounts of each class of work required. The bids and the contract were made in accordance with the above provision. Many of the objections are fully answered by a consideration of the effect of this method of taking bids and making the contract. There is no foundation for the claim that there was any material difference in the profits to the contractor in laying macadam of one thickness over that to be made in the other. Hence the provision that the pavement should in general have a uniform thickness of four inches, and that the contractor should not reduce it without the consent of the engineer, does not affect the legality of the contract. So, also, with respect to the liquid surface coating, the direction that it was to be applied upon the whole road, or any part of it, as the engineer should decide, was not unlawful in view of the contract that the payment was to be by the square foot for the amount actually applied. The profile and cross-sections showed that the gravel foundation, or the pavement itself where gravel foundations were not required, was to be in general laid upon the existing surface of the road. This was to be rolled with a heavy roller weighing not less than 350 pounds per lineal inch. Where a subgrade was to be made by excavation, that also was to be rolled in like manner. If soft spots developed under such rolling, they were to be excavated to a depth of two feet, and then filled with clean dry earth or gravel. The foundation was to be of gravel wherever directed by the engineer and was to be not less than three inches thick after compacting, or thicker, if so directed by the engineer. The provisions for extra work in excavating the soft spots which might be developed when the heavy roller was applied comes within the rule regarding unforeseen contingencies, declared in Haughawout v. Hubbard and the other similar cases above cited. The specification that the engineer should decide where the gravel foundation should be laid and its thickness is not objectionable, since by the contract the contractor is to be paid for laying such foundation at a fixed price per ton for the amount of gravel used therein. The decision of the engineer could not injuriously affect him.

The specifications contained the following provisions regarding extra work: "Extra Work. The board of supervisors reserve the power to change, at the recommendation of the highway commission, during the progress of the work, any cuts, fills, slopes, dimensions and alignments from those specified or appearing upon the plans. If such changes should, in the judgment of the engineer, entail an additional expense upon the contractor above that contemplated by him, the board of supervisors and the commission shall have power to agree with the contractor upon a price over and above that named in the contract, for such additional work, and the contractor shall be paid for such additional work as if it had been included in the original bid upon the work." It is always a wise precaution, in making contracts of this magnitude, to insert provisions to control the case of extra work which may appear to be necessary or desirable while the construction is going on. As was remarked in Kitchel v. Union County, 123 Ind. 540, 24 N. E. 366: "No prudent individual would make a contract for the construction of a building of any magnitude without incorporating a provision somewhere making specific and definite arrangements concerning extra work." The statute gives the supervisors power to authorize the highway commission to contract for any work, or for any part of an improvement, without letting it out to bidders, provided the cost thereof does not exceed one thousand dollars. And they were empowered, in their discretion, "to authorize the highway commission to purchase the necessary material, purchase or hire tools and appliances, and hire laborers, and to do the work or any part thereof without letting any contract therefor." Section 9. Extra work is, of course, work not included in the contract. Under the above provisions, it was entirely lawful for the board to agree for the performance of such work without the formality of letting it out to bidders, if it did not exceed $1,000 in cost. And for that purpose it was within their power to agree in advance with the contractor that he should do the extra work at a price to be afterward agreed upon, if it did not exceed $1,000. Or they might, under the second provision of the statute above quoted, authorize the commission to agree with the contractor to do the extra work under the supervision of the commission, even if it cost more than $1,000. The only restriction upon this power is in the additional provision that in that event contracts for materials, tools, or appliances necessary and amounting to more than $1,000, must be advertised and let to the lowest bidder. We cannot assume that the supervisors by this provision in the specifications contemplated the doing of such extra work in any unlawful manner, when the statute clearly gives them power to accomplish it lawfully in a specified mode. We must presume that they intended to proceed lawfully and within their powers, and hence the contract in question is not made illegal by this specification so far as the extra work is concerned. If they should attempt to go beyond their powers, the taxpayers have other remedies and means to prevent it, and the possibility that this may be attempted does not invalidate the proceedings.

It is suggested that the power to change the cuts, fills, dimensions and alignments authorized changes which will greatly reduce the amount and cost of the work; that the specifications in question do not provide for any reduction in the price to correspond with such reduction in cost; that, in that event, the law would give the contractor the right to the full compensation named in the contract for full performance; and that this would open the door to gross frauds between the contractor and the supervisors, if they should act in collusion to reduce the cost without reducing the contract price. If this was the necessary effect of such power, there might be no answer to the argument. But we do not think this is the law. We are of the opinion that, if an alteration in the plans caused a material reduction in the amount of the work, the contractor would not be entitled to the full price, and that, to the contrary, the county would be entitled to a reduction in the price in proportion to the decrease in the work, such reduction to be computed at the contract rate so far as possible. With regard to everything except the grading the contract furnished the ready means for calculating the deduction from the price. The gravel was to be paid for at so much per ton for the amount used; the macadam at a price per square foot for the area laid; the surface coating in the same way. Any change in the plans operating to reduce these items would automatically work a deduction from the estimated contract price by the terms of the contract itself. There was no estimate of the amount of the grading, and the contract provided that the lump sum of $18,000 was to be paid therefor. The plans, profiles, and specifications, however, showed the elevations of the various grades above or below the natural surface, their length, width, and slope, and from these data the number of cubic yards of excavation or fill required could be readily calculated and the average price per yard ascertained. The reasonable value of grading work omitted by reason of any alteration could be determined. In cases where extra work is caused by authorized deviations from a building contract, and no agreement is made regarding the price thereof, or payment therefor, the law implies an agreement by the owner to pay the reasonable value of the extra work. In Dubois v. Del. & H. C. Co., 4 Wend. (N. Y.) 291, it is said: "Where work is done under a special contract at estimated (stipulated) prices, and there is a deviation from the original plan by the consent of the parties, the estimate is not excluded, but is to be the rule of payment as far as the special contract can be traced; and for the extra labor the party is entitled to his quantum meruit." This rule is supported by the following cases: Aikin v. Bloodgood, 12 Ala. 224; Clark v. Mayor, 4 N. Y. 343, 53 Am. Dec. 379; Reed v. Phillips, 4 Scam. (Ill.) 42; H. E., etc., Ry. Co. v. Snelling, 59 Tex. 119; Wright v. Wright, 11 Ky. 180; Jones v. Adams, 12 La. Ann. 621; Holmes v. Stummel, 17 Ill. 455; Goldsmith v. Hand, 26 Ohio St. 107; Jewett v Weston, 11 Me. 349; White v. Oliver, 36 Me. 92; Hayward v. Leonard, 7 Pick. (Mass.) 187, 19 Am. Dec. 268; Jones v. Woodbury, 11 B. Mon. (Ky.) 169; Hood v. Smiley, 5 Wyo. 70, 36 Pac. 856; De Boom v. Priestly, 1 Cal. 206; O'Connor v. Dingley, 26 Cal. 21; Mowry v. Starbuck, 4 Cal. 274; McCormick v. Connoly, 2 Bay (S. C.) 404; 3 Sutherland on Damages, § 707; 2 Sedgwick on Damages (8th Ed.) § 655. In H. E., etc., Co. v. Snelling, supra, in which there was a contract for the construction of a railroad, the court says: "If the line of the road was changed after the contract was made, and Snelling was required to construct it upon the new line, and did so, the law would imply an agreement to compensate him for such additional cost of construction as the new line imposed, in the absence of some agreement to the contrary. But in case of such deviation from the contract, by consent, which completion of the new line by the contractor, without protest, would seem to imply, it would seem that the original contract, so far as can be, should regulate the price for the work."

Where the consent of the parties to an alteration is secured by a reservation of power in the employer to make such changes inserted in the original contract, the rule must necessarily be the same with respect to the right to compensation for extra work caused thereby, or to a deduction from the price for work omitted thereby, as when the alteration is made by consent after the work is begun. It is established that in such cases the contractor is entitled to charge and receive the reasonable value or cost of the extra work caused by the alteration. Upon the same principles, it must also be held that the employer or owner is entitled to a reasonable deduction from the contract price, if the changes thus made by authority or consent have materially lessened the amount and cost of the work required by the original contract, and that such deduction should be made at the contract rate for the work omitted, so far as practicable. The rule is thus stated in 3 Sutherland on Damages, § 709: "It often occurs that a partial rescission results from deviations from the original plan and contract made by deliberate and explicit direction of the employer, or with his consent and acquiescence, and by such departures other work is substituted with other prices agreed to, or implied. In such cases the omission of the particular work excluded by the substitution is not a violation of, but is dispensed with by modifying, the contract. * * * The contractor may then be entitled to recover the contract price with increase or subject to such diminution as is produced by the change of plan, on a quantum meruit." The following cases hold that in case the work is materially diminished by such alteration the employer is entitled to have the contract price proportionately reduced. Holmes v. Stummel, supra; Goldsmith v. Hand, supra; Jewett v. Weston, supra; White v. Oliver, supra; Wright v. Wright, supra. The reason of this rule is practically the same as in the numerous cases holding that a slight failure of the contractor to make complete performance is not sufficient to defeat his right to recover the contract price, less a reasonable deduction for the imperfections. This is the rule where the imperfections are not fraudulent, but are made by accident or inadvertence, and are not of sufficient extent to constitute a substantial departure from the original plan. The employer is presumed to agree to take the completed structure as it is, with the implied agreement by the contractor to make the proper deduction from the price, and the recovery is upon the contract, and not upon the quantum meruit. See Perry v. Quackenbush, 105 Cal. 308, 38 Pac. 740; Marchant v. Hayes, 117 Cal. 672, 49 Pac. 840; Elliott v. Caldwell, 43 Minn. 361, 45 N. W. 845, 9 L. R. A. 52; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608. An alteration from the original plan, decreasing the grading, under the contract in the case at bar, could not be said to be a breach of the contract, since the contract authorizes it. But, as it does not provide for a decrease of the price corresponding to the decrease in the grading, it would be necessary to resort to the general principles of the law of implied contracts. The county in that event would be entitled to deduct from the contract price for the grading a proportion thereof equal to the proportion which the omitted portion of the work of grading would bear to the whole work, with reasonable allowances to either party for any material variations in the expense of such omitted grading arising from conditions different from the average. This being the rule, the provision for extra work is fair to all parties, and cannot be supposed to have had a tendency to prevent competition in bidding.

The provision of the specifications to the effect that except by permission of the highway commission no unnaturalized alien shall be employed in the work is invalid and unenforceable when attempted by public authorities. The Constitution provides that all men have the inalienable right of enjoying liberty and acquiring property, and that foreigners of the white race, eligible to citizenship, while bona fide residents of the state, shall have the same right to acquire property as native-born citizens. Const. art. 1, §§ 1, 17. Laws forbidding the employment of aliens have been held invalid. Chicago v. Hulbert, 205 Ill. 363, 68 N. E. 786; People v. Warren, 34 N. Y. Supp. 943, 13 Misc. Rep. 615. Such a law would violate the treaties with almost all the nations from which this country receives immigrants. See Estate of Ghio, 108 Pac. 516. The statute in question charges the supervisors with the duty of administering the scheme for building roads, but it does not purport to confer power to make or enforce a provision of this character. They have, no doubt, a wide discretion as to the manner of carrying on the work, and may adopt any measure reasonably tending to facilitate the same, or perhaps any which may incidentally further any laudable public purpose. But they are not given authority to put restrictions upon the contractor which can only hinder the work, which make it more expensive, and which have no relation whatever to the thing to be done, or to any conceivable legislative purpose disclosed in the statute, and which would be a direct attempt to discriminate against one class of bona fide residents of the state and favor another, a violation of treaty obligations, and contrary to the principles of the Constitution. No express authority for such a provision is given, and we are satisfied that the supervisors have no implied power to impose such a mischievous and burdensome restriction. A violation of it by the contractor would not defeat his right to recover the contract price upon performance of the work.

It is not alleged or claimed that there were alien laborers at hand to do the work at less expense, or at all. It may be that if a taxpayer had endeavored to enjoin the letting of the contract, on the ground that this limitation of the specifications was void and that it tended to discourage bidders and make the work more expensive, the suit could have been maintained, or it may be that in a proceeding in invitum, where a stricter rule prevails, where the consent of the taxpayers has not been previously obtained and the money is yet to be raised from them by assessment, such a clause in the specifications would be fatal to the validity of the contract. This may be conceded, but we need not determine it. This case is not of that kind. The contract has been let, the work involved in this demand has been performed under it in good faith, and the people have voted the bonds and the money has been realized therefrom. No facts are shown to indicate that this clause had any effect whatever upon the bids. In People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768, where a similar case was presented, the court held that the contractor must be presumed to have known that the clause in the specifications was void, and to have made his bid with that understanding, and that he was entitled to payment under the contract, notwithstanding such invalid clause in the specifications and contract. It appeared in that case that the courts had previously decided that the provision was void and that this was actually known to the successful bidder. But the court distinctly declares that the rule would be the same in the absence of such decision. In People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, a similar clause in the contract was held to be invalid. But it was further held that the contract was not void, and that, when such a contract has been made and has been performed by the contractor, the fact that he has violated the invalid provision is no defense to an action by him to enforce payment of the contract price. The same conclusion was declared in Chicago v. Hulbert, supra; Marshall v. Nashville, 109 Tenn. 513, 71 S. W. 815; Cleveland v. Clements, 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670. In Inge v. Board, 135 Ala. 202, 33 South. 678, 93 Am. St. Rep. 20, the work had not been performed, and the suit was instituted by taxpayers to restrain its performance. It was an ordinary street improvement proceeding. There was a similar clause in the specifications, and it was held that this prevented fair bidding and made the contract void. The point that it should be presumed to have been disregarded was not raised or considered. We think that the cases first cited above apply the better rule to be followed here. The void provision did not in any respect concern or affect the character of the improvement to be made, but was wholly collateral thereto. The case does not come within the scope of the rule that public corporations are not estopped by benefits received from the actual performance of an ultra vires contract, as in Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, and the numerous cases following the rule there stated. The presumption being that the parties all disregarded the collateral and invalid specification and there being nothing tending to prove or to indicate the contrary, the conclusion logically follows that, so far as this point is concerned, the contract was properly awarded and lawfully made.

Some other supposed defects are alleged in the answer, but they were not urged upon the argument, and we will assume that they are not of sufficient importance to merit consideration.

Let the writ issue as prayed for.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

158 Cal. 275

THOMAS v. WENTWORTH HOTEL CO. et al. (L. A. 2,496.)

(Supreme Court of California. Aug. 31, 1910.)

1. CORPORATIONS (§ 268*)—CORPORATE DEBTS —LIABILITY OF STOCKHOLDERS.

Under Civ. Code, § 322, measuring the liability of each stockholder of a corporation for its debts by the proportion which his stock bears to the whole of the subscribed stock, the complaint in an action to enforce a stockholder's liability must allege the amount of the subscribed stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1137, 1138; Dec. Dig. § 268.*]

2. PLEADING (§§ 207, 433*)—AIDER BY JUDGMENT.

A complaint in an action to enforce a stockholder's liability for corporate debts, which alleges that at the time the debts were incurred the total number of shares of stock then "outstanding" was a specified amount, sufficiently alleges, after judgment, the total amount of stock subscribed and the defect in the use of the word "outstanding" in place of the word "subscribed" may be reached only by demurrer pointing out the special objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512, 1451–1477; Dec. Dig. §§ 207, 433.*]

3. CORPORATIONS (§ 216*)—CORPORATE DEBTS —LIABILITY OF STOCKHOLDERS.

The liability of stockholders for corporate debts rests on contract ordinarily ascertained from the articles of incorporation read in the light of the statute authorizing the creation of the corporation, but where a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to the laws of such state, and the liabilities which those laws impose will attend the transaction of such business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829–834; Dec. Dig. § 216.*]

4. CONTRACTS (§ 144*)—LIABILITY OF PARTIES —WHAT LAW GOVERNS.

The parties to a contract made with reference to the laws of a jurisdiction other than that of the place of contracting are deemed to have incorporated into the contract the law of such jurisdiction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 724–727; Dec. Dig. § 144.*]

5. CORPORATIONS (§ 216*) — STOCKHOLDERS— LIABILITY FOR CORPORATE DEBTS.

The rule that, where a corporation is formed in one state with the intent of doing business in another state and business is done, there it must be assumed that the charter contract was made with reference to the laws of that state, applies whether the corporators intend to do all or only a part of their business in such state, and their relations to the state into which they come with regard to business there done is not affected by the circumstance that they also intend to or do transact business elsewhere.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829–834; Dec. Dig. § 216.*]

6. CORPORATIONS (§ 216*) — STOCKHOLDERS — LIABILITY FOR CORPORATE DEBTS.

Under Const. art. 12, § 15, providing that foreign corporations shall not be allowed to transact business in the state on more favorable conditions than are prescribed to domestic corporations, and Civ. Code, § 322, declaring that the liability of each stockholder of a foreign corporation is the same as the liability of a stockholder of a domestic corporation, the stockholders of a corporation organized under the laws of a sister state authorizing corporations to exempt the property of its members from liability for corporate debts are liable for corporate debts incurred in doing business in California, where the stockholders formed the corporation with the intent of doing business in California, though the articles of incorporation filed in California exempted the stockholders from such liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829–834; Dec. Dig. § 216.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frank N. Thomas against the Wentworth Hotel Company and another. From a judgment against defendant F. A. Warner, he appeals. Affirmed.

W. S. Wright, for appellant. Porter, Sutton & Cruickshank, for respondent. J. R. Scott, amicus curiæ.

SLOSS, J. The defendant Warner, a stockholder of the Wentworth Hotel Company, a corporation, appeals from a judgment against him for his proportionate share of the indebtedness of the corporation evidenced by two promissory notes executed, and by their terms payable, in this state. The appeal is on the judgment roll alone.

The appellant contends that each of the two counts is defective in failing to allege the number of shares of stock of the corporation which had been subscribed. Since the liability of each stockholder is measured by the proportion which his stock bears to the "whole of the subscribed capital stock or shares of the corporation" (Civ. Code, § 322), it is plain that an averment of the amount of such subscribed stock is an essential part of the cause of action. Without it there is no showing of one of the elements necessary for the computation of the "proportion" of the debt for which the defendant is liable. Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752; Roebling's Sons Co. v. Butler, 112 Cal. 677, 45 Pac. 6.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The allegation of the complaint before us is that at the time the indebtedness was incurred "the total number of shares of the capital stock of the said defendant, Wentworth Hotel Company, then outstanding was thirty-five hundred." The word "outstanding" can hardly be said to be the exact equivalent of "subscribed," and its use in a pleading of this character is not to be commended. At the same time it is no stretch of construction to say that, in view of the purpose of the action, the pleader was endeavoring, by means of the allegation quoted, to set forth the amount of the total subscribed stock. In one of our own decisions (Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047), the word "outstanding" was used in the sense here indicated. In speaking of an action to enforce the liability of stockholders, the court, per Temple, J., stated that "it was incumbent upon the plaintiff to prove the whole amount of stock outstanding to enable the court to determine the liability." That this mode of expression is found in the course of the argument in an opinion is, of course, no ground for saying that it is sufficient for the purposes of a pleading. We may, however, take it as furnishing some basis for the contention that the word "outstanding," as applied to shares of stock, may bear the meaning of "subscribed." If this be so, there is not a total failure to allege the necessary fact, but rather an imperfect or ambiguous averment. Such defect should be reached by a demurrer pointing out the special objection. Ryan v. Jacques, 103 Cal. 280, 37 Pac. 186. No demurrer, general or special, was interposed here, and we think that after trial and judgment this should be treated as "a case of defective pleading which may be waived, and not an entire omission to plead a material fact which is fatal." Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111.

The appellant makes the further point that, under the facts shown by the pleadings and the findings, there is no liability on his part. The Wentworth Hotel Company was incorporated under the laws of the territory of Arizona. The complaint alleges that it was organized for the purpose, among other things, of transacting business in the county of Los Angeles, state of California. The answer does not undertake to deny this otherwise than by the averment that "the only words in the articles of incorporation of said defendant company which concern its possible purpose of doing business outside of the territory of Arizona, are as follows," quoting provisions of the articles to the effect that the principal place of business in Arizona is Tucson, and the principal place of business outside of Arizona shall be in the city of Los Angeles, or at the option of the board of directors, the city of Pasadena, California, at which place meetings of stockholders or directors shall be held, and quoting further provisions of the articles describing the business to be transacted in very comprehensive terms. The findings follow the averment of the complaint that the corporation was organized for the purpose, in part, of doing business in Los Angeles county, but state, further, that the articles of incorporation contain nothing concerning the intent to do business, outside of Arizona beyond the matter quoted in defendant's answer. This last finding does not, however, modify the finding that the purpose was, in part, to transact business in Los Angeles. The answer raised no substantial issue in this regard. The articles, so far as set forth in the defendant's pleading, plainly declared the purpose of transacting some, if not the principal part of the corporate business in Los Angeles county. The court found, further, that at the time the liabilities upon which the action is based were incurred the corporation was actually doing business in said county and the appellant was a resident of this state.

The appellant's claim of exemption is based upon the following allegations of his answer, which were found by the court to be true. The laws of Arizona, under which the Wentworth Hotel Company was incorporated, provide for the formation of corporations for the transaction of any lawful business, and that such corporations shall have power, among other things, "to exempt the private property of members from liability for corporate debts." The articles of incorporation are required to state whether private property is to be exempt from corporate debts. If not so exempted, stockholders are liable for the debts of the corporation in the proportion which their stock bears to the whole capital stock. The articles of incorporation of the Wentworth Hotel Company expressly declare that the stock shall be nonassessable, and that "the private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations." Certified copies of these articles were filed with the secretary of state of California and with the clerk of the county of Los Angeles. The facts so set up and found do not constitute any defense to the action—a conclusion which requires no support further than that afforded by a citation of the cases of Pinney v. Nelson, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125, and Peck v. Noee, 154 Cal. 351, 97 Pac. 865. In the first of these cases it was held that stockholders of a Colorado corporation, whose articles of incorporation declared its purpose of doing part of its business in the state of California, were liable according to the provisions of section 322 of the Civil Code for liabilities incurred by the corporation in the latter state, notwithstanding the fact that under the laws of Colorado a stockholder is not liable for any portion of the corporate debt. In Peck v. Noee the rule was applied to the case of a corporation organized under the laws of Nevada, whose Constitution provided that "corporators of corporations formed under the laws of this state shall not be individually liable for the debts or liabilities of such corporations." The appellant has not succeeded in distinguishing the case at bar from those cited. It is true, as contended, that the liability of stockholders rests upon contract and that the terms of the contract between the incorporators are ordinarily to be ascertained from the articles of incorporation, read in the light of the statute which authorizes the creation of the corporate body. But, as is pointed out by the Supreme Court of the United States in Pinney v. Nelson, supra, when a contract is made with reference to the laws of a jurisdiction other than that of the place of contracting, the parties will be deemed to have incorporated into their agreement the law of the jurisdiction with reference to which they were contracting. Accordingly, says the court, "when a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business." It can make no difference that in Pinney v. Nelson and Peck v. Noee, the freedom from individual liability was declared by statute or constitution, whereas here it was, under the authority of the statute, declared in the articles. The provision of the articles can have no greater force than is to be attributed to the express law of the state creating the corporation. Such law is, for most purposes, imported into the contract of the association and forms a part of it, whether stated in the charter or not. But, in so far as the charter or articles declare an intent to do business in another state, the law of that state becomes, so far as concerns business there done, a part of the contract. The articles, like the law itself, are not to be read as providing for exemption from stockholders' liability for debts to be incurred in a state which permits foreign corporations to come in only upon condition that the stockholders shall be liable for the corporate debts. And here is the answer to the suggestion that the filing, in this state, of certified copies of the articles conveyed to creditors constructive notice of the fact that the contract of the corporators exempted them from liability and estopped the creditors from claiming such liability. The contract, properly construed, does not purport to apply such exemption to business done in California, and there is no ground therefore for the operation of an estoppel.

The appellant argues in his brief that in both of the cases relied on by the plaintiff the articles showed an intent to do the entire corporate business in California, whereas here the articles indicate an intent to do a part of the business of the corporation in other places. The supposed distinction does not really exist. The articles of incorporation in the Pinney Case declared merely a purpose of carrying on part of the business beyond the limits of Colorado, the state of incorporation, and provided for an office and place of business in Colorado. In this respect the articles are very similar to those of the corporation here involved. But, if the fact were as suggested, it would present no valid ground of discrimination. The fact that a corporation is formed in one state with the declared purpose of doing business in another justifies, as we have seen, the assumption that, with regard to the business to be done in such other state, the corporators agree to be bound by its laws. It can make no difference whether they intend to do all or only a part of their business in such state. Their relations to the state into which they come, with regard to business there done, cannot be affected by the circumstance that they also intend to, or do, transact some business elsewhere. There is no injustice or hardship in this result. The law of this state declares in express terms that "the liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state." Civ. Code, § 322. This statute carries out the constitutional mandate that foreign corporations shall not be "allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." Const. Cal. art. 12, § 15. These provisions existed when this corporation was formed for the express purpose of doing business in California. The stockholders, seeking to avail themselves of the permission granted by this state to foreign corporations to do business here, knew, or should have known, the terms upon which this privilege was tendered. They should not be allowed to take advantage of the benefits afforded by our law, at the same time repudiating the accompanying burdens.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

158 Cal. 300

MUNCY v. BRAIN. (L. A. 2,516.)

(Supreme Court of California. Sept. 1, 1910. Rehearing Denied Sept. 29, 1910.)

1. SALES (§§ 477, 479*)—CONDITIONAL—FAILURE OF PAYMENT—POSSESSION.

Where a contract of conditional sale of an automobile provides that, on failure of payment by a certain date, the seller should have possession, on default the seller may both obtain possession and retain the proceeds from the sale of security given for the price, but must return the automobile on the buyer's payment of the balance due, since the retention of the proceeds of the security was a waiver of the right to require payment on the date specified.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1438; Dec. Dig. §§ 477, 479.*]

2. SALES (§ 479*)—CONDITIONAL SALES—FAILURE OF PAYMENT—RIGHTS OF LESSOR.

Under the contract of lease of an automobile, whereby the lessor should have the right to possession on default in any of the payments of rent for which security was given, he could on default both obtain possession of the automobile and for the rent retain the proceeds from the sale of the security.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

3. SALES (§ 479*)—CONDITIONAL—FAILURE OF PAYMENT—RIGHTS OF SELLER.

Where a conditional sale contract provides that the seller may regain possession on default, he may elect whether to take the property or require payment, but cannot do both.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

Department 1. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by R. E. Muncy against W. C. Brain. From the judgment, plaintiff appeals. Affirmed.

Tanner, Taft & Odell, for appellant. A. J. Sherer and Edward Winterer, for respondent.

SHAW, J. Appeal from the judgment upon the judgment roll alone.

The plaintiff sued to recover damages in the sum of $10,000 for an alleged conversion to his own use by the defendant of 5,000 shares of corporate stock, alleged to belong to the plaintiff. On December 18, 1907, the plaintiff and defendant entered into a series of contracts concerning an automobile belonging to the defendant. There were three documents, each dated and signed and appearing to be separate and distinct contracts, but they were executed simultaneously, as part of the same transaction, they bear the same date, and they must all be considered together as constituting the entire contract between the parties.

By the document which we will designate as the first agreement, Muncy leased or hired of Brain the automobile in question for a term ending on June 30, 1908. Muncy paid to Brain $29.20 at the execution of the agreement, and agreed therein to pay him the further sums of $25 on January 16, 1908, $37.50 on March 16, 1908, and $2,537.50 on June 25, 1908, all of which the agreement expressly declared were paid and to be paid for the rental, hire, and use of said automobile. It further provided that if Muncy failed to pay said rent, or any part thereof when due, or to perform any of the agreements, conditions, or undertakings contained in that instrument, Brain might "demand, take and repossess said automobile, with or without process of law," and that at the expiration of said term Muncy would return and deliver the same to Brain in good order. The last clause in this document was as follows: "It is further understood by the parties hereto, that in the event said party of the second part (Muncy) complies with all the terms of this agreement, the second party shall then (but not otherwise) have the right to purchase said automobile, and the said first party shall be required to transfer and sell said automobile to said party of the second part, as hereinafter agreed and set forth." This was immediately followed by an attestation and date and the signatures of the two parties as in execution of the agreement.

The second agreement, the one referred to in the first one by the words "as hereinafter agreed and set forth," is as follows: "In consideration of one dollar and other good and valuable considerations to me in hand paid, I hereby agree to and with R. E. Muncy, the said party of the second part to the foregoing lease, that in the event he shall on his part well and truly perform and fulfill all the conditions of said lease and pay as they become due the different installments of rent, and all other sums therein and herein agreed to be paid, that he will on the 3rd day of July, 1908, provided the said R. E. Muncy shall so desire, sell and convey the said automobile described in said lease to the said R. E. Muncy, for the sum of $6.25 then in cash to be paid said undersigned as hereinbefore set out and agreed upon. It is expressly agreed and understood, however, that time shall be of the essence of this contract, and that unless all the conditions of the said foregoing lease shall have been fulfilled and performed by the said R. E. Muncy, and the said $6.25 paid as aforesaid, then the privilege to purchase said automobile hereby granted shall be waived and forfeited. Los Angeles, California, December 18th, 1907. W. C. Brain. R. E. Muncy. The conditions of the above agreement are hereby accepted. Los Angeles, California, December 18th, 1907. R. E. Muncy."

The third agreement appears from its terms and from the findings to have been indorsed on or attached to another instrument whereby Muncy became the owner of the stock in controversy. The first agreement aforesaid was attached to the said third agreement, and was referred to therein as "Exhibit A," and made a part thereof. This third agreement was, in effect, a pledge by Muncy to Brain of the 5,000 shares of stock as security for the payment of the sums of money which Muncy had by the first agreement agreed to pay to Brain; that is to say, the rental accruing for the use of the automobile during the term of the lease thereof. It was signed by Muncy alone.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Muncy paid the small sums falling due in January and March, but did not pay the $2,537.50 due on June 25th, or any part of it. Thereafter, on September 4, 1908, Brain sold the pledged stock at public auction in the manner required by law (Civ. Code, §§ 3000–3005) to satisfy his demand for the aforesaid unpaid rent. To whom it was sold does not expressly appear, but, as it is admitted that Brain was in possession of it after the sale, we may assume that he was himself the purchaser, if the fact is material. The value of the stock did not exceed the amount of rent unpaid. Muncy did not pay the $6.25 mentioned in the second agreement as the price to be paid by him for the automobile as a condition of the sale thereof by Brain to him on July 3, 1908, but at some time before this action was begun (September 26, 1908,) he offered to do so. On June 28, 1908, after Muncy's failure to pay the rent, Brain demanded possession thereof, which Muncy refused to deliver. He did not deliver the automobile to Brain on June 30, 1908, as the first agreement provided he should do, but retained possession thereof. On July 11, 1908, Brain, in an action of claim and delivery against Muncy, obtained possession thereof. Judgment in said action was given in favor of Brain. After Brain sued for possession of the automobile, Muncy demanded of him the possession of the pledged stock, which was refused. Thereupon Muncy, claiming this to be an unlawful conversion of the stock to his own use by Brain, began the present action to recover the value thereof as damages for the alleged conversion. Brain, by way of counterclaim, alleges that the stock sold for only $1,500 at the sale by him as pledgee, and that after applying this sum on the rent there remained unpaid a balance of $1,072.53, for which he asked judgment. The court made no findings on the facts stated in this counterclaim, but stated as a conclusion of law that defendant was not entitled to recover anything thereon, and gave judgment that plaintiff take nothing by his action and that each party pay his own costs.

It is not asserted that the execution of these contracts was induced or procured by any misapprehension of their effect, or by fraud, mistake, coercion, or undue influence. Muncy entered into the transaction, and signed them with accurate knowledge of their terms. His contention is that the several instruments, constituting, as they do, but one contract, did not provide for a lease of the automobile for a fixed term upon a certain rental, with an option, available only after, and in the event of, performance of the prescribed precedent condition, to buy the automobile for $6.25, but that, although in form of the effect just stated, their true legal effect was to provide for a conditional sale of the automobile for the price of $2,735.45, being the aggregate of the several sums named as rental and the $6.25 stated as the price in the third agreement. Upon this theory of the effect of the contracts he claims that Brain had but two alternatives upon a failure of performance by Muncy—he could either take the automobile back, or he could leave it with Muncy and obtain payment of the price by a sale of the pledged corporate stock, but could not, after having elected to retake the automobile, retain his right as pledgee, or recover the amount due by the contract nominally as rent, but really, as is claimed, as the price thereof.

The cases hold that where there is a contract which by its terms, or by the liberal interpretation sometimes to that end indulged by the courts, constitutes an agreement for the sale of personal property, the title to pass only upon the condition that the price is paid and not until then, the title in the meantime remaining in the seller, possession being given to the buyer, and providing that the seller may retake possession upon default in payment, the seller, upon such default, is put to his election either to retake possession and relinquish all right to the price, or to recover the price and relinquish the right to retake possession, and that, if he pursues one remedy, he loses his right to the other. Parke & Lacy Co. v. White River L. Co., 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435.

The question whether or not the transaction was in legal effect a lease or a conditional sale is not necessarily involved in the determination of this appeal, and therefore we need not consider it. Conceding, for the sake of the argument, that it was a conditional sale, it would nevertheless be a sale upon the conditions stated in the contracts, and not upon any other terms or conditions. Although Muncy may even now have the right to buy, he can only do so upon the terms and at the price fixed by the contract, and in the meantime his right to possession of the automobile, his obligations to pay the sums agreed on, and the rights of Brain concerning the same, are all to be determined by the provisions of the contract in that behalf. The sum of $2,537.50 was to be paid on June 25th. The obligation to pay it at that time was not dependent on any conditions, concurrent or otherwise, but was absolute, and such payment did not operate to transfer title. Immediately upon default in such payment, Brain became entitled to enforce payment, and this right was neither dependent nor concurrent upon the delivery or retention of the possession of the automobile, nor upon any other act or event. Brain was therefore within his contract rights when he enforced payment pro tanto by a lawful sale of the pledged stock. With regard to the possession of the automobile, the provision was that it should be delivered to Brain on June 30th. Muncy's right of possession ceased on that day absolutely and unconditionally. The prompt payment of the $2,537.50 on June 25th would not relieve him from the obligation to deliver the automobile in good order to Brain on June 30th. He could not, under the conditions of the contract, again acquire a right to possession until July 3d in any event, and then only upon full payment of the price and an exercise of the option given by the second instrument. He does not claim that he offered to exercise that option prior to the suit of Brain in claim and delivery, or that he ever, under the terms of the contract, gained a right to exercise it. Hence he never was entitled to the possession after June 30th, and Brain was, from and after that day, entitled thereto. His conduct in retaking possession, whether by suit or not, was not a violation of the rights of Muncy under the contract. Nor was it inconsistent with Muncy's right to purchase. Miller v. Steen, 30 Cal. 407, 89 Am. Dec. 124; Liver v. Mills, 155 Cal. 463, 101 Pac. 299. A right of the buyer to complete a purchase may exist, notwithstanding the fact that the seller has possession. If the provisions making time of the essence of the contract, and limiting the right to buy to the very day fixed, are to be taken literally and strictly enforced, then the other provisions are to be given like force, and there was no agreement of sale at all, but a lease, accompanied by a mere option to buy, and option never exercised and dependent upon conditions which have never occurred, in which case the money would be due absolutely as rent and not upon a purchase, and Brain would have a clear right to sell the pledged stock for its payment. If they are not to be so construed or enforced, but taken as a conditional sale, then the provisions making time of the essence, and requiring the option to be exercised on the precise day fixed, were waived by Brain when he elected to take the price, after it was past due, and, although he was entitled to possession of the automobile after June 30th by virtue of the provision to that effect, he would hold it subject to the right of Muncy to complete his purchase by paying the balance due Brain upon the price after deducting the sum realized by the sale of the pledged stock. Liver v. Mills, supra; Miller v. Steen, supra. In either alternative the sale by Brain of the pledged stock was lawful and not inconsistent with his right to take possession of the automobile and hold it, at least until a proper offer to buy was made by Muncy. The rule laid down in the decisions first above cited, that upon a conditional sale the seller cannot retake the property and also recover the contract price, applies where the property is given into the buyer's possession by virtue of the contract of sale until the time when payment is to be completed and the passing of the title to the buyer is concurrent with and dependent upon the payment of the price. It does not apply where the contract declares that the seller shall retain the possession, or where, as here, it provides for its redelivery to him at a fixed date, different from the time for the completion of the sale and passing of title, and not dependent thereon. In cases of the latter character the seller may recover the price and retain possession until full payment thereof is made. There was therefore no unlawful conversion of the stock.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

158 Cal. 290

BOONE v. TEMPLEMAN et al. (S. F. 4,995.)

(Supreme Court of California. Aug. 31, 1910.)

1. VENDOR AND PURCHASER (§ 187*)—DEFAULT BY PURCHASER—WAIVER.

Acceptance by the vendor of installments on the price without objection long after they fell due was a waiver of all previous breaches.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 375; Dec. Dig. § 187.*]

2. VENDOR AND PURCHASER (§ 95*)—DEFAULT BY PURCHASER—WAIVER.

Mere acceptance by the vendor of one payment after its maturity does not waive the right to declare a forfeiture if default occurs in subsequent installments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 159; Dec. Dig. § 95.*]

3. VENDOR AND PURCHASER (§ 95*)—DEFAULT BY PURCHASER—WAIVER.

The vendor waived the right to forfeit for nonpayment of installments of the price on time where, while the purchaser was in possession, 14 successive payments were accepted after maturity without protest, and the vendor apparently acquiesced in the continuance of the contract, giving no notice to the contrary, or doing anything inconsistent therewith for 14 months more, though 24 monthly installments, principal and interest, fell due, and were not paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 159; Dec. Dig. § 95.*]

4. VENDOR AND PURCHASER (§§ 97, 303*)—DEFAULT BY PURCHASER—VENDOR'S RIGHTS.

Where a contract to convey makes the price payable in installments and a deed is to pass when the whole is paid, the vendor may on failure to pay any intermediate installment forthwith sue for its recovery, but, if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the purchaser in default, and the vendor must tender his deed as a condition to demanding payment of the price, and he cannot without such tender declare a forfeiture or sue for the price or for any installment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 162, 851–859; Dec. Dig. §§ 97, 303.*]

5. VENDOR AND PURCHASER (§ 78*)—CONTRACT TO CONVEY—TIME AS ESSENCE.

Where time was originally of the essence of a contract to convey, but for sufficient cause forfeiture for default therein has been waived, time ceases to be essential, and becomes only material thereafter until the vendor makes it essential by proper notice and demand.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121–125; Dec. Dig. § 78.*]

6. Equity (§ 72*)—Laches—When Defense may be Made.

The defense of laches may be made where the lapse of time is less than the statutory period of limitation, but in such case it may be maintained only where from the delay and the circumstances there appears either actual or presumptive injury or prejudice to the other party.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 72.*]

7. Specific Performance (§ 105*)—Contract to Convey—Laches.

A complaint for specific performance of a contract to convey will not be held bad for laches on demurrer, where it does not appear that the vendor has been prejudiced by the delay.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325–340; Dec. Dig. § 105.*]

In Bank. Appeal from Superior Court, Alameda County; William Waste, Judge.

Action by P. R. Boone against Henry Templeman and another. From a judgment for defendants, plaintiff appeals. Reversed.

A. E. Shaw (Leon E. Martin, of counsel), for appellant. Chickering & Gregory and McElroy & Stetson, for respondents.

SHAW, J. Appeal by plaintiff from a judgment in favor of the defendants, given after a ruling sustaining a general demurrer to the complaint. The sole question presented is the sufficiency of the facts stated in the complaint to constitute a cause of action.

The plaintiff sued to enforce specific performance of a contract for the sale of land, executed by him as purchaser, and by Templeman as vendor. Mayer is a subsequent purchaser from Templeman, with notice of plaintiff's rights. The contract of sale was in writing, and was executed on October 17, 1901. The price fixed for the land was $2,750, of which $600 was paid at the time of the execution of the contract. The remainder, $2,150, was to be paid thereafter in monthly installments of $50 each, with interest at the rate of 8 per cent. per annum, said installments and interest to be paid in advance on the 5th day of each month, beginning on November 5, 1901. The interest was to be compounded if not paid as it fell due. If any installment of principal and interest was not paid within 60 days after it became due, the whole of the unpaid portion of the price should, at the election of the vendor, forthwith become due, in which event the vendor was given power to sell the land to pay the sum unpaid and all previous payments were thereupon to become forfeited. The title to the land remained in the vendor, and he was to convey the same to Boone when the price was fully paid. Boone was to have immediate possession, and he was to pay all taxes and assessments on the land. He received immediate possession and has ever since retained possession of the land, occupying and using it, but making no improvements. Time was declared to be of the essence of the contract.

In addition to the $600 paid when the contract was executed Boone paid $50 on November 2, 1901, $50 on December 12, 1901, $150 on March 27, 1902, $100 on June 8, 1902, $150 on September 8, 1902, and $250 on April 24, 1903. He has made no other payments of principal or interest. Nothing is averred concerning taxes and assessments. The amended complaint was filed on July 19, 1907. The date of filing the original complaint is not shown in the record on appeal. Counsel for respondents in their brief say the action was begun on March 18, 1907, and this is not controverted.

The contention of the respondents is that, by his failure to make the payments of the contract price as they fell due, the plaintiff has forfeited his rights to a conveyance under the contract, and that, by reason of his delay and laches in beginning the action, it has become barred. Anticipating these assertions, the plaintiff alleges certain facts which he claims excuses the failure and delay and prevents the forfeiture of his rights. It will be observed that only one payment was made when due, that of November 2, 1901, which was three days in advance of the time specified. The others were all made after the time fixed. The installments due in January, February, and March, 1902, respectively, were paid in a lump sum of $150 on March 27th. Those for April 5 and May 5, 1902, were not paid until June 8th. Those for June, July, and August, 1902, were not paid until September 8th. The next and last payment, $250, was on April 24, 1903, and this would pay up for only five additional months, including the $50 falling due February 5, 1903. We have not included the accruing interest in this computation. It is alleged that each of these payments was accepted by Templeman "without objecting thereto on the ground that plaintiff was not complying with his contract." Templeman never demanded any payments whatever, and never, until July, 1906, notified plaintiff that he was delinquent in making payments on the price, and he has never tendered a deed or demanded the balance of the price. So far as appears, he never demanded possession. In July, 1906, Templeman, without any previous demand for performance, gave Boone a written statement purporting to rescind said contract. Boone immediately offered to pay Templeman $1,000 upon the price, asked a statement of the exact balance due, and offered to pay the whole thereof as soon as it was ascertained. Templeman refused to accept the $1,000, or to give a statement of the balance due, but said he would consider and let Boone know in a few days what he would do about it. Templeman did not make any further communication to Boone on the subject. On December 3, 1906, Boone made an offer in writing to Templeman to pay all sums of money due under the contract and to fully perform the same upon the condition that Templeman should perform on his part by executing the necessary deed. Boone was then, and ever since has been, ready, willing, and able to perform. Templeman made no objection to the sufficiency of Boone's offer, nor any objection thereto whatever, but referred Boone to his attorneys. His attorneys were forthwith seen, and they said Templeman would at once begin suit against Boone about the matter. No suit was begun by Templeman, however, and, after learning from Templeman's attorneys that such suit would not be instituted, Boone began the present action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The plaintiff contends that the conduct of Templeman in the matter amounts to a waiver of the condition that time should be of the essence of the contract, and of his right to declare a forfeiture for nonpayment. The general rule on the subject is thus stated by Mr. Pomeroy: "A condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore a defense." Pomeroy on Contracts, § 337. "The one entitled to insist upon a punctual performance by the other or else that the agreement be ended may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default." Id. § 294. Mr. Sugden says: "Although time be made of the essence of the contract, yet the condition may be waived, just as in an ordinary case; but, if the purchase money is to be paid by installments, each breach in nonpayment is a new breach of the agreement, and gives the seller a right to rescind the contract, but that right should be asserted the moment the breach occurs." 1 Sugden on Vendors, c. 6, § III-20, *p. 271. To this point are cited Hunter v. Daniel, 4 Hare, 432, Linscott v. Buck, 33 Me. 530, and Grigg v. Landis, 21 N. J. Eq. 506, which fully support the text. Mr. Warvelle says: "Where a forfeiture has been practically waived by partial payments by the vendee after the time prescribed, the vendee cannot then suddenly stop short and insist upon a forfeiture for the nonpayment of the arrears remaining unpaid, without any previous notice of the intention to do so if the arrears are not paid"—citing Harris v. Troup, 8 Paige (N. Y.) 426, and to the same effect 2 Warville on Vendors, § 820, p. 962.

These authorities make it clear that the acceptance of payments of installments on the price by Templeman, without objection long after they had become due, was a waiver of all breaches which had occurred at or prior to the time such payments were actually made, and that he could not afterwards insist upon a forfeiture on account thereof. On April 24, 1903, when the last payment was made, after crediting that payment, there still remained due and unpaid the two installments for March and April of that year, and all the interest accrued to that date. As to these breaches the forfeiture was waived. The respondent does not seriously dispute this. But $1,200 of the price became due after April, 1903, and there was a new breach of the agreement on the 5th of May and on the 5th of each month thereafter, until May 5, 1905. The controlling question in the case, therefore, is whether or not the conduct of Templeman as averred in the complaint, constituted a waiver of the condition that time was of the essence of the contract, as applied to the payments falling due after April 24, 1903, when the last sum paid was accepted.

The decisions are not entirely harmonious on this point. We find none that goes so far as to hold that the mere acceptance of one payment after its maturity will waive the right to declare a forfeiture if default occurs in subsequent installments. In Lent v. Burlington, etc., Co., 11 Neb. 201, 8 N. W. 431, the court on this point says: "The simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and, as to those following, the provisions of the contract are left to operate with unimpaired force." To the same effect are Phelps v. Ill. C. R. Co., 63 Ill. 470; Stow v. Russell, 36 Ill. 18; Keefe v. Fairfield, 184 Mass, 334-337, 68 N. E. 342; Cash v. Meisenheimer, 53 Wash. 576, 102 Pac. 429. But in the present case we have much more than this. Boone was in the possession and in actual use of the land during the whole period. A payment of $50 was due on the price on the 5th of every month after November, 1901. Not one of these payments had been made on the day they were due, nor, except the first, until months afterwards. Fourteen payments in succession had been accepted after maturity and without objection or protest of any kind. Interest fell due each month, but nothing was paid as interest, and none was demanded, nor were any objections raised on that score. After the acceptance of the last sum paid, 24 additional payments of principal and interest fell due and were not paid; Boone remaining in possession and Templeman apparently acquiescing in the continuance of the contract, giving no notice to the contrary, nor doing anything inconsistent therewith for still another period of 14 months. We think from these facts a court might infer a waiver of the conditions regarding forfeiture and time, and that they supported the general allegation of the complaint that Templeman had waived those conditions. The authorities with practical unanimity so hold. In Monson v. Bragdon, 159 Ill. 66, 42 N. E. 385, the court, upon similar facts, says: "While not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right (of forfeiture) as could only be restored by his giving a definite and specific notice of an intention to that effect." Similar rulings were made in Steele v. Branch, 40 Cal. 13; Hudson v. Duke, 21 Ga. 403; Kansas L. Co. v. Horrigan, 36 Kan. 387, 13 Pac. 564; Pier v. Lee, 14 S. D. 600, 86 N. W. 642; Timmins v. Russell, 13 N. D. 487, 99 N. W. 48; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Gaughen v. Kerr, 99 Iowa, 214, 68 N. W. 694; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Keator v. Ferguson, 20 S. D. 473, 107 N. W. 678, 129 Am. St. Rep. 947; Peck v. Brighton Co., 69 Ill. 200.

Another proposition seems applicable to the question of forfeiture. Templeman did not exercise his option to declare the whole price due upon the default for sixty days in paying any of the installments, but suffered it all to become due by lapse of time. Where in a contract for the sale of land the price is made payable in installments at different times and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But, if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the vendee in default. The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment. McCroskey v. Ladd, 96 Cal. 459, 31 Pac. 558; Russ v. Muscupiabe, etc., Co., 120 Cal. 526, 52 Pac. 995, 65 Am. St. Rep. 186; Glock v. Howard, 123 Cal. 18, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Underwood v. Tew, 7 Wash. 297, 34 Pac. 1100; Malaby v. Kuns, 3 Ind. 388; Gorham v. Reeves, 3 Ind. 83; McCulloch v. Dawson, 1 Ind. 419; Cunningham v. Gwinn, 4 Blackf. (Ind.) 343, and cases cited in McCroskey v. Ladd, supra. There are a few cases to the contrary. Duncan v. Charles, 4 Scam. (Ill.) 566; Sheeren v. Moses, 84 Ill. 448; Biddle v. Coryell, 18 N. J. Law, 377, 38 Am. Dec. 521. Templeman did not declare a forfeiture, nor take any steps toward doing so until July, 1906, more than a year after the last payment became due. He could not at that time put Boone in default as to any of the payments so as to work a forfeiture without tendering a conveyance of the land. Until Boone was in default there was no right of forfeiture. He attempted to declare a forfeiture without tendering a deed. Having, by his conduct, waived the right of forfeiture for nonpayment of the installments at the precise date of maturity, he could not, after the whole became due, revive or renew it without previous notice accompanied by a tender of a deed. Upon the face of the complaint we hold that the contract is still subsisting. We find nothing in the opinion in Glock v. Howard, supra, in any manner inconsistent with what is here said. That was a suit against a vendor to recover purchase money paid. The subject of a waiver of the right to a forfeiture was not involved. We have treated the case upon the theory that a forfeiture would occur by a mere failure to pay an intermediate installment, and without awaiting the lapse of 60 days and giving the notice of election to declare the whole due, as provided in the contract. As the question has not been argued and the contract is not set out in full, we do not wish to be understood as definitely deciding anything to that effect.

On the subject of laches the following statements of Prof. Pomeroy are pertinent: "When the purchaser has received the equitable title, has obtained possession of the land, has been in the enjoyment of its rents and profits, has paid the price, and nothing remains to complete the contract except the conveyance of the legal title, and nothing has happened which rendered the want of the legal title injurious or detrimental to the vendee, a delay in conveying the legal title, though lasting through many years, and without any excuse of real difficulty in the way, has been repeatedly held to be no impediment to a decree of specific performance. *The same is true where the delay has been in completing the payment*, provided there has been no substantial change in the circumstances and relations of the parties during the interval, and the interest will constitute not only a theoretical, but an actual compensation for the purchaser's default in payment." Pomperoy on Contr. § 400. The italics are ours. And again: "If the vendee, therefore, takes and retains possession of the premises with the vendor's consent, his mere delay in bringing a suit, or even in paying the price, will not prevent him from compelling a conveyance upon a subsequent payment or tender of the amount due; nor will his right to the relief be cut off until the vendor places a limit to the lapse of time by a demand of payment at or before a specified day, and a notice that the agreement will be rescinded unless the demand is complied with, and the vendee's default thereon." Id. § 404.

It is to be observed that these principles apply where time is merely material to the contract, and not where it is essential. Where time was originally essential, but for sufficient cause a forfeiture for default therein has been waived, time ceases to be essential, and becomes only material thereafter until the vendor again makes it essential by a proper notice and demand. In the case at bar, upon the facts shown by the complainant, a forfeiture had been waived, and thereafter time was not essential, but its efflux was a material fact bearing upon the right of Boone to enforce performance by suit. The defense of laches may be made where the lapse of time is less than the statutory period of limitation, but in such cases it can be maintained only where from the delay and the circumstances there appears either actual or presumptive injury or prejudice to the other party. Cahill v. Superior Court, 145 Cal. 47, 78 Pac. 467; Cohen v. Cohen, 150 Cal. 105, 88 Pac. 267; Bacon v. Bacon, 150 Cal. 493, 89 Pac. 317. This case is submitted to the court upon the statement of the facts made by the vendee in his complaint. It appears that the vendor, by the contract, is entitled to 8 per cent. annual interest, and that at least until the final payment became due it was payable monthly and compounded monthly. The contract is not set out according to its tenor, but only in substance and effect. There is nothing in the facts before the court to indicate that this interest will not fully compensate Templeman for the delay in payment of the principal, or that he has been at all prejudiced thereby. What may be disclosed when the defendant has answered and the facts developed by a trial may alter the case materially on this point. Upon the complaint alone, we are of the opinion that no laches is shown.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

(158 Cal. 264)

FAIRCHILD-GILMORE-WILTON CO. v. SOUTHERN REFINING CO. (L. A. 2,541.)

(Supreme Court of California. Aug. 31, 1910. Rehearing Denied Sept. 29, 1910.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER.

Error in overruling a demurrer to a complaint which failed to separately state causes of action on two distinct contracts of sale was harmless where defendant was not prevented from presenting its defense as effectively as if the causes had been separately stated and where the contracts were treated as one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089–4105; Dec. Dig. § 1040.*]

2. PLEADING (§ 433*)—CURE OF ERROR—UNCERTAIN PLEADING.

Where asphalt is contracted to be sold under different quotations in single and double headed packages, failure of the buyer's complaint for the seller's breach to state whether asphalt purchased elsewhere at a higher price was packed in single or double headed packages was cured by a finding that it was all packed in single-headed packages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451–1477; Dec. Dig. § 433.*]

3. TIME (§ 5*)—"MONTH"—MEANING OF.

The word "month" in a contract to sell 4,000 tons of asphalt to be delivered on orders not exceeding 400 tons "in any one month" payments to be made on the 10th of each month for asphalt delivered during the preceding month meant calendar month.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 5–8; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 5, pp. 4574–4575; vol. 8, p. 7724.]

4. SALES (§ 71*)—DELIVERY—EFFECT OF CONTRACT.

Under a contract to sell 4,000 tons of asphalt to be delivered on orders not exceeding 400 tons in any one month, the seller was not bound to deliver more in any one month than was demanded, nor more than 400 tons to make up for smaller orders in previous months, but was bound to make deliveries to cover deficient shipments, either in such quantities as were demanded or the contracts would be extended by operation of law if the buyer insisted, until full delivery was made at 400 tons a month.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189–196; Dec. Dig. § 71.*]

5. PLEADING (§ 239*) — AMENDMENT — CONDITIONS.

Where the buyer in an action for the seller's failure to make full delivery stipulated as a condition for permission to amend at the trial that recovery might be limited to defaults subsequent to a particular time, findings based on demands for delivery before that time were improper.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626–635; Dec. Dig. § 239.*]

6. EVIDENCE (§ 215*)—ADMISSIONS—DAMAGES.

In an action for a seller's failure to make full deliveries contracted, whereby the buyer was compelled to buy elsewhere at a higher rate, a letter written by the seller to the buyer after the breach offering to sell at a price higher than the contract price was properly submitted as an admission tending to show value at that time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754–759; Dec. Dig. § 215.*]

7. SALES (§ 416*)—BREACH BY SELLER—DAMAGES—EVIDENCE.

In an action for a seller's failure to make full deliveries contracted, evidence that plaintiff purchased at a higher rate in the open market while the seller was failing to fill contract orders was immaterial, though the fact was alleged and denied, since it was not essential to the buyer's right to recover.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. Sales (§ 418*)—Breach by Seller—Damages—Measure.

Under Civ. Code, §§ 3308, 3354, a buyer's measure of damages for breach of a contract to sell asphalt was the excess over the contract price of the market value in the nearest market at such time after the breach as would enable the buyer by reasonable diligence to buy an equivalent amount, regardless of whether it actually bought an equivalent quantity or of the price paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

9. Witnesses (§ 268*)—Cross-Examination—Sales.

Where a witness in an action for breach of contract to deliver goods sold testified to market value, it was proper to ask him on cross-examination as to the profit he would make per ton at that price.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

10. Sales (§ 101*) — Contracts — Seller's Right to Rescind.

One who contracted to sell asphalt on monthly deliveries and payments could not rescind as to remaining deliveries for the buyer's failure to make payments on time where the course of dealings showed that the seller did not intend to insist on prompt payments, and where the seller was delinquent in deliveries.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 267, 268; Dec. Dig. § 101.*]

11. Contracts (§ 264*)—Right to Rescind—Performance.

A party to a contract cannot rescind it where he is in default.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1184, 1185; Dec. Dig. § 264.*]

12. Contracts (§ 261*)—Building Contracts—Rescission—Grounds.

Generally a building contractor can rescind for the owner's failure to pay installments of contract price on time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. § 261.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Fairchild-Gilmore-Wilton Company against the Southern Refining Company. From a judgment for plaintiff, and from an order refusing a new trial, defendant appeals. Reversed and remanded.

McNutt & Hannon, J. W. McKinley and Byron M. Marble for appellant. Gibson, Trask, Dunn & Crutcher, for respondent.

SHAW, J. This is an action by plaintiff, a buyer of certain asphalt, to recover of the defendant, the seller thereof, damages for the alleged failure of the seller to deliver the asphalt as the contract provided. Plaintiff obtained judgment for $19,463.56. The defendant appeals from the judgment and from an order denying its motion for a new trial.

There were two contracts for the sale of asphalt. Both were made in the form of a written proposal by the defendant to sell and a written acceptance thereof by the plaintiff. The first was made on January 3, 1906, as follows: "Referring to conversation had at your office some several days since with reference to furnishing you with 4,000 tons asphalt, 'D' and 'DX' grades, we beg to submit herewith proposal covering same as follows: We propose to furnish you with 4,000 tons asphalt, grades 'D' and 'DX', our make, at $7.00 per ton, gross weight, f. o. b. our refinery when packed in single headed packages, and $7.50 per similar ton when packed in double headed packages. Said amount of asphalt, viz.: 4,000 tons to be taken within one year from January 1st, 1906. Deliveries to be made as rapidly as possible, provided, however, not more than 400 tons is ordered or called for in any one month. Payments for said asphalt to be made on the 10th day of each month for all material delivered during the preceding month. This proposal to be subject, however, to strikes, fires and other causes beyond our control." The second contract was made on May 16, 1906. It is identical in language with the first, excepting (1) the date, which is May 16, 1906; (2) the time within which the asphalt was to be taken, which is "one year from May 16th, 1906," instead of one year from January 1, 1906, as in the first contract; and (3) that immediately preceding the last clause the following clause was inserted: "This in addition to amount agreed to furnish you January 3, 1906."

The complaint consisted of but one count. It alleged the delivery of 5,005.615 tons of asphalt, under both contracts, prior to January 26, 1907, the demand by plaintiff of the defendant and the refusal of defendant to deliver the remaining 2,994.385 tons called for thereby; that, by reason of such failure, plaintiff was compelled to and did buy 2,994.385 tons of asphalt of equal quality in open market at current market rates, and to pay therefor at the rate of $15 per ton, whereby plaintiff was damaged in the sum of $23,955.08. The finding of the court was that the plaintiff paid $13.50 for the asphalt bought to supply the deficiency, and that it was damaged to the amount of $19,463.56 by the defendant's failure to deliver.

1. The first point urged by appellant is that the two contracts were separate and independent; that the breach of each would be a cause of action, irrespective of the other; and hence that the complaint avers two causes of action which are not separately stated. This objection is now made a ground of demurrer. Code Civ. Proc. § 430. It is one of the grounds of the demurrer to the complaint, which was overruled in the court below. It may be admitted that the contracts were independent, that the last was not a mere supplement to or alteration of the first, and that two causes of action are alleged. It is evident that this method

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of stating the plaintiff's case did not prevent the defendant from presenting its defense, or its case to the court as fully and effectively as it could have done if each contract had been pleaded separately as the foundation of a distinct cause of action. It appears from the evidence that in fact both parties, after the making of the second contract, treated the two as one, kept no separate account of either, and that the orders were given, and the deliveries and payments made, without distinguishing them in any way by any reference to there being different contracts. The terms of the two were identical, except as to dates. The method of pleading did not prejudice the defendant. Even if each had been made the subject of a separate count, the conduct of the parties in their performance was such that the cause must have been tried and the evidence introduced upon both together. This error of itself would not justify a reversal of the judgment.

2. The complaint is uncertain, in that it does not state whether the asphalt which it alleges the plaintiff had to buy because of the failure of the defendant to deliver the amount contracted for was packed in single-headed packages, or in double-headed packages. This made it impossible to determine whether the measure of damages—that is, the difference between the value of the asphalt to the plaintiff and the contract price—was $7.50 per ton or $8 per ton. To make the total amount claimed it should have been in single-headed packages, as that would have made a difference of $8 per ton. This defect, however, is cured by the finding that it was, in fact, all in single-headed packages, which was in accord with the uncontradicted evidence.

3. The most serious question in the case is the sufficiency of the evidence to sustain certain findings. In order to determine this question intelligently, it is necessary first to consider the effect of the contracts and the obligations imposed on the defendant thereby. Each contract was for the sale of 4,000 tons of asphalt to be taken within a year from its date, and delivered as rapidly as possible, but not more than 400 tons were to be ordered "in any one month." We think the proper construction of the contract of May 16th is that by the "one month," therein referred to, a calendar month was intended and understood. This is shown by the clause immediately following, to the effect that payments were to be made on the 10th of each month for all the asphalt delivered during the preceding month. Evidently both of these kindred provisions refer to the months of the calendar. They were so treated in the subsequent dealings. Each contract called for but 4,000 tons, and, if the full complement of 400 tons each month had been called for and delivered, each contract would have been performed within 10 months from its date. The defendant was not obliged to deliver more in any month than was demanded, unless it was delinquent for some previous month. We need not inquire whether or not, where the full amount for one month was ordered and the defendant failed to deliver it all, it was obliged, during the next or any succeeding month, in the life of the contract or afterward, to deliver more than 400 tons a month in making up the delinquency. As we understand the facts, this question does not arise.

It appears, however, from the admissions at the trial and the findings that the total amount delivered up to November 1, 1906, was only 4,360.339 tons. During that period the maximum quantities that could have been ordered under the contracts were 400 tons each month from January to April, inclusive, 600 tons for May and 800 tons each month from June to October, inclusive—a total of 6,200 tons. If the maximum had been ordered during each of these months, the deficit of 1,839.661 tons would have remained due, and defendant would have been obliged to deliver the same subsequently, either in such quantities as were demanded, or the life of the contracts would be extended by operation of law, if plaintiff insisted, until the full complement of 8,000 tons had been delivered at 400 tons per month. But, if all that was demanded during those months was then delivered, the defendant was not in default on November 1, 1906, and during the remainder of the terms of the contracts it was not under obligation to deliver more in any month than the respective contracts called for during the years specified therein; that is, 800 tons for November and December, 400 tons per month thereafter to May 1st, and 200 tons for the half of May, making 3,400 tons in all. The 4,360.339 tons delivered up to November 1, 1906, left 3,639.661 tons yet to deliver of the 8,000 tons contracted for. This was more by 239.661 tons than could be ordered during the continuance of the respective contracts, at the limited rate stipulated therein. Each contract expired at the end of the year specified therein, and thereafter the defendant was under no obligation to deliver any part of the total quantity contracted for therein, unless it was delinquent for failure to deliver the quantities rightfully ordered while the contract was in force.

It thus appears that the question whether or not the defendant was delinquent in the delivery of asphalt ordered prior to November 1, 1906, is important and material in determining the amount of its liability for damages. The finding was that the defendant delivered 5,005.615 tons and failed and refused to deliver the 2,994.385 tons necessary to make the 8,000 tons contracted for, and that the plaintiff was compelled to buy the amount of the deficiency at $13.50 per ton, in single-headed packages, which was $6.50 a ton in excess of the contract price, and a damage to the plaintiff in that sum per ton, the total damage for 2,994.385 tons at $6.50 a ton being $19,463.56, for which amount the judgment was given. As a basis for this the court also found that "during the months of the year 1906, in which said contracts were in force," the plaintiff demanded "at divers times during each of said months, the asphalt agreed to be furnished plaintiff under said contracts, stating the quality and amount required by plaintiff." It also found that like demands were made during the life of the second contract in 1907, coupled with a demand for the preceding deficits. It is contended that these findings are not sustained by the evidence.

The evidence as to demands during 1907, and as to the months of November and December, 1906, is sufficient to justify the findings as to those months. As to the months preceding November the finding is contrary to the express stipulation of the plaintiff at the trial. There was no dispute about the amount delivered up to November 1, 1906. It was admitted to be 4,360.339 tons, as above stated. The exact quantity for each month was stated in a writing admitted to be correct. During the trial the plaintiff offered to amend paragraph 5 of the complaint. The defendant objected that it would change the issues. Counsel for plaintiff then said that "for the purpose of avoiding any trouble over allegations of failure of defendant to comply with the demands prior to November 1, 1906, plaintiff was willing to stipulate that the defendant practically complied with the terms of the contract up to that date, and that it would not seek to show any shortage for the months preceding November 1, 1906." The court said: "The proposition is that any judgment should be for defaults after the 1st of November, 1906." This was agreed to, and thereupon the amendment to the complaint was allowed. The evidence was all directed to demands made after November 1st. It follows that the finding that demands were made in each month prior to November, 1906, for the full amount of 400 tons for each of those months, was unwarranted. The defendant was not shown to be in default on November 1, 1906.

The court finds, and it was admitted, that after October 31, 1906, defendant delivered 645.276 tons. As only 3,400 tons could have been lawfully demanded by plaintiff after that date, in the absence of prior delinquencies of defendant, it follows that the defendant was liable for a failure to deliver to the extent of 2,754.724 tons and no more. The delinquency charged in the findings and computed in the judgment was 2,994.385 tons. This was 239.661 tons more than defendant was liable for under the facts stipulated. This excess, at the rate of $6.50 per ton, would amount to $1,557.79. The judgment should have been that much less, or $17,905.77, instead of $19,463.56. For the same reasons it is obvious that the clause in finding that "the defendant was, during all of the months under said contracts, subsequent to May, 1906, constantly in arrears in furnishing the asphalt required by plaintiff," is also contrary to the evidence. It is not necessary to consider the other assignments as to insufficiency of the evidence.

4. A number of rulings on the admission and exclusion of evidence are assigned as error. In view of the necessity of a new trial it is proper to consider some of them. The letter of defendant to plaintiff dated January 14, 1907, offering to sell asphalt at $15 per ton, was properly admitted. It was competent as an admission of the defendant tending to show the value of asphalt at that time. Evidence of plaintiff's purchases of asphalt at $15 a ton in the open market during the time the defendant was failing to fill plaintiff's orders was immaterial. The fact was alleged and denied, but the allegation was not essential to plaintiff's right to recover. Upon the defendant's breach of the contract to sell and deliver the asphalt plaintiff was entitled to damages. The measure of damages was the excess, over the contract price of the market value of the asphalt in the nearest market, at such time after the breach as would enable the plaintiff by reasonable diligence to buy an equivalent amount. Civ. Code, §§ 3308, 3354. This it could recover whether it actually bought an equivalent quantity or not, and regardless of the price it paid for what it did buy. Evidence of the price paid for particular sales is not competent as evidence of value. The proof might have been admissible if the defendant had sought to show that plaintiff had succeeded in replacing the asphalt at less than the market value. But no such attempt was made. The question put to the witness Jones as to the profit he would make per ton at the price he had testified to be the market rate should have been allowed. It was proper cross-examination concerning his testimony as to the market value. Other like questions in cross-examination of other witnesses to value should have been permitted.

5. The last point for consideration is the claim of the defendant that it rescinded the second contract in January, 1907, and that the plaintiff cannot recover on either contract because it was in default in the payments for asphalt actually received. The contracts provided that on the 10th of each calendar month the plaintiff would pay the price of all asphalt delivered to it during the preceding month. The plaintiff never did pay the full amount due in any month, and on January 10, 1907, it owed the defendant $6,442.21 on account, the greater part of which was for asphalt previously delivered on the two contracts. Some sharp correspondence ensued between them in re-

gard to the matter. On January 25th the defendant wrote plaintiff a letter, in which, after referring to the plaintiff's failure to accept a proposal for a new contract for another year at a higher price, it said: "We consider the matter a closed incident, and would at this time remind you that as you have, also, failed to keep your part of the agreement already supposed to be existing between us, we will, also, call this matter off. It only remains for you to settle your indebtedness to us after which our relations will be determined by the future." The defendant itself was at that time in default for failure to deliver asphalt ordered by plaintiff during the months of November and December, 1907, the amount of its delinquency being at least 1,000 tons. It appears from the evidence, and the court finds, that the plaintiff was in default in payments at each monthly pay day during the life of the contracts up to that time, but there is no evidence that it ever refused to pay. At each demand for payment the plaintiff had made partial payment of the sum due and had asked, and had been granted, indulgence in the time to pay the balance. To the letter of January 25th, the plaintiff answered on January 26th, by a statement that it was withholding payment as security for the damages it had suffered up to that time by the failure of the defendant to deliver the asphalt previously ordered. On January 28th the defendant, by letter, repudiated any liability for nondelivery and reiterated its refusal to deliver more. On January 29th the plaintiff disavowed its position assumed in its previous letter, and declared its willingness to pay in full for the asphalt delivered, remitting $6,150 as a payment in full of the account as shown on its own books, and offering to pay any further amount if the defendant's books showed a greater amount due, and again demanded the asphalt then deliverable under the two contracts. The entire balance was paid shortly afterwards. At the time the defendant declared, or attempted to declare, the rescission of the contracts, there had been a complete waiver by it of all right to rescind for delinquencies in payment prior to January 10, 1907, and the entire course of business indicated that it did not intend to insist on payment promptly on the day fixed. It was itself in arrears in delivery as above stated, and at the going price of asphalt as found by the court, $13.50 per ton, the plaintiff was entitled to damage, for the nondelivery for the last two months of 1907, in at least the sum of $6,500, which was more than the payments then due for the asphalt delivered at the contract price. The defendant was therefore in default as fully as the plaintiff. Under all these circumstances, we think the court below was justified in its conclusion upon the facts found that there was no effectual rescission of the contract as to the remaining months of the last contract, and that plaintiff's failure to pay did not bar its recovery. "The rule is general that the right to rescind a contract rests only with the party who is without default. One party cannot violate the contract himself, and then seek a rescission on the ground that the other party has followed his example." State v. McCauley, 15 Cal. 458; 2 Chitty, Cont. (11th Am. Ed.) 1092; 2 Parsons, Cont. (9th Ed.) *p. 679.

We have assumed, for the purposes of the discussion on this point, that the seller of a stated quantity of goods, to be delivered in installments, which are to be paid for at fixed times, on or after delivery, has the right to rescind the contract upon an unexcused and unwaived failure of the buyer to pay an installment when due. In view of the fact that a new trial may be had and that the evidence may be different on such trial, we do not think it advisable to lay down this rule as the law of the case. In the course of the long litigation in the cases of Cox v. McLaughlin and the Western Pacific Railroad Company (44 Cal. 18; 47 Cal. 87; 52 Cal. 590; 54 Cal. 605; 63 Cal. 196; 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164), it was decided that, under the provisions of the contract there involved, the nonpayment of the installments of the contract price by McLaughlin as they fell due authorized Cox to rescind and sue on a quantum meruit for the value of the work done. That was a building contract. It is generally the case that progress payments upon such contracts are provided, so that the contractor may have funds wherewith to proceed with the subsequent work to be performed. It seems to be established in this state that in the case of building contracts, in the absence of special conditions or circumstances demanding a different rule, the rule above given is applicable. Porter v. Arrowhead Co., 100 Cal. 503, 35 Pac. 146; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 116, 38 Pac. 635; San Francisco Bridge Co. v. Dumbarton, 119 Cal. 275, 51 Pac. 335. The same considerations do not so uniformly apply to a failure to make payments upon contracts for the sale of goods by installments wherein the price for the goods delivered is to be paid in full, as delivered, or at fixed dates after each delivery. There are no decisions on the precise point in this state. In other jurisdictions there is a conflict of authority on the question whether a mere failure to pay an installment at maturity, not amounting to a refusal to pay and not intended by the buyer as a repudiation or renunciation of the contract, nor understood to be such by the seller, will authorize a rescission by the seller. Benjamin on Sales (5th Ed.) notes to sections 560–609, p. 604; 2 Mechem on Sales, §§ 1140–1148, and notes. We prefer to leave the question open for further consideration hereafter, if it should arise.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, J.; SLOSS, J.

13 Cal. App. 781

MURPHY v. CASEY. (Civ. 716.)

(Court of Appeal, Third District, California. July 25, 1910.)

1. COSTS (§ 3*)—RIGHT TO COSTS—STATUTES. The right to costs is purely statutory.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.*]

2. COSTS (§ 22*)—RIGHT TO COSTS—STATUTES. Code Civ. Proc. §§ 1022, 1025, allowing costs to plaintiff recovering a judgment for $300 or over, and declaring that no costs are allowable when plaintiff recovers less than $300, apply to a judgment rendered under section 997, pursuant to an offer and acceptance of judgment, and a plaintiff obtaining such a judgment for $200 is not entitled to costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47-73; Dec. Dig. § 22.*]

3. COSTS (§ 22*)—RIGHT TO COSTS—STATUTES. The disallowance of costs in an action in the superior court when judgment is for plaintiff for less than $300, as provided by Code Civ. Proc. § 1025, is in the nature of a penalty, and is intended to discourage the bringing of actions in the superior courts which should be tried in justice's courts.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47-73; Dec. Dig. § 22.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by D. J. Murphy against James T. Casey. From an order refusing to strike out plaintiff's cost bill on the ground that he was not entitled to costs, defendant appeals. Reversed.

Bond & Hays, for appellant. Park Henshaw, for respondent.

HART, J. The plaintiff brought this action on June 12, 1909, to recover the sum of $462, an alleged balance due for board and lodging furnished to certain employés of defendant and for a certain quantity of corn sold and delivered to said defendant by plaintiff. The defendant answered the complaint in due time, and the cause was set down for trial for December 21, 1909. On the 20th day of December, 1909, the defendant served a written offer on the plaintiff to allow judgment to be taken for the sum of $200. This offer was filed on the 21st day of December, 1909, and on the same day the plaintiff accepted in writing said offer, and thereupon judgment was rendered and entered in favor of plaintiff for the amount so offered and accepted. Respondent thereafter filed his cost bill, and subsequently the defendant moved to strike out the same on the ground that, as the judgment rendered and entered in his favor was for a sum less than $300, plaintiff was not entitled to costs. The court made an order denying this motion, and it is from said order that the defendant presents this appeal.

The precise question submitted here is new in California, so far as we know to the contrary. We are of opinion, however, that plaintiff is not entitled to his costs, and that, therefore, the court erred in denying the motion to strike out his cost bill.

There must be in any case some statutory warrant for the allowance of costs. Fox v. Hale & Norcross S. M. Co., 122 Cal. 223, 54 Pac. 731. It is said in that case that "the right to recover costs is purely statutory, and, in the absence of a statute, no costs could be recovered by either party." It is quite obvious that, in order to justify the awarding of costs to the plaintiff in the case at bar, there must be imported into the statute language which the Legislature has omitted to insert therein, as an examination of the several sections of the Code relating to costs will readily affirm.

The offer and acceptance of a compromise judgment is authorized by section 997 of the Code of Civil Procedure, which reads: "The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." Section 1022, subdivision 3, of said Code, provides that "costs are allowed of course to the plaintiff, upon a judgment in his favor, * * * in an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over." Section 1025 expressly declares, without qualification or exception, that "no costs can be allowed in any action for the recovery of money or damages, when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars."

Counsel for the respondent undertakes to maintain that the two last-mentioned sections relate entirely to cases wherein the issues tendered are actually litigated and by consequence do not apply to a case like the one at bar, where a compromise judgment is agreed to under the terms of section 997. But we cannot assent to that contention. Construing together, as we must, the three sections of the Code mentioned, we think that it is very clear that it was the intention of the Legislature to disallow costs in any case in which the judgment obtained is for less than the sum of $300 without regard to whether such judgment has been awarded after the issues involved have been actually tried or is entered without trial by agreement of the parties. We can perceive no sound or substantial reason for any other construction of the Code sections bearing upon the subject of costs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The disallowance of costs in an action in the superior court where the judgment is for plaintiff in an amount less than the sum of $300 is in the nature of a penalty and manifestly intended to discourage the bringing of actions in the superior courts which should be tried in justices' courts. The acceptance by the plaintiff of an offer by the defendant to allow judgment to be entered against him for a sum less than that sued for is tantamount to a confession by plaintiff that the sum offered is as much as he could expect to obtain judgment for were the issues tried and litigated. No proposition can be more patent than that a compromise judgment taken under the authority of section 997 of the Code of Civil Procedure is no less a judgment than one rendered and entered after a trial, and, as declared, we have been pointed to no section of law relating to costs which can, by any possible construction, authorize, in such a case, the awarding of costs to either party where the judgment agreed to is below the sum of which the superior court has jurisdiction.

That part of section 997 which provides that, if a plaintiff fails to obtain a more favorable judgment than that involved in an offer of compromise, he cannot recover costs, simply and clearly means that even if, after the refusal of the offer, he should receive a judgment for an amount within the superior court's jurisdiction but less than for the amount offered, he would not be entitled to costs.

The respondent has cited a number of cases, which, with the exception of Lee v. Stern, 22 Mo. 576, throw little light on the question here. The case mentioned, which undoubtedly sustains the contention of respondent, was where the defendant, having made an offer to plaintiff, under a statute similar in its terms to section 997 of our Code, to take judgment for a sum below the court's jurisdiction, which offer was accepted by plaintiff, set up a right to the payment of his costs. The court held that there was no authority under said statute for the awarding of costs to the defendant, and affirmed the judgment for costs to plaintiff. But, as is manifest from what we have already said, we are not in accord with the conclusion reached in the Missouri case.

The construction here given these sections is sustained by the case of Moffett v. Deom, 8 Civ. Proc. R. (N. Y.) 85, where, under a statute also similar in its terms to section 997 of our Code of Civil Procedure, the defendant offered to allow the plaintiff to take judgment for a sum less than that of which the court had jurisdiction, and the offer was accepted. Both parties claimed costs. The court held that neither party was entitled to costs; that, "as the recovery was less than $50, there was no authority in the statute entitling the plaintiff to any costs, and the defendant, by making the offer, waived his statutory right thereto." See Johnson v. Sagar, 10 How. Prac. (N. Y.) 552. We think, as we have tried to show, that the New York case announces the true rule upon the question before us.

The order is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 1

SKROCKI v. STAHL et al. (Civ. 733.)

(Court of Appeal, Third District, California. July 30, 1910. Rehearing Denied by Supreme Court, Sept. 20, 1910.)

1. LIBEL AND SLANDER (§ 6*)—ARTICLES LIBELOUS PER SE.

A newspaper article stating that plaintiff remarked to a fellow workman at the time of the assassination of President McKinley that "he ought to be killed," and that plaintiff was placed under arrest and held in jail, but subsequently released, etc., is libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3–16; Dec. Dig. § 6.*]

2. LIBEL AND SLANDER (§ 113*)—LIBELOUS COMMUNICATIONS—DAMAGES.

One suing for language libelous per se may recover the actual damages suffered thereby, unless it is shown that the charge made is true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 342; Dec. Dig. § 113.*]

3. LIBEL AND SLANDER (§ 73*)—PERSONS ENTITLED TO SUE.

Under the statute providing that, in a civil action for libel, it is sufficient to state generally that the language was published concerning plaintiff, etc., a statement in a newspaper article that a decedent who had committed suicide had been an anarchist is not a basis for a cause of action in favor of decedent's brother.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 174; Dec. Dig. § 73.*]

4. LIBEL AND SLANDER (§ 73*)—ARTICLES LIBELOUS PER SE.

The malicious defamation of the memory of the dead is an affront to the general sentiments of morality and decency, and, though the interests of society demand its punishment, the law does not contemplate the offense as causing any special damages to another individual, though related to decedent.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 174; Dec. Dig. § 73.*]

5. LIBEL AND SLANDER (§§ 94, 100*)—JUSTIFICATION—PLEADING—PROOF.

A defendant in pleading a justification in libel need not justify every word of the defamatory matter, but it is sufficient where the gist of the libelous charge is justified, and immaterial variance and defects of proof on minor matters may then be disregarded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 225, 249; Dec. Dig. §§ 94, 100.*]

6. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADING AND PROOF.

Where, in an action for libel based on an article stating that plaintiff at the time of the assassination of President McKinley stated that he ought to be killed, and that plaintiff was placed under arrest and held at the city jail, but subsequently released for failure to press the charge, the court charged that the burden of proof was on defendant to establish the truth of the material portion of the publication, and plaintiff did not request an instruction as to what portion of the article was material, the failure of defendant, relying on justification, to prove that plaintiff was arrested and detained in jail, was not prejudicial to plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086; Dec. Dig. § 1039.*]

7. Appeal and Error (§ 1033*)—Harmless Error—Error Favorable to Party Complaining.

One suing for libel, based on a charge that he had remarked at the time of the assassination of President McKinley that he ought to be killed, may not complain of the overruling of an objection to a question asked him on cross-examination as to whether he was a Socialist.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4055; Dec. Dig. § 1033.*]

8. Libel and Slander (§ 107*)—Evidence—Admissibility.

In libel, evidence of what others said to plaintiff after the publication of the libel is not admissible to show plaintiff's mental suffering.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 299, 300; Dec. Dig. § 107.*]

9. Libel and Slander (§ 105*)—Evidence—Admissibility.

Where, in libel, there was no controversy nor uncertainty as to the person to whom the libelous language referred, evidence of what was said to plaintiff by others after the publication of the libel was inadmissible to show that the libelous words were understood to refer to plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 283; Dec. Dig. § 105.*]

10. Appeal and Error (§ 1033*)—Harmless Error—Erroneous Instructions.

Where two defendants were jointly charged with publishing a libel, an instruction that the jury could find a verdict against one of the defendants if he was liable for the publication, though they might believe that the codefendant had no connection with it, was not prejudicial to plaintiff, as it was in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4056-4058; Dec. Dig. § 1033.*]

11. Constitutional Law (§ 42*)—Validity of Statutes—Party Entitled to Raise Question.

Where, in an action for libel, plaintiff did not give a bond, and the court did not allow anything for attorney's fees on defendant recovering judgment, the question of the validity of the statute requiring plaintiff in libel to file a bond and allowing a counsel fee to the successful defendant could not be raised by plaintiff.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

12. Constitutional Law (§ 248*)—Equal Protection of the Laws.

The statute allowing counsel fees in an action for libel allows as costs to the prevailing party counsel fees, and the statute is not invalid as discriminating between the parties, and denying them the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 248.*]

13. Statutes (§ 67*)—Special Legislation—Retroactive Operation of Constitutional Prohibition.

The statute allowing a counsel fee in an action for libel in force at the time of the adoption of the present Constitution is not objectionable as special legislation in violation of the present Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 69; Dec. Dig. § 67.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Walter Skrocki, sometimes known as Walter Skdocki, against H. F. Stahl and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Austin Lewis and R. M. Royce, for appellant. Theodore A. Bell, for respondents.

BURNETT, J. The action, being for libel, was tried before a jury, and the general verdict was in favor of the defendants. The alleged defamatory matter was published in the "Vallejo Evening News," a daily newspaper, of which the defendants are the owners and publishers, according to the undenied allegation of the complaint. The article complained of stated that a brother of plaintiff had committed suicide, leaving a letter setting forth the race track and slot machines as the reasons for ending his life. The tragic manner of his self-destruction is graphically described, and the article proceeds in the following strain, which is the gist of the offending: "Skrocki was an anarchist and a brother of Walter Skrocki, who, when President McKinley was assassinated remarked to a fellow workman on Mare Island, 'He ought to be killed.' He was placed under arrest and held at the city jail, but the complainant refusing to press the charge, the prisoner was released." It is denied in the answer that plaintiff was damaged to any extent, and by way of justification it is alleged that the statement as to plaintiff's declaration in regard to President McKinley was and is true, "and as a matter of fact the plaintiff did make said remark at the time and place and under the circumstances alleged." In mitigation of any damages to which plaintiff might appear to be entitled, it is set out in the answer that the matter of which complaint is made was reported to the defendants by W. T. Stanford, chief of police of the city of Vallejo, within 24 hours prior to the publication of the same, and that defendants at the time of the publication believed all things therein stated to be true and "the same were published by the defendants as matters of current public news."

The law of libel has been so frequently considered and clearly announced by the courts and text-writers that scarcely any feature of it is involved in doubt, and it may be said that little difficulty can be experienced here in the application of well-established principles to the facts of the case. Preliminarily, we may assert without further consideration that it cannot be disputed, and, indeed, is not, that the published article contains language which is libelous per se. It is such a defamation as would manifestly expose plaintiff "to public hatred, contempt, or ridicule," and, unless shown to be true, would entitle him to whatever actual damage he may have suffered thereby, and it may be said no claim was made to exemplary or punitive damages the plaintiff contending that defendants were chargeable with malice "in law," but acquitting them of any "malice in fact." At the trial there was substantial evidence that the plaintiff used the language attributed to him in the publication, and we may, therefore, as to this feature of the alleged libel, base the affirmation of the judgment upon the ground that the justification of defendants, shown to the satisfaction of the jury by the testimony of a witness, is not assailable on appeal, since it is admitted that the proof of the truth of the charge is a complete defense. It was not shown, however, that plaintiff's brother was an anarchist or that plaintiff himself was placed under arrest or held at the jail. The inquiry is thus presented whether those considerations affect the validity of the verdict and judgment.

As to the first, the failure to justify the publication seems entirely immaterial, since the allegation in the complaint does not constitute the basis for a cause of action in favor of plaintiff. "A malicious defamation * * * tending to blacken the memory of one who is dead" is indeed a libel, and may subject one to criminal prosecution, but the statute provides that in a civil action for damages "it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and, if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken." It is manifest that the charge concerning the brother of plaintiff was not published concerning the latter, and hence the requirement of the statute in this regard could not be complied with. As a matter of sound public policy, the malicious defamation of the memory of the dead is condemned as an affront to the general sentiments of morality and decency, and the interests of society demand its punishment through the criminal courts, but the law does not contemplate the offense as causing any special damage to another individual, though related to the deceased, and therefore it cannot be made the basis for recovery in a civil action. This probably is a necessary incident to the theory of the social relations entertained here where one is supposed to stand or fall upon his own merits, and where success or failure is entirely independent of the accidents of rank or family connection. It necessarily follows that, theoretically, at least, no man's success can be aided or retarded by the character of his relative. The defamation of such character, therefore, however grievous or disturbing, can afford no injury that can be measured by a pecuniary standard. At any rate, under the statute, appellant cannot complain because the defendants offered no proof of the truth of their accusation that plaintiff's brother was an anarchist. And, since the matter is entirely immaterial, of course, the court committed no error in sustaining an objection to the question propounded to plaintiff concerning his brother's political belief.

In relation to the failure to prove that plaintiff was arrested and detained in jail, it is entirely clear that this was without prejudice to any of his substantial rights. The rule established here by the authorities, and manifestly based on right reason, is that the defendants were not required to justify every word of the defamatory matter. It was sufficient if the gist or sting of the libelous charge was justified, and immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be justified. Hearne v. De Young, 119 Cal. 670, 52 Pac. 150, 499. The sting of the charge here is that the plaintiff said that President McKinley "ought to have been killed." The clear implication is that plaintiff was a man of abandoned character, opposed to the reign of law and order, and favoring the assassination of public officials. In comparison with such a charge how insignificant is the accusation that he was arrested therefor and detained in jail. It would require certainly a good deal of temerity for any one to argue to a jury that, although defendants were justified in declaring in effect that plaintiff was an anarchist, he was damaged by the false publication in regard to his arrest. If this contention were made, the jury would probably conclude that such a man could not be and was not injured by such a comparatively trivial accusation.

Aside from the foregoing, it may be said that the jury were fully instructed that the burden of proof was upon the defendants to establish by a preponderance of the evidence the truth of the material portion of the publication, and that, if they believed the publication complained of had damaged plaintiff, it was the duty of the jury to assess the same at whatever sum they might believe from the evidence he had suffered, not to exceed the sum of $10,000. The presumption would be that the jury concluded that the plaintiff was not perceptibly damaged by any portion of the publication. If plaintiff had desired an instruction that the portion of the article in question was material, he should have requested it. While we are satisfied that it constitutes a circumstance of trifling importance, yet, as the record is presented, we cannot say that the jury did not consider it material, but we must rather assume that it was found to be without damage.

Some criticism is made of the action of the court in overruling plaintiff's objection to the question asked of him on cross-examination if he was a Socialist. Whether the question should have been allowed or not need not be discussed, as it is apparent the answer could have done no harm. If he had stated that he was a Republican or Democrat, he would have no less cause for complaint. While there may be some uncertainty in the public mind as to just what is a Republican or Democrat or Socialist, yet we apprehend that the distinctive political principles of any one of these organizations, as generally recognized, would not be urged by any fair-minded man in derogation of the mentality or character of the person espousing said principles. Indeed, if we accept Socialism as what its votaries declare it to be, "a theory or system of social reform which contemplates by peaceable means a reorganization of society with a more just and equitable distribution of property and labor," the average man would be impressed with its humanitarianism, although he might doubt its feasibility. At any rate, it would be a reflection upon the intelligence or sense of fairness of the jury to say that they were prejudiced against plaintiff by reason of his avowal of his connection with Socialism.

Complaint is also made of the refusal of the court to allow testimony of what was said to plaintiff by others after the publication of the alleged libel. This ruling was clearly right, and is upheld by the authorities. Turner v. Hearst, 115 Cal. 394, 47 Pac. 129; Hearne v. De Young, supra. Therein it is declared that such evidence is not admissible to show the mental suffering of the plaintiff or to show that the libelous words were understood by those who read them to refer to the plaintiff. Such evidence was equally inadmissible here. It could not be received for the first purpose for reasons stated by the Supreme Court, nor for the second, because no such issue is made by the pleadings. In fact, there is no controversy nor uncertainty as to the person to whom the language referred.

There is no error in the instructions of the court. When considered together, they seem to state the law consistently and accurately. Even if liable to the objections urged by appellant, we should have to assume that the criticized instructions were given at his request, in the absence of anything in the record to show to the contrary. But the law seems to have been stated by the learned judge as favorably to plaintiff as he had any right to expect. Assuredly there was no injury to plaintiff in the instruction that the jury might find a verdict against one of the defendants if he was liable for the publication, although they might believe the other had no connection with it. The effect of this was manifestly to accord to plaintiff the advantage of a several liability on the part of defendants, although they were jointly charged. According to appellant's contention, the jury should have been instructed that they must find against both of the defendants or neither, while the instruction as given presented, as we have seen, the more advantageous view of a joint and several liability. The case of Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171, is beside the mark, as here there is no question raised by the pleadings as to principal and agent.

Appellant contends that the statute requiring the plaintiff in an action for libel to file a bond and allowing a counsel fee to defendant in the event that the plaintiff fails to sustain his action is unconstitutional. But the question is hardly reviewable in this proceeding, as the record does not show that a bond was given or anything allowed for attorney's fee; it being recited in the judgment that defendants were entitled to so much for "costs and disbursements," without further specification. But, assuming that the question is properly presented, it is admitted by appellant that the Supreme Court has upheld the constitutionality of said act. Smith v. McDermott, 93 Cal. 421, 29 Pac. 34. It is claimed, however, that the decision is opposed to the principle announced in Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Building Supply Depot v. O'Connor, 150 Cal. 267, 88 Pac. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193; Union Lumber Company v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081. It will be seen, though, upon examination that each of those cases involved, an entirely different statute and conditions from what we have here. In the Ellis Case, supra, it was decided that "a state statute imposing an attorney's fee not to exceed ten dollars, in addition to costs upon railway corporations omitting to pay certain claims within a certain time after presentation, which applies to no other corporations or individuals, is unconstitutional as denying to them the equal protection of the laws." The act not only singled out certain corporations, but, as said by the court: "They do not enter into the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right and pay nothing if wrong." Therefore it was held that they were unequal before the law. For similar reasons in the O'Connor and Simon Cases, supra, it was decided that the provision in the mechanics' lien law allowing an attorney's fee to the plaintiff was unconstitutional and void.

The statute before us makes no such discrimination. The fee is allowed as costs to the party that prevails in the action. Hence the parties do "enter the courts upon equal terms."

If it were contended that it is special legislation and therefore obnoxious to the state Constitution, a sufficient answer would be that it was in effect at the time the present Constitution was adopted.

The record has received careful attention, but we find no prejudicial error therein.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

14 Cal. App. 17

STEINEGUL v. NORTHERN ELECTRIC CO. (Civ. 621.)

(Court of Appeal, Third District, California. Aug. 4, 1910. Rehearing Denied Sept. 3, 1910.)

1. APPEAL AND ERROR (§ 994*)—RULING OF THE TRIAL JUDGE—CREDIBILITY OF WITNESSES.

The credibility of witnesses is for the trial judge, and his determination thereon will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

2. APPEAL AND ERROR (§ 1011*)—RULING OF THE TRIAL JUDGE—CONFLICTING TESTIMONY.

The weighing of conflicting testimony is for the trial court and its ruling thereon will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

3. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—MODE OF TRIAL.

Though a case was tried below on too "broad principles," there was no ground for reversal where the correct result was reached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by C. E. Steinegul against the Northern Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Seymour and A. F. Jones, for appellant. Guy R. Kennedy and Park Henshaw, for respondent.

CHIPMAN, P. J. Plaintiff brings the action as assignee of 24 separate claims for labor performed by certain Japanese for defendant, aggregating $804. The cause was tried by the court, and plaintiff had judgment, from which defendant appeals on bill of exceptions.

The court found that defendant admitted on the trial of the action "that all of the persons named in the complaint had performed labor for the number of days stated in said complaint." The court also found that the defendant hired said persons at the agreed price of $2 per day for ordinary laborers and $2.50 per day for foremen. The sole point in dispute is whether the men were employed by the defendant and to be paid by the defendant, or whether the contract of employment was made with one Howe upon what is termed a "force contract," i. e., Howe to furnish the men and to pay them and the company to pay Howe. No controversy arises over the rate of the wages to be paid, for that fact appeared substantially without conflict, as well as the fact that the men performed the labor claimed in the complaint. The contention of appellant is that the findings rest mainly upon the testimony of witness Howe, which, it is claimed, was shown by the cross-examination to be "inherently improbable," besides being flatly contradicted by several of defendant's witnesses.

We do not feel disposed to spend much time in a discussion of the testimony. We have carefully read all the evidence and do not discover any such inherent improbability in witness Howe's testimony as would justify its rejection. The contract was made by him, as he testified, for the Japanese by telephone communication with defendant's engineer, Barnes, who had authority to make it. Howe testified that the agreement was that the men were to work for defendant and to be paid by defendant; that there was nothing said at the time about a "force contract"; and that he had no interest in the wages and was not to pay the men, nor was he to receive their pay. A telephone operator present in the telephone office when the contract was made corroborated Howe in some particulars. There was evidence that the laborers themselves understood that they were working for the company. There was evidence sharply conflicting with Howe's testimony and tending to show that the contract was of the class known as a "force contract," and Barnes so testified. But the credibility of the witnesses, as well as the matter of reconciling the conflict in the testimony, was to be determined by the trial judge, and we find no sufficient warrant in the record for taking from him this responsibility. It is perfectly clear that defendant has received the benefit of the services rendered upon an agreement to pay the wages charged. The court, we think, upon sufficient evidence, held that the agreement was to pay the assignors of plaintiff.

Some errors of law are assigned as occurring in admitting and excluding certain testimony. The court remarked, towards the close of the evidence: "We have tried the case somewhat on broad principles, not according to the rules of the pleadings or rejecting testimony, but more with the idea of getting the true facts in the case." Some of the rulings indicate that the case was tried upon somewhat too "broad principles"; but we think no serious prejudice to defendant resulted. The court succeeded in "getting the true facts in the case," and that comes pretty near being the ultimate purpose of all trials in courts.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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14 Cal. App. 25

FURTINATI v. BUTTERFIELD et ux.

(Civ. 737.)

(Court of Appeal, Third District, California. Aug. 4, 1910.)

1. SPECIFIC PERFORMANCE (§ 6*)—CONTRACTS ENFORCEABLE—PERFORMANCE OF CONTRACT.

Under Civ. Code, §§ 3386, 3392, providing that neither party to a contract can be compelled to perform it specifically unless the other party has performed either completely or nearly so, together with compensation for any want of entire performance, etc., a party to a contract may compel specific performance, though the adverse party could not do so, and though the party failed to completely perform his part of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9–11; Dec. Dig. § 6.*]

2. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS—JUDGMENT—VALIDITY.

The court on appeal on the judgment roll alone must presume that the evidence justified the findings, and, unless the findings fail to support the judgment, it must stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

3. SPECIFIC PERFORMANCE (§ 65*)—CONTRACTS ENFORCEABLE—PERFORMANCE.

A contract for the sale and purchase of land bound the purchaser to plant land to grapes, and to cultivate the same, and stipulated that, on his failure to perform any part of his duty, the vendor could do so, and hold a lien on the property at specified wages, and provided that plaintiff guaranteed 95 per cent. of living vines at the end of three years. The vendor undertook the replanting of dead vines, and, after such replanting and proper cultivation, there was not a 95 per cent. stand of living vines, but the shortage was but little more than 5 per cent. The purchaser was refused an extension of time to which the contract entitled him to complete his part of the contract, and his failure to produce the 95 per cent. of living vines at the end of the third year was for some unforeseen reason which the contract contemplated might arise. The court gave the vendor compensation for his work and for damages. *Held*, that the court could at the suit of the purchaser compel specific performance of the contract under Civ. Code, §§ 3386, 3392, relating to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 196; Dec. Dig. § 65.*]

4. COSTS (§ 201*)—TAXATION—NOTICE.

Under Code Civ. Proc. § 1005, authorizing the court to prescribe a time less than five days for notice of the hearing of a motion, and section 1033, providing that a party dissatisfied with the costs claimed may file a motion for taxation by the court, the court may fix a time less than five days for the notice of the hearing of a motion to retax costs, and, where a party had notice of the hearing fixed by the court, he could not complain of the order made on his failure to appear at the time fixed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 764–766; Dec. Dig. § 201.*]

Appeal from Superior Court, San Joaquin County; E. W. Norton, Judge.

Action by Mrs. Bianchi Furtinati against F. E. Butterfield and wife. From a judgment for plaintiff and from an order retaxing the costs, defendants appeal. Affirmed.

C. W. Miller, for appellants. Webster & Webster, for respondent.

CHIPMAN, P. J. Action for specific performance of a contract for the sale of land. Plaintiff had judgment, from which and from the order retaxing the costs, defendants appeal.

It appears from the amended complaint that on November 14, 1905, defendants entered into a written contract with plaintiff (wife of P. Bianchi, the action concerns her separate property) by which she was let into possession of certain 33⅓ acres of land belonging to defendants, situated in section 4, township 2 S., range 8 E., in San Joaquin county, plaintiff agreeing to plant the same to Tokay and Zinfandel grapes, in the proportion advised by defendants, prior to February 1, 1906, "to prepare said land for the cultivation of grapes only and is to grant, cultivate, prune, hoe and weed, and is to pay all expenses incurred thereto." It was further agreed that, should plaintiff "fail to perform any part of his (her) duty at the usual and customary time," defendants, "at their own option, perform said duties necessary for the cultivation of grapes, and hold a lien on the property hereinafter described as property belonging to" plaintiff, "at the following wages: One man per day, $2.00; one man and two horses with any kind of tool, $3.50; one man and four horses with plow, $5.00 per day"; plaintiff guaranteed "95 per cent of living vines at the expiration of three years." It was next provided that if plaintiff performed all her duties as agreed, "and then, for some unforeseen reason, fails to get a stand of 95 per cent of living vines, he (she) is to have an extension of time of one year, but no time to exceed four years from this date," all crops were to belong to defendants "and upon the fulfillment of the above agreement, it is understood that" defendants "will give a good and sufficient deed to a certain piece of land described as follows." (A tract of 20 acres in the said section, of which plaintiff was given the possession under the contract.) Plaintiff avers performance on her part and willingness to perform all her said covenants, avers that for good and sufficient reasons she has been unable, through no fault of hers, to get a stand of 95 per cent. of living vines, as provided in said contract, up to and inclusive of January 4, 1909, on which date defendants, without right and against plaintiff's consent, in disregard of her rights, entered upon said premises and kept her out of possession, to her damage in the sum of $1,000, avers that before the commencement of the action she demanded of defendants a good and sufficient deed to said 20-acre tract and to give plaintiff full and peaceable possession thereof, but defendants refused and still refuse so to do. Defendants admitted the execution of said agreement, but denied that plaintiff had carried out its covenants on her part to be performed and denied most of the other material averments of the complaint, aver that during the term of said agreement defendants were compelled to do certain work in the caring for said vines, because of plaintiff's failure in that regard.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

As a separate defense, defendants aver that in January, 1909, a dispute arose between plaintiff and defendants "as to whether or not plaintiff was entitled, as she claimed to be, to an extension of one year under said contract from the 14th day of November, 1908, within which to complete and perform said contract, and that defendants at that time claimed that plaintiff was not entitled to the extension claimed by her, and they accordingly refused to grant plaintiff an extension of one year for the performance of said contract, and so informed the plaintiff herein; but that thereafter these defendants, reconsidering said matter, and on the 1st day of February, 1909, and while there was ample time remaining for the plaintiff herein to perform said contract, * * * offered in good faith to allow plaintiff herein to continue in possession of the premises described in said agreement, and requested her, both orally and in writing, to perform all the terms of said agreement, and to allow her until November 14, 1909, within which to complete and fully perform the said agreement," but plaintiff neglected and refused, etc.

By way of cross-complaint, defendants set forth many of the foregoing facts as to plaintiff's failure to perform her covenants of said contract, and that defendants found it necessary to furnish vines and do the work of replanting and cultivating where vines were missing, which defendants did at their own expense in the year 1909, and for which they claim damages, as provided in said contract, for the labor thus bestowed and also for the cost of the vines and also special damages. Plaintiff in her answer denied most of the averments of the cross-complaint, and upon the issues thus framed the cause was tried by the court without a jury and findings made. The amended complaint was filed in March, 1909, and the findings were made in June, 1909. These findings are adverse to plaintiff upon almost every issue, and the court found that upon the expiration of three years from the date of the contract there was not 95 per cent. of living grape vines upon said tract, "and there is not now, after proper replanting, care and cultivation, in 1909, a 95 per cent. stand of living grape vines on said land, and that the failure of plaintiff to perform said contract in the particulars found, was mainly caused by her own neglect and lack of ordinary care." As to the dispute between the parties which arose in January, 1909, the court found that defendants refused to grant plaintiff an extension of one year and so informed her, but that thereafter, on February 1, 1909, and while there was still time sufficient to do the necessary replanting and cultivation, defendants offered in good faith to grant such extension and requested her to perform all the terms of said agreement and to allow her until November 14, 1909, in which to complete her said agreement, but she refused. The court next finds that by reason of plaintiff's said neglect defendants furnished 3,817 vines, replanted the missing parts of the vineyard, furnished labor, tools, horses, etc., and did all the necessary work in caring for said vineyard at a cost of $246.02, and also found that defendants had been damaged, through plaintiff's said negligence, in the sum of $250. As conclusions of law, the court found that "plaintiff has substantially complied with said written contract;" that defendants are entitled to the sum of $250 damage for plaintiff's failure to comply with said contract and also to the further sum of $246.02 expended by defendants "in caring for said vineyard, and are also entitled to judgment for their costs herein;" and that upon payment of said sums to defendants plaintiff "is entitled to a good and sufficient deed from said defendants to the twenty acres of land described in said contract, free from incumbrances, said payment to be made by the 15th day of September, 1909." Judgment passed accordingly. It would seem somewhat paradoxical for defendants to have findings largely in their favor and plaintiff to have the judgment in her favor, and this is about what defendants claim appears from the record. The evidence is not before us; the appeal being on the judgment roll. There are certain provisions of the Civil Code which appellants seem to have overlooked in their contention for the application of the rule as to mutuality of remedies where specific performance is sought. It does not follow that, because the personal services agreed to be performed by plaintiff could not be specifically enforced, the agreement of defendants could not. Nor does it follow that, because plaintiff failed to completely perform her part of the contract, she could not compel specific performance of defendants' covenants.

Section 3386 provides as follows: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance." Section 3392 reads: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default."

We must presume that the evidence justified the findings, and, unless the findings fail to support the judgment, it must stand. It is contended that the judgment is not thus supported because it is found that plaintiff failed to perform her contract, and did not produce 95 per cent. of living vines agreeably to her guaranty, and hence the court was not justified in drawing the conclusion that the contract had been substantially complied with. The court found that defendants undertook the replanting of the 3,817 dead or missing vines, which the contract contemplated defendants might do upon plaintiff's failure. The court found that, after such replanting and proper care and cultivation, in 1909, there was not a 95 per cent. stand of living vines. How much short of this was the fact is not found, and we must presume that the evidence showed the shortage was but little more than 5 per cent. and this the court concluded was a substantial compliance with the contract, or, as the statute has it, was compliance "either completely or nearly so" which, "together with full compensation for any want of entire compliance" as given by the findings and judgment, it seems to us was an equitable and fair adjustment of the matter in controversy and within the spirit and terms of the code rules.

Appellant cites Pacific, etc., Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 Pac. 623, where the failure to perform something less than one-third of the work required by the contract was held not to be a substantial performance of the contract. Appellant assumes that plaintiff's failure must be tested by the situation at the end of the third year when there were 3,817 vines missing, or, as it is figured out, about 26 per cent. of the vineyard. But the court found that plaintiff sought and was refused an extension of time to which the contract entitled her, and we must presume that the evidence showed her failure to produce the 95 per cent. of living vines at the end of the third year was "for some unforeseen reason" which the contract contemplated might arise. At this point defendants themselves exercised the option which they reserved, and undertook to do the work which plaintiff offered to do. The result was a stand of vines, we must presume, but little short of the 95 per cent. provided for in the contract. For this work as well as for additional damages they were compensated by the money judgment. The court had the right, we think, to look at the facts as they existed at this time rather than as appeared at the end of the third year.

Among the items of defendants' cost bill were two items, to wit: "Reporter's fee, transcribing ninety-one folios at 30c per folio, $27.30"; also the item, "J. L. Torre, fees as interpreter on March 30th when deposition was read to and signed by plaintiff, $3.00." Plaintiff filed a motion to tax the memorandum of costs and to strike out the foregoing items "on the grounds that said items were not necessarily incurred, and that the deposition described therein was taken for the purpose of harassing and intimidating this plaintiff." This motion was filed on September 7, 1909, and on September 14, 1909, plaintiff served upon defendants' attorneys a notice that on September 15, 1909, at 10 o'clock a. m. of that day, at the courtroom of said court, plaintiff would call up her motion "to tax the costs herein for hearing and determination." The court made an order on September 14th, shortening the time within which said motion would be heard to September 15th, at the hour named in the notice. The motion came on to be heard at the hour named, and, defendants not appearing, the hearing was continued until 1:30 o'clock p. m. of said day, and, defendants not then appearing, the court made an order striking from the cost bill said two items. Defendants claim that the court was without jurisdiction to make the order "for the reason that under section 1033, Code of Civil Procedure, the adverse party must be served with a notice in writing, specifying the objection to the cost bill, as well as the time when the application to the court or judge will be made to correct or strike it out." Section 1033 does not require the "party dissatisfied with the costs claimed" to serve a copy of his motion. The statute says he "may * * * file a motion to have the same taxed by the court." Section 1005, Code Civ. Proc., provides that, when a written notice of a motion is necessary, it must be given five days before the time appointed for the hearing; "but in all cases the court, or a judge thereof, may prescribe a shorter time." The court had jurisdiction. Defendants had due notice of the hearing, and cannot now complain that the court made the order upon their failure to appear at the time appointed.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

13 Cal. App. 776

PEOPLE v. JOHNSON. (Cr. 131.)

(Court of Appeal, Third District, California. July 25, 1910.)

1. CRIMINAL LAW (§ 543*)—ABSENT WITNESS — TESTIMONY AT PRELIMINARY EXAMINATION — WHEN ADMISSIBLE — "DUE DILIGENCE."

Under Pen. Code, § 686, subd. 3, providing that in a criminal case the testimony of a witness made under the opportunity for cross-examination by both sides may be admitted in evidence where such witness cannot with "due diligence" be found within the state, defendant's reliance upon the sheriff's promise to produce the witness if possible on the state's subpœna for him was not such "due diligence" as the statute requires, but he should have issued one himself, since the state had the right to withdraw its subpœna at any time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*

For other definitions, see Words and Phrases, vol. 3, pp. 2223–2225; vol. 8, p. 7643.]

2. CRIMINAL LAW (§ 1170*)—ABSENT WITNESS—FORMER TESTIMONY—REFUSAL TO ADMIT — GROUNDS OF ADMISSION — HARMLESS ERROR.

Error in refusing to permit defendant to show that he had used due diligence to obtain a witness so as to allow the admission of his testimony taken on the preliminary examination is not ground for reversal, where the admitted facts show that such diligence had not been used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

3. CRIMINAL LAW (§ 543*)—DUE DILIGENCE TO OBTAIN ABSENT WITNESSES—WHAT CONSTITUTES.

Under Pen. Code, § 686, subd. 3, providing that the testimony of a witness given with an opportunity of both sides to cross-examine may, in a criminal proceeding, be admitted in evidence when with due diligence the witness could not be found within the state, as to what constitutes "due diligence" depends upon the circumstances of each case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*]

4. CRIMINAL LAW (§ 666*)—SUMMONING WITNESSES—DUTY OF PROSECUTION.

While it is the duty of a prosecuting attorney to prosecute fairly and impartially, yet it is discretionary with him as to what witnesses he will summon, and he may withdraw a subpœna for any witnesses that he may deem of no value to the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1567–1579; Dec. Dig. § 666.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Robert C. Johnson was convicted of manslaughter, and he appeals. Affirmed.

E. S. Bell, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of manslaughter under an information accusing him of the crime of murder. This appeal is from the judgment and the order denying defendant a new trial.

The only point made here is on the ruling of the court refusing, it is claimed, to allow the defendant to establish a foundation for the introduction in evidence of the deposition of a witness taken at the preliminary examination of the charge on which the accused was tried. Section 686, subd. 3, Pen. Code, upon which counsel sought to introduce the evidence of said witness, provides, inter alia, that "where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." There is no claim that the witness was dead or insane at the time of the trial. Even if it be true that the court committed in a strict technical sense error in its rulings refusing to permit the defendant to make whatever showing of diligence that he could make, still we think that an examination of the admitted facts will disclose that such rulings were without prejudice.

It appears that, on the close of the case for the people, counsel for defendant called the sheriff of Napa county to the witness stand, and by him undertook to lay the foundation for the introduction in evidence of the deposition of said witness. It may be stated that it is only from the colloquy which took place between counsel for the defendant, the district attorney, and the court, on objections made by the district attorney to questions put to the sheriff by counsel for defendant that the facts may be gathered; there being no other showing in the record upon the proposition. Thus we learn that at the preliminary examination one Ira M. Wilson testified on behalf of the people. It further appears from a statement by defendant's counsel that after the magistrate made the order committing the defendant to trial a subpœna had been issued at the request of the district attorney, commanding said witness to appear at the trial of the defendant as a witness for the people, and that said subpœna was placed in the hands of the sheriff for service. It is admitted by counsel for the defendant that he did not himself cause a subpœna to be issued for said witness, but he stated to the court, when endeavoring to introduce proof preparatory to the introduction of Wilson's deposition, that he had talked with both the sheriff and the district attorney prior to the date fixed for the beginning of the trial, informing them that he desired Wilson as a witness for his client; that he was told by the sheriff that the latter had in his possession a subpœna for Wilson issued at the request of the people, and that he (the sheriff) was making every effort and would continue to make every effort to find and subpœna and have said witness at the trial; that the district attorney stated to him that he (district attorney) would exert his full power to cause the subpœna to be served and have the witness at the trial. In order to lay the foundation for the admission of Wilson's deposition in evidence, the attorney for the defendant sought to show these facts as establishing or tending to establish that the witness could not, after the exercise of "due diligence," be found within the state. The court sustained objections by the district attorney to this line of inquiry, holding that the defendant could not establish the diligence required by the statute unless he could show that he had himself caused a subpœna to be issued for the witness. In other words, the court in effect held that proof of the issuance of a subpœna for Wilson on the motion or at the request of the district attorney would not tend to establish "due diligence" on the part of the defendant, where the latter himself had failed to secure a subpœna for the witness; "that," to use the language of the judge, "it was the duty of the defense, if they wanted Mr. Wilson, to issue process of this court to bring him here."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It has been correctly said that "diligence" is a relative term incapable of precise or exact definition, and that whether the "due diligence" as contemplated by the statute has been exercised in a given case must be determined by and upon the facts and circumstances of such case. See Heintz v. Cooper, 104 Cal. 669, 38 Pac. 511. The circumstances of each case must, therefore, stand, as the criteria by which the courts must determine whether the amount of diligence required has been exercised and shown. In other words, there is and can be obviously no iron-clad rule which of itself definitely fixes or can so fix or measure the quantum of diligence which will satisfy the requirements of the statute in all cases. As is said in the case we have cited, what would constitute "due diligence" in one case might fall far short of it under another and different state of facts. We think it may be safely stated, however, that as a general proposition where a party to an action whether criminal or civil depends entirely upon his adversary for the production of a witness by whose testimony he expects to sustain his action or defense, and can make no further showing, negligence rather than diligence is thus disclosed. And this seems to have been the course pursued by counsel for defendant. According to his own admissions, he took out no subpœna for Wilson, but merely stated to the sheriff that he desired to use that individual as a witness for his client, and requested the officer to put forth every effort to secure his attendance at the trial by means of the subpœna which had been issued for him at the instance of the district attorney. This action on the part of counsel for defendant did not amount to that diligence which the statute contemplates shall be shown to have been exercised in order to justify a trial court in permitting, under the terms of section 686 of the Penal Code, the deposition of an absent witness to be read to the jury. Assuming it to be true, as counsel for the appellant declared to the court below, that the sheriff assured him that he would serve the subpœna, if possible, and thus procure Wilson's presence at the trial if he could be found within the state, and that the district attorney made substantially the same promise, which is denied by the district attorney, yet the people's attorney had the legal right, if disposed to exercise it, to withdraw his own subpœna at any time and to advise the sheriff that, so far as he was concerned, he need make no further effort to procure the attendance of the witness at the trial. In other words, while it is the sworn duty of a district attorney to fairly and impartially prosecute persons accused of crime, and to protect as well the individual rights of an accused person as those of the whole people, whose laws he is specifically enjoined to uphold and maintain, yet there is and must be committed to his judgment many matters of discretion in the discharge of his duties as a public official. When he proceeds with the trial of a criminal case, it must be assumed that his investigation of the facts has persuaded him of the guilt of the accused. He is under no legal obligation to subpœna and much less to introduce as a witness for the people a person whose testimony he knows will be adverse to the theory of the prosecution, for, having been convinced of the guilt of the accused, it would be widely at variance with the policy of any sensible lawyer to introduce proof destructive of his case which he may perhaps believe has been conceived in a misapprehension of the facts or in a desire to exonerate the defendant through false testimony. Therefore, if in any case he should decide that he does not need or require a certain witness, and in consequence withdraws before the trial a subpœna which he had previously caused to be issued for such witness, he must be assumed to have had a just and sufficient reason for his course, and has thus acted in strict accord with his duty under the law with respect to the case as to which such subpœna has been issued and with no purpose or desire to thereby unjustly hamper the defendant in a full and fair presentation of whatever defense he may intend to interpose to the charge alleged in the information or indictment. We do not say that the record discloses that the district attorney took this course in the case at bar. We only make these suggestions for the purpose of showing that a party should not rely upon his adversary for the production of a witness desired by him, and that in doing so, and thus relying upon securing the attendance of the witness or a diligent effort to secure him, he cannot thereafter claim, in the absence of such witness, that he has himself exercised that diligence which alone would entitle him to have his deposition read.

It is very clear, as we have shown, that the defendant here, having relied entirely upon the subpœna issued by the people for the procurement of Wilson as a witness, and having himself admittedly taken no other steps to secure the attendance of the witness, would, had the court permitted him to prove the facts which he claims he could have shown, have utterly failed to lay such a foundation as would have justified the court in allowing Wilson's deposition to be read to the jury at the trial.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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14 Cal. App. 12

PEOPLE v. MACK. (Cr. 208.)

(Court of Appeal, First District, California. Aug. 2, 1910.)

1. WITNESSES (§ 374*)—IMPEACHMENT—STATEMENT OF OPINION AS TO GUILT—WHEN ADMISSIBLE.

While the statement of a witness made prior to the trial as to his opinion of defendant's guilt is not admissible to contradict him as to his statement of facts, yet his statement in a conversation with another witness that defendant "ought to be in jail" was admissible to show his bias in favor of defendant, for whom he was testifying on the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1202; Dec. Dig. § 374.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—HEARSAY—TESTIMONY—HARMLESS ERROR.

Where a witness without objection gave the hearsay testimony that another party had stated that defendant had robbed her, his subsequent testimony that the party also said that "she hated to think that he would rob her" was a harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§§ 419, 420*)—HEARSAY EVIDENCE—ADMISSIBILITY.

A witness could not testify as to his conversation with the officer after arresting defendant; it being hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. §§ 419, 420.*]

4. CRIMINAL LAW (§ 369*)—EVIDENCE OF ANOTHER CRIME—ADMISSIBILITY.

In a prosecution for robbery, evidence that defendant and the prosecuting witness were subsequently together with some whisky containing morphine was admissible to show that defendant was attempting to induce the witness not to prosecute him, since incriminating evidence is admissible, although it tends to connect defendant with another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

5. CRIMINAL LAW (§ 361*)—EVIDENCE—ADMISSIBILITY.

Where, in a prosecution for robbery, evidence had been admitted tending to show that defendant had put some morphine in whisky so as to enable him to induce the prosecuting witness to stop the prosecution by giving her a drink, evidence that a month before a party had left some white powders with the witness was inadmissible to show that the witness herself put the morphine in the whisky, in the absence of any evidence connecting such powder with the morphine.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 361.*]

6. CRIMINAL LAW (§ 1172*)—IMPERTINENT INSTRUCTION—HARMLESS ERROR.

In a prosecution for robbery, although an instruction in regard to corroborative evidence was wholly inapplicable to the case, no evidence of an accomplice having been relied upon, yet where it was a correct statement of the law, and instructions pertinent to the case were fully given, no harm could result therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3159; Dec. Dig. § 1172.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Charles Mack was convicted of robbery, and he appeals. Affirmed.

Philip M. Walsh, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of grand larceny for stealing $110 from Mrs. Edith McRea, and upon this appeal it is not contended that the evidence is not sufficient to support the verdict. The only grounds urged for a reversal relate to some rulings of the court upon objections to evidence and in giving a certain instruction.

The larceny in question was committed at premises kept as a saloon by one Le Forte. Le Forte was called as a witness on behalf of defendant and gave testimony favorable to defendant. Upon cross-examination this witness was asked over the objection of defendant two questions, as to whether or not he had two certain conversations with Mrs. McRea. The words of the several conversations were repeated in the questions, and if they occurred showed that the witness was endeavoring to induce Mrs. McRea to drop the prosecution of the defendant, and to absent herself from the county when needed as a witness. In the purported conversation as set forth in the questions was a statement by the witness that the defendant ought to be in jail. The witness answered "No" to each question; and subsequently, over the objection of defendant, the prosecution was allowed to prove that he did have the conversations as set forth in the questions. The only part of the conversations about which there can be any question is the part in which the witness stated that defendant ought to be in jail. If the conversation had been given in evidence simply to contradict the testimony of the witness, it would probably have been inadmissible. The general rule is that evidence that a witness has stated an opinion as to the guilt of defendant may not be introduced to contradict him as to the facts to which he has testified. Such is the character of the cases cited by appellant, to which many more might be added along the same line. But the evidence containing the conversations between the witness Le Forte and Mrs. McRea was not for the purpose of contradicting him as to the evidence he had given as to the facts of the case, but was for the purpose of showing his interest and bias in favor of the defendant on trial. That evidence tending to show the interest of a witness in the case may be given cannot be doubted, and evidence that a witness has endeavored to induce the prosecuting or any other witness to absent himself from the trial or to drop the prosecution of the case is clearly of such character. The bias and interest of the witness in the case is a matter going to the weight to be given his testimony. People v. Lee Ah Chuck, 66 Cal. 667, 6 Pac. 859; People v. Thompson, 92 Cal. 506, 28 Pac. 589; People v. Wong Chuey, 117 Cal. 627, 49 Pac. 833; Lewis v. Steiger, 68 Cal. 200, 8 Pac. 884; People v. Murray, 85 Cal. 350, 24 Pac. 666. The fact that the witness in the conversation in which he attempted to dissuade the prosecutrix from appearing as a witness, also stated as his opinion that the defendant ought to be in jail, simply emphasized the proof of his interest and bias. It showed the length to which the witness was willing to go to aid his friend, the defendant. The court did not err in admitting this testimony.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Without objection the witness Le Forte testified to a conversation with Mrs. McRea, in which she stated to Le Forte that the defendant had robbed her. Appellant now complains that the court permitted the witness Le Forte to further testify upon cross-examination that Mrs. McRea also said that "she hated to think that he would rob her, or words to that effect." This evidence was hearsay, but it is impossible to believe that any injury could have been done to defendant thereby in view of the fact that the witness had already twice or more testified without objection that Mrs. McRea stated that defendant had robbed her. The court did not err in refusing to allow the witness Le Forte to testify to a conversation he claimed to have had with Officer Kyle after the arrest of the defendant. No questions had been asked the witness by the prosecution about such conversation, and no evidence of such conversation had been given by anyone. The rejected evidence was purely hearsay, and for that reason was not admissible.

The appellant contends that the court erred in permitting evidence to be given by the prosecution that certain whisky brought to the house of Mrs. McRea by defendant and two companions two days after she had sworn to a complaint charging him with the larceny contained morphine. It is insisted that this evidence tended to prove a distinct crime against defendant in no way connected with the charge for which he was on trial. The evidence tends to show that, on the occasion of the visit of defendant and his two witnesses to Mrs. McRea, he, in effect, attempted to dissuade her from prosecuting him for the larceny. Mrs. McRea did not in fact drink any of the whisky, but the circumstances in evidence were such that the jury might well infer that defendant expected that she would, and that she would thus be reduced to a condition in which she would the more readily consent to refrain from an effective prosecution of him. The evidence concerning the whisky tended to connect the defendant with an unfair effort to dissuade the prosecutrix from prosecuting the defendant, and thus tended to show a consciousness of guilt upon his part. For this purpose it was admissible. Evidence that logically tends to connect a defendant with the commission of the crime charged is admissible, although it also tends to connect him with another crime. People v. Cook, 148 Cal. 340, 83 Pac. 43; People v. Sanders, 114 Cal. 216, 46 Pac. 153; People v. Argentos, 156 Cal. 720, 106 Pac. 65; People v. Soeder, 150 Cal. 15, 87 Pac. 1016.

Objection is made that the court refused to allow evidence that at some time, stated as a month or two before the whisky was brought to Mrs. McRea, one Johnson left with her a white powder. Counsel for defendant claims that from this fact the jury could infer that Mrs. McRea herself put morphine in the whisky. No competent evidence was offered that the powder was in fact morphine, or that Mrs. McRea retained it in the house at the time the whisky was brought there. Indeed, the circumstances that counsel stated to the court he expected to prove about the leaving of the powder would strongly indicate that it would not be preserved. We think the offered evidence was too remote and inconsequential to justify a reversal for its exclusion.

The court gave to the jury an instruction concerning corroborative evidence, which is not claimed to be erroneous as a statement of law, but is claimed to be wholly inapplicable to this case, as the prosecution in no way relied on any evidence of an accomplice. The instruction does not appear to us to be pertinent to any theory of the case, but it was a correct statement of law in the abstract, and, as the court fully and fairly instructed the jury on the law pertinent to the case, the challenged instruction could do no harm.

The appellant also makes the point of misconduct on the part of the district attorney. We have examined the record in this regard, and find nothing to support the claim of appellant.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 9

PEOPLE v. SCHWARTZ. (Cr. 248.)

(Court of Appeal, First District, California. Aug. 2, 1910.)

1. GAMING (§ 85*)—INFORMATION—CONSTRUCTION.

The fair interpretation of an information charging that defendant offered to bet with the spectators or any of them at a certain ball game on the result thereof at certain odds; and, on the offer being accepted by one of the spectators, he received and recorded said bet, is that defendant was engaged publicly in offering to bet with any and all comers, and that the bet recorded was of that character, which character of betting is within Pen. Code, § 337a, declaring a punishment for one who records or registers bets on the result of any contest of skill or contingent event.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 85.*]

2. GAMING (§ 98*)—RECORDING BET—EVIDENCE.

Evidence that at the time defendant made a bet he made a memorandum on a piece of paper, and that he tore it to pieces when the officer arresting him attempted to get it, is sufficient evidence that he recorded the bet within the prohibition of Pen. Code, § 337a.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 98.*]

3. CRIMINAL LAW (§ 369*)—EVIDENCE—SIMILAR ACTS.

Evidence that between the earlier innings of a ball game defendant walked back and forth among the spectators, offering certain odds that a certain one of the clubs would not score, and that a number of the spectators indicated their acceptance of such offer for various amounts, tends to show that defendant was actually engaged in the business of bookmaking, and, such acts being similar to the one charged in the indictment, that he offered to bet at such odds with the spectators or any of them that such club would not score in the eighth inning and on the offer being accepted by a spectator recorded the bet, in violation of Pen. Code, § 337a, declaring a penalty for recording or registering bets, and having been committed at about the same time, illumined the act charged, and was admissible to show its true character.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 369.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Charles Schwartz was convicted of recording a bet, and appeals. Affirmed.

T. I. Fitzpatrick and John J. Greeley, for appellant. U. S. Webb, Atty. Gen., C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

KERRIGAN, J. The defendant was informed against by the district attorney of the city and county of San Francisco, charged with a violation of the provisions of section 337a of the Penal Code. He was tried, convicted, and sentenced to imprisonment in the county jail for the term of 30 days. This appeal is from the judgment.

In substance the information charges that at a certain game of baseball played between the San Francisco and Oakland baseball clubs the defendant offered to bet with the spectators or any of them at the ratio of 3½ to 1 that the San Francisco baseball club would not score in the eighth inning of said game; that John Liebold, one of the spectators, accepted the offer, and a bet at the odds mentioned was then and there made, whereupon defendant "received and recorded said bet," and subsequently, the San Francisco baseball club having scored in the eighth inning, the defendant paid the amount of the bet.

The first question raised by appellant is whether the facts stated in the information constitute a public offense. The information is founded upon that portion of said section 337a which reads as follows: "Every person * * * who records or registers bets or wagers, or sells pools upon the result of any trial or contest of skill * * * or of any lot, chance, casualty, unknown or contingent event whatsoever * * * is punishable by imprisonment in a county jail or state prison for a period of not less than thirty days or not exceeding one year." As just stated, it is charged that the defendant offered to bet with the spectators or any of them at a certain baseball game at given odds on a named contingency, and, upon the offer being accepted by one of the spectators, he registered or recorded the bet. We think the fair interpretation of this language is that the defendant was engaged publicly in offering to bet with any and all comers, and that the bet charged to have been recorded was a bet of that character. This character of betting we believe comes within the language and intent of the act. The language of the information that the defendant "received and recorded said bet" is to be construed in connection with the context; and, as thus construed, we have no hesitation in holding that a violation of the portion of the act quoted is charged.

It is next contended that the evidence does not show that the defendant recorded the bet. With this we cannot agree. It shows, in effect, that at the time the bet was made the defendant made a memorandum on a piece of paper; that upon the arresting officer attempting to get this paper the defendant tore it to pieces. This evidence was sufficient to warrant the jury inferring that the defendant recorded the bet. It is true that the defendant and the person with whom he made the bet controverted this evidence; but the jury weighed the testimony on both sides, and, having reached the conclusion from the acts testified to that the bet was registered, we have no power or inclination to interfere. The evidence in all respects is sufficient to sustain the allegations of the information. Evidence was introduced to show that during various innings of the game the defendant went among the spectators and made certain offers to bet. One witness testified that commencing about the second inning the accused would walk back and forth among the spectators, and say, "Three and a half to one that the San Francisco club won't score." A number of men in the crowd would say, for example, "Give me a dollar," and some would hold up two fingers, and some would say, "Make it five." The next inning he would repeat the same thing, walking back and forth, calling out "Three and a half to one they won't score." In the eighth inning he did the same thing.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant claims that this testimony was inadmissible; and, while it went in without any objection from him being interposed, nevertheless he asserts that his motion to strike it out should have been granted. But this evidence tended to show that the defendant was actually engaged in the business of bookmaking, and the acts referred to being similar to the one averred in the information, and having been committed at about the same time, illuminated the act charged, and were admissible to show the true character of the act charged.

No error was committed by the trial court in its refusal to give certain instructions requested by defendant.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

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13 Cal. App. 789

PEOPLE v. VERDUZCO. (Cr. 133.)

(Court of Appeal, Third District, California. July 30, 1910. Rehearing Denied by Supreme Court Sept. 20, 1910.)

1. Homicide (§ 250*)—Evidence.

In a prosecution for homicide, evidence *held* to sustain a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 516; Dec. Dig. § 250.*]

2. Criminal Law (§ 742*)—Credibility of Witnesses.

In a criminal prosecution, the responsibility of passing on the credibility of the witnesses and the probability of their testimony is on the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1719–1721; Dec. Dig. § 742.*]

3. Criminal Law (§ 789*)—Homicide (§ 30*)—Aiding and Abetting—Instructions.

In a prosecution for homicide, the state relied on evidence that the fatal shot was fired by accused and also on a common understanding between accused and his brother to kill or injure deceased, while defendant claimed that his brother fired the shot, and that defendant did not participate in the difficulty. *Held*, that instructions that if defendant and his brother agreed that they together would commit a felonious assault on deceased, and, pursuant thereto, defendant's brother made such assault, with defendant aiding and abetting, and during the assault the brother killed deceased, defendant would be equally guilty under the law, but that, if there existed a reasonable doubt as to whether defendant shot and killed deceased, then the jury should find him not guilty, unless they were convinced from the evidence to a moral certainty and beyond a reasonable doubt that he aided and abetted, or advised and encouraged the commission of the crime, etc., were correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71–74, 76–81, 1846–1849, 1904–1922, 1960, 1967; Dec. Dig. § 789;* Homicide, Cent. Dig. §§ 48–51; Dec. Dig. § 30.*]

4. Criminal Law (§ 789*)—Instructions—Reasonable Doubt.

A statement in an instruction on reasonable doubt that everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt, and that the reasonable doubt referred to was that state of the case, etc., did not render the instruction erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1904–1922, 1960, 1967; Dec. Dig. § 789.*]

5. Criminal Law (§ 789*)—Instructions—Reasonable Doubt.

An instruction on reasonable doubt was not erroneous because its concluding clause directed that, while each juror should decide for himself, it was his duty to consult with the other jurors with the view of reaching an agreement if they could without violence to their individual understanding of the evidence and instructions of the court, and that they should not hesitate to sacrifice their views or opinions of the case when convinced that they were erroneous, even though in so doing they deferred to the views or opinions of others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1904–1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Jose Verduzco was convicted of murder, and he appeals. Affirmed.

R. E. Rhodes and G. W. Mordecai, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was charged by information with the crime of murder, was convicted as charged, and sentenced to imprisonment for life. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

The homicide occurred on the night of July 4, 1909, at the house of one Jesus Belmontes and his wife, Catalina, with whom defendant and his brother, Seferino Verduzco, and deceased, Constantino Soto, were at the time living; the last three named being laborers and working at a mill near the town of Madera. It appeared by the testimony of Mrs. Belmontes that deceased had his supper about 5 o'clock and left the house. Defendant and his brother had supper about half an hour later and also left the house. About

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8 o'clock, or shortly after, deceased and Seferino returned to the Belmontes house, deceased entering immediately behind Seferino. The deceased sat down upon a bench near a table, and Seferino went to his room, where he remained about five minutes. He re-entered the room where deceased still sat upon the bench, and as he passed out he said to deceased, "I don't want any business with you," and the deceased replied: "Neither do I with you." Mrs. Belmontes testified: "In about 10 minutes the two Verduzcos returned, Seferino Verduzco and Jose Verduzco. * * * Jose Verduzco in front and Seferino Verduzco behind, both entered about the same time, * * * and when Jose entered he said: 'What's up? What passes?' * * * When Verduzco said, 'What's up, what passes,' the deceased replied, 'Nothing is up, nothing passed.'" He was at that time sitting on the same bench where Seferino left him. Mrs. Belmontes was sitting on the opposite side of the table with a child in her arms. She testified that Jose passed one side of her and Seferino on the other towards the bench where deceased sat. When these words passed between Jose and deceased, Mrs. Belmontes' husband came out of the bedroom adjoining and placed himself at a point between Seferino and deceased, the latter meantime having arisen to his feet. Mrs. Belmontes testified: "Q. Did any words pass at that time? A. No, sir; when my husband got in between he said: 'What are you going to do?' When Jose Verduzco replied: 'What's up with my brother is with me.' Jose Verduzco then fired the shot." Deceased died from the effect of the wound in about one hour. Jesus Belmontes testified: "When I heard them saying, this man saying: 'What's up, what passes,' is when I came out and told them I did not want any trouble in my house. Q. Who were in the room when you came out? A. Jose Verduzco and Seferino Verduzco. Soto was there and my wife. Q. Where was Seferino Verduzco? A. He was at one side of the table and they surrounded him from each side. * * * Q. Did you see any weapons in the hands of either one of the Verduzco boys? A. When Jose Verduzco said, 'What is with my brother is with me,' they were close in on him and Seferino had a knife, and then I got between him and Seferino. I got in between Jose and Seferino, saying that they wouldn't strike him, and then the deceased turned around as he indicated by his gestures, towards Jose Verduzco, and then he fired the shot. * * * Q. How did you know that Seferino had a knife? A. Because I saw it when he took it out to strike him. Seferino was nearest to my bedroom. Q. Did you see the flash of the shot? A. When I knew it was a shot, just because I heard the sound and my face was dazed in fire, when I got between Seferino and Jose to defend him against the knife. Q. Did you see the flash come from Jose or Seferino? A. From Jose. I went to the door quickly and pulled the door to and hollered for help." Defendant and his brother immediately went to this door, forced it open, and Seferino escaped, and has not been heard of since. Jose returned to the Belmontes house and was there arrested about 10 o'clock the same night.

On the 8th of July, following the homicide, defendant made a voluntary statement under oath, in which he claimed that at the request of his brother, Seferino, he went to the Belmontes house; that he was entering the door as he heard a shot and two men ran out whom he did not recognize; that he did not see his brother in the room where the shot occurred, and that he did not see him afterwards; that Mrs. Belmontes had denounced him (Jose) as the perpetrator of the killing, but that he was wholly innocent; that he knew of no trouble between deceased and his brother, Seferino, and there was none between deceased and himself. On the 7th of August following he made another voluntary statement, at variance with his former statement, in which he repeated a conversation he had with his brother, Seferino, in which the latter spoke of some altercation between him and deceased after which Seferino told him of their going to the Belmontes house together and of Seferino entering his room and coming out again and leaving the house; that not long after the two brothers returned to the house, and that deceased uttered "some malediction towards his brother" and his brother shot him. It appeared that the three men came from the same part of Mexico, and had known each other there, but there was no evidence of any quarrel between them except as above stated. The evidence all tended to show that one of the two Verduzco brothers committed the crime, and the only other witnesses to the tragedy both testified that defendant was the one who fired the fatal shot.

The evidence is challenged as insufficient for its inherent improbability, because, as was shown, defendant had borne an excellent character for peace and quiet; that the younger Verduzco fled and defendant stood his ground, conscious of innocence; that defendant had had no trouble of any kind with deceased and had no ill feeling toward him, while his brother entertained feelings of hostility toward deceased and was a person of violent temper; that defendant is not shown to have had a pistol, while it did appear that his brother could and probably did procure the weapon when he went into their bedroom, as narrated by the witnesses; that it is improbable that Belmontes would have pursued Seferino and paid no attention to Jose if it be true, as he testified, that Jose fired the shot; that the witness Catalina Belmontes first stated to witness Bancroft, who came to the house soon after the affray, that Seferino fired the shot, and that her explanation why she did this and afterwards accused Jose is not satisfactory; that Belmontes was shown to have been too deaf to have heard what he testified to, and, furthermore, that his wife first stated that he was in bed when the Verduzcos entered the house. We shall not undertake to reconcile the alleged improbability of the testimony of the two witnesses to the homicide or point out how the jury might have been able reasonably to do so. Not the slightest suspicion was by the evidence cast upon any one but one or both of the Verduzcos as the perpetrators of the crime. Jose's statement, upon entering the room with his brother, that "What is with my brother is with me," coupled with the other proven facts, was sufficient justification for the jury to infer a common understanding between Jose and Seferino when they confronted the deceased. We find nothing not susceptible of reasonable explanation, in the light of all the evidence, which seriously conflicts with the truth of the narrative of the killing as given by the only two eye-witnesses. The responsibility of passing upon their credibility as well as upon the probability of their testimony was upon the jury, and we can find no warrant in the record for assuming this responsibility.

The court instructed the jury that if they were satisfied beyond a reasonable doubt that deceased was killed by the inflicting of a gunshot wound, and that, immediately prior thereto, defendant and his brother "reached an understanding that they two together would commit a felonious assault upon said Soto and would kill and murder him, and that, in pursuance of said understanding, said defendant and his brother Seferino Verduzco did make such assault upon Soto, with the defendant and his brother aiding and abetting each other therein, and during such assault Soto was shot, killed, and murdered by one of said assailants according to a common, prior understanding, then, under such circumstances, the court instructs you that no matter which of the two named assailants fired the alleged fatal shot, both are equally guilty under the law." The court also in this connection instructed the jury: "If there exists in your minds a reasonable doubt as to whether the defendant shot and killed the deceased, then you shall find defendant not guilty, unless you are convinced from the evidence to a moral certainty and beyond a reasonable doubt that the defendant aided and abetted, or advised an encouraged another in the commission of the crime. In this connection you are instructed if you believe from the evidence that the deceased was unlawfully killed by Seferino Verduzco, and there exists in your minds a reasonable doubt as to whether the defendant aided and abetted, or advised and encouraged the commission of the crime, then your verdict must be not guilty." It is true that the prosecution relied upon the evidence that the fatal shot was fired by defendant, but it also relied upon a common understanding between the brothers Verduzco. Furthermore, the contention of defendant was that defendant's brother, and not defendant, was the guilty assailant, and fired the shot. The evidence presented the case where there might be doubt as to which one of the two assailants was the immediate cause of the killing, and notwithstanding such doubt might be equally guilty if the jury found the facts to be as pointed out in the instructions complained of. We see no error in these instructions.

Error is assigned in the giving of the instruction on reasonable doubt. We can discover in this instruction no material departure in phraseology or substance from the stereotyped and frequently approved instruction that has come down to us from Judge Shaw in the trial of Prof. Webster. The statements that "everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt" and that the reasonable doubt referred to "is that state of the case," etc., have too often survived the criticism to which they have been subjected to leave their correctness any longer in doubt.

The court instructed the jury as follows: "In conclusion, you are instructed that if, after a full consideration of the entire evidence in this case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so doing for the single reason that a majority of the jury should be in favor of a verdict of guilty. In this connection you are instructed that juries are impaneled for the purpose of agreeing upon verdicts if they can conscientiously do so. They are admonished at each recess of the court not to form an opinion as to the merits of the case until it shall be finally submitted to them, and, when it is so submitted, it is the duty of jurors to deliberate and consult together with the view of reaching an agreement if they can without violence to their individual understanding of the evidence and instructions of the court. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others."

The objection to this instruction is aimed particularly at the concluding paragraph by which it is urged that the individual juror was required to render a verdict on the opinion of his fellow jurors. The essence of the instruction is that each juror should decide for himself but that it is his duty to consult with the other jurors, counsel with them, "with the view of reaching an agreement if they can without violence to their individual understanding of the evidence and instructions of the court." But, if convinced that his views are erroneous, a juror should defer to the views of others. It is claimed that the instruction is "diametrically antagonistic" to the rule announced in People v. Dole, 122 Cal. 488, 55 Pac. 585, 68 Am. St. Rep. 50, where the court held that an instruction, as asked, should have been given, which said, among other things: "If after a consideration of the whole case any juror should entertain a reasonable doubt of the guilt of the defendant it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so doing for the single reason that a majority of the jury should be in favor of a verdict of guilty." The difference between the two cases is obvious. In the instruction now before us, the very proposition laid down in the Dole Case is stated, and it was only when the juror should become convinced that his views of the case were erroneous that he was told that he should defer to the opinions of the other jurors.

We discover no prejudicial error in the record, and the judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

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14 Cal. App. 20

CONDE et ux. v. SWEENEY, Sheriff.
(Civ. 741.)

(Court of Appeal, Third District, California. Aug. 4, 1910.)

1. Injunction (§ 136*)—Temporary Injunction—Complaint—Sufficiency.

A complaint in an action by a vendor of mining claims to restrain a levy on machinery placed thereon by the purchaser in possession under a contract stipulating that the property shall belong to the vendor until paid for, which alleges that the machinery has become and is a fixture attached to the mines and is the property of the vendor, is sufficient to justify a temporary restraining order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

2. Mines and Minerals (§ 83*)—Contracts of Purchase—Rights Acquired.

A purchaser of mining claims in possession under a contract stipulating that the claims and all the machinery placed thereon in working the mines shall be the property of the vendor until the purchase price is paid, and permitting the purchaser to work and develop the mine and extract ores and appropriate the proceeds, may prospect and develop the mines, but he may not commit waste or remove from the situs of the mines that which constitutes a part of the realty other than ore bodies.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 212–215; Dec. Dig. § 83.*]

3. Fixtures (§ 21*)—Vendor and Purchaser—Attachment.

Where a purchaser in possession of mining claims under a contract that the claims and machinery placed thereon should belong to the vendor until the purchase price was paid placed machinery on the claims for use in working the mines and the machinery became fixtures attached to the mines, the machinery could not be attached by a creditor of the purchaser while the purchase price remained unpaid.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 47–56; Dec. Dig. § 21.*]

4. Appeal and Error (§ 907*)—Presumptions.

Where a cause was heard on oral and documentary evidence not brought up on appeal, the court must presume that the evidence was sufficient to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2914; Dec. Dig. § 907.*]

5. Appeal and Error (§ 768*)—Record—Statements in Brief.

The court on appeal cannot act on a statement of fact made in respondent's brief, and not denied by appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3103; Dec. Dig. § 768.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by James E. Conde and wife against William Sweeney. From an order granting an injunction pendente lite, as prayed for in the complaint, defendant appeals. Affirmed.

J. B. Curtin, for appellant. Street & Street and F. P. Otis, for respondents.

CHIPMAN, P. J. This is an action to restrain the defendant from levying a writ of attachment. In their complaint the plaintiffs alleged ownership and possession of certain quartz mining claims, known as the Dreisam mines, "together with all the fixtures and all other machinery and tools used in working and developing said mines"; that on June 15, 1908, plaintiffs entered into a written agreement with the Parlin Gold Mining Company, whereby plaintiffs agreed to sell said mines to said company for a certain sum which was to be paid on or before May 1, 1909; that for a consideration the time of payment was extended to September 1, 1909; that about June 15, 1908, said company entered "in and upon said mines and proceeded to work and develop the same and in the working and developing of said mines placed and used thereon certain electrical machinery," being certain motors, lighting transformer, and pump, fully described; "that by the terms of said agreement all machinery and tools used by the Parlin Gold Mining Company in the working and development of said mines became, have been, and now are fixtures attached to said mines and ever since said motors and electrical machinery have been placed upon and used in the working and development of said mines have been and now are the property of said plaintiffs until said mines shall have been fully paid for by said Parlin Gold Mining Company in accordance with the terms of said agreement;" that on August 29, 1909, defendant, as sheriff, by virtue of a writ of attachment issued out of the superior court of Tuolumne county, in an action wherein one Claytor is plaintiff and the Parlin Mining Company, a corporation, is defendant, levied upon said property and "did commence the moving of said electric motors, lighting transformer and electric pump from said Dreisam mines" and said defendant as such sheriff threatens to continue the removal of said machinery "from off said property, all of which will cause these plaintiffs great and irreparable injury; that it is necessary that defendant be restrained from moving from said mines said electric motors and electrical machinery to prevent a multiplicity of judicial proceedings." Plaintiffs pray that defendant be restrained from levying upon said property and machinery, "and from interfering with or taking or removing any of said machinery from said Dreisam mines to which they are now affixed" and for further relief.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint was filed on August 30, 1909, and on the same day the court made its restraining order and fixed the hearing for September 3, 1909, at which time, by consent of the parties, the order to show cause and time in which defendant was to plead was continued to September 24, 1909, at which time defendant filed a general demurrer, a motion to dissolve the restraining order on the ground that the complaint does not show sufficient facts to justify the restraining order, and also filed an answer to the complaint. On September 25, 1909, and before the hearing, plaintiffs served and filed a supplemental complaint alleging that they are now and during all the times mentioned therein they have been the owners of said mining property and said electrical machinery, and that since September 1, 1909, and after the filing of the original complaint, the agreement set forth in plaintiffs' complaint expired and terminated and the deed placed in escrow * * * has been withdrawn by plaintiffs, and the said company now has no right, title or interest in said described mines; that defendant threatens to remove from said mines said machinery, described in said original complaint and such removal will work great and irreparable injury to plaintiffs. On October 4, 1909, defendant served and filed his answer to said supplemental complaint, and on October 8, 1909, the court made its minute order denying defendant's motion to dissolve the restraining order and granted the injunction upon plaintiffs giving bond for $500. The formal order was made October 9, 1909, and recites that the hearing came on regularly September 24, 1909, "and, after the introduction of oral and documentary evidence, the hearing was continued for argument until Monday the 27th day of September, 1909, and on said date said matter was duly argued by the respective counsel and submitted to the court for its decision." In his answer to the original complaint defendant denies, on information and belief, most of its averments. Likewise he denies the averments of the supplemental complaint, on information and belief, admits that he threatens to remove from said mines said fixtures as set forth in plaintiffs' original complaint but denies that it will work great or irreparable injury, avers that he is acting in obedience to a writ of attachment in an action wherein one Claytor is plaintiff and Parlin Mining Company is defendant, as alleged in the original complaint. Defendant appeals from the order "granting plaintiff an injunction pendente lite, as prayed for in the complaint," claiming that neither the order denying the motion to dissolve the restraining order nor the order granting the injunction should have been made, for the reason that there was no sufficient showing made in the complaint.

The complaint alleged that the property which defendant threatened to remove had become fixtures to the realty and part thereof, and that, by the terms of the agreement, it was to belong to plaintiffs as did the other realty "until said mines shall have been fully paid for by the said Parlin Gold Mining Company in accordance with the terms of the said agreement." Presumably the agreement, when introduced at the hearing (it was not set forth in the complaint or answer), supported plaintiffs' averments. It would have been more satisfactory had the complaint set forth the agreement in terms so as to have shown from its face that the averments of the complaint were thereby supported, but we think there were sufficient facts alleged to justify the restraining order pending the hearing.

It is argued by appellant that the Parlin Gold Mining Company had the right of possession and the right of property until September 1, 1909, subject to payment of the full purchase price of the property on that day, and hence plaintiffs had no rights therein until after that date. But the right of the company was a right to prospect and develop the mines. It had no right to commit waste or remove from its situs that which constituted a part of the realty, other than ore bodies or minerals, or to make such use of timber and the like as might be necessary in the working of said mines. Obviously, no creditor had any greater right. Appellant cites Miller v. Waddingham, 91 Cal. 380, 27 Pac. 751, 13 L. R. A. 680, which was an action by the vendor for trespass committed by the vendee, under a contract of sale of land. The court there likened the relation to that of a mortgagor and mortgagee, and it was said: "By parity of reasoning the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession should show that he will sustain some injury before he can maintain an action like the present. So long as the sufficiency of the security is unimpaired, he has no right to disturb the vendee in any use or enjoyment which he may make of the land." Suppose the case of the vendee going into possession under an agreement, as part consideration, to make certain improvements —erect a dwelling house on the land, for example—would it be contended that he could remove the house or that his creditors could remove it under attachment before completing his purchase? In such a case the dwelling having become a part of the realty and by so much having increased its value, to remove it would impair the value of the freehold, just as effectually as if the dwelling had been placed there by the vendor before the sale. See Pomeroy v. Bell, 118 Cal. 635, 50 Pac. 683. Here the vendee had the right to work as well as to develop the mine, extract ores, and appropriate the proceeds. There was nothing unreasonable in the provision of the agreement by which it had this privilege that whatever fixtures it found necessary to affix to the land should thereupon become the property of plaintiffs, unless the company made full payment for the mines at the time stipulated. The injunction was granted after the expiration of the company's right to purchase, and there is no pretense that it complied with or offered to comply with the terms of its contract to purchase. The cause was heard upon oral and documentary evidence. The evidence is not brought up, and it must be presumed that it was sufficient to support the judgment.

Respondents state in their brief that, since this motion was heard and determined, "the case has been tried on its merits, findings of fact and conclusions of law were duly made and judgment entered in favor of plaintiffs." This is not denied. We cannot act upon this statement alone, but, if it be true, it would avail appellant nothing should he prevail on this appeal. Regardless, however, of this fact, we think the order should be affirmed and it is so ordered.

We concur: HART, J.; BURNETT, J.

14 Cal. App. 32

HILLS et al. v. EDMUND PEYCKE CO.

(Civ. 715.)

(Court of Appeal, Third District, California. Aug. 5, 1910. Rehearing Denied by Supreme Court Sept. 29, 1910.)

1. SALES (§ 164*) — PARTIAL DELIVERY — RIGHTS OF SELLER.

A seller can recover the value of quantities delivered, subject to the buyer's right to counterclaim for any damage caused by the seller failing to furnish the whole amount contracted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 388; Dec. Dig. § 164.*]

2. SALES (§ 353*)—ANTICIPATING DEFENSES.

A seller suing for the value of quantities delivered need not anticipate a counterclaim for damage caused by his failure to furnish the whole amount contracted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1001; Dec. Dig. § 353.*]

3. SALES (§ 181*) — ACTION FOR PRICE — DEFENSES—BURDEN OF PROOF.

In a suit for the price of fruit, wherein the buyer counterclaimed for failure to deliver additional fruit contracted for, the burden was on him to show that additional fruit which was rejected was of inferior quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 475; Dec. Dig. § 181.*]

4. APPEAL AND ERROR (§ 989*)—REVIEW—EVIDENCE.

On appeal, the evidence must be regarded in the light most favorable to the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3897; Dec. Dig. § 989.*]

5. SALES (§ 181*)—COUNTERCLAIM BY BUYER—EVIDENCE—WEIGHT.

Evidence on a counterclaim by a buyer of fruit for failing to deliver the full quantity contracted *held* to show that his inspector acted arbitrarily in rejecting fruit offered, and that only a small quantity of inferior quality was offered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 475; Dec. Dig. § 181.*]

6. SALES (§ 71*)—"MORE OR LESS."

In a contract for sale of goods, the qualifying words "more or less" merely provide against slight and accidental variations in number, measure, or weight.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 191; Dec. Dig. § 71.*

For other definitions, see Words and Phrases, vol. 5, pp. 4582–4595.]

7. EVIDENCE (§ 397*)—CONTRADICTING PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence is inadmissible to show an intention contradicting that expressed in a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1756; Dec. Dig. § 397.*]

8. SALES (§ 87*) — QUANTITY — EVIDENCE — WEIGHT.

Evidence on a counterclaim by a buyer of fruit for failing to deliver the full quantity contracted *held* to show that "twenty cars more or less" contracted for was intended as an estimate of the quantity to be derived from particular trees.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 245, 246; Dec. Dig. § 87.*]

Appeal from Superior Court, Butte County; K. S. Mahon, Judge.

Action by D. O. Hills and another, partners as Hills & Fitzgerald, against Edmund Peycke Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. W. McKinley and George F. Jones, for appellant. Carlton Gray, for respondents.

BURNETT, J. The complaint was for the balance due on a contract for the sale of certain oranges by plaintiffs to defendant. The answer does not deny the execution of the contract set out in the complaint, but, by way of counterclaim, presents an offset for labels furnished by defendant to plaintiffs. There is also a cross-complaint for damages caused by plaintiffs' failure to furnish as much fruit as the agreement called for. Plaintiffs admitted the allegations in reference to the labels, but took issue with the cross-complaint. The action was tried before the court and judgment was rendered in favor of plaintiffs, findings having been waived.

The claim for damages on the part of defendant is based on the contention that plaintiffs furnished only nine car loads of fruit of the quality prescribed, whereas they agreed to sell "twenty cars of seedling oranges, more or less," and that, relying upon said agreement, defendant contracted with its customers for the sale of 15 cars. The deficiency, so it is claimed, was supplied at an additional expense to defendant.

We think there is no merit in the contention that the complaint fails to state a cause of action. The position of appellant in that respect is that the complaint attempts to state a cause of action on a contract for an agreement to sell and deliver 20 car loads of fruit, which contract respondents claim they fulfilled by delivering nine car loads and no more. But this view ignores the allegation "that said defendant received and accepted all of said nine car loads of oranges so sold and delivered to it by plaintiffs as aforesaid." If plaintiffs did furnish less than the contract called for, yet defendant would be liable for the value of the nine car loads which it received and accepted, subject, of course, to the right of defendant to set up a counterclaim for damages, if any, caused by the failure of plaintiffs to comply fully with the terms of the contract. Manifestly plaintiffs, in their complaint, are not required to anticipate any such claim on the part of defendant. In Polhemus v. Heiman, 45 Cal. 573, it is said: "If the vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and, if he accepts a part, he may return that and refuse to accept less than the whole, but, having received and retained a part, he cannot refuse to pay for the part received." In Willamette, etc., Co. v. Union, etc., Co., 94 Cal. 157, 29 Pac. 773, in approving the doctrine of the Polhemus Case, it is said: "The contention of appellant is that, as a portion of the lumber mentioned in the contract was not delivered, therefore nothing was due, and the action cannot be maintained. This contention involves the proposition that appellant could keep and use all the lumber received and retained by it without paying for it. There has been, no doubt, some conflict of authorities as to the rights of parties in the situation of the parties to this action; but the true rule is stated in the opinion of the court in Polhemus v. Heiman, 45 Cal. 577." The same principle is affirmed in Ontario, etc., Ass'n v. Cutting, etc., Co., 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681. 86 Am. St. Rep. 231.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The main reliance of appellant for a reversal, however, seems to be upon the position that the judgment is unsupported by the evidence. It is urged that it appears without conflict that defendant, by reason of plaintiffs' failure to comply with the contract, suffered loss as alleged in the cross-complaint. It does, indeed, appear that defendant, in order to fill its contracts with other parties, incurred a greater expense than if it had received all of the fruit from plaintiffs at the price agreed upon. But were plaintiffs responsible for this additional expense? The evidence shows that defendant sold to its customers 15 car loads of oranges. Plaintiffs offered to deliver this number to defendants. It cannot be said, therefore, that plaintiffs are responsible for defendant's loss, at least, unless it was shown that the fruit rejected was inferior in quality to the standard required. The burden of proof as to this was, of course, cast upon defendant, as it was one of the material allegations of the cross-complaint. The only evidence upon the subject was furnished by plaintiffs, and this, of course, must be regarded in the light most favorable to the judgment of the trial court. In the examination of Mr. Hills, one of the plaintiffs, the following questions and answers appear: "Were those oranges which were rejected by their inspector of the same appearance, size, and quality as the oranges called for by the contract? A. I would consider them so, the majority of them. Q. You said they were the same size and quality? A. Yes, sir; that is, to all appearances. A person could not tell until after they cut all the oranges open whether they were or not. To all appearances they were. Q. Did the appearance indicate anything different from the appearance of the oranges they did take? A. No, sir; I don't think so to my opinion. Q. How many oranges were rejected by them? A. We figured we picked fully fifteen car loads of fruit and there was six car loads rejected. Out of that six car loads I think fully four car loads was equally as good fruit as anything they got. All the oranges we had we sold to the defendant." There was no evidence more favorable to the appellant than the foregoing. It is apparent, therefore, that the trial court was justified in concluding that defendant's inspector acted arbitrarily and unjustly in rejecting six car loads of the oranges, and, furthermore, that, while plaintiffs admitted that some of the oranges were not up to the standard, yet the proportion was very small and the evidence concerning it so indefinite that it could not be said that defendant had established this material allegation of its cross-complaint.

Indeed, considering the whole record, the conclusion is inevitable that the judgment of the court was just and it ought not to be disturbed unless some plain principle of law requires it. The plaintiffs acted in the utmost good faith and entirely in accordance with the intention of the parties. It is true that the contract was reduced to writing and called for "twenty car loads, more or less," and the decisions are to the effect that the "addition of the qualifying words 'about,' 'more or less,' and the like in such cases is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight." Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622. The rule is also that parol evidence is inadmissible to show that the parties intended otherwise than the words indicate, but, as a matter of fact, plaintiff, Hills, testified without objection as follows: "Well, I went in and talked about oranges and made them a price. I think to start with $1.30, and they said they would take it up and in the course of a day or so wanted to know if I would take $1.20 for seedlings, and I said 'Yes,' and Mr. Wilson then wrote up a contract for 20 cars flat not putting 'more or less' in. I said 'No' I would not sign the contract because we might not have 5 cars or might have 15 or we might not have 10, but that they would get all the fruit we got, and we tore up that contract and wrote this contract, putting in 'twenty cars, more or less,' which was signed, and Mr. Peycke, after reading the signed contract over, said, 'Oh that might mean one car,' and I said 'You will have more than one car, Mr. Peycke. You will get all the fruit we get.'" The vice president of appellant, Mr. Wilson, also testified in reference to the same conversation that Mr. Hills said he was to get the fruit "from the orchards that he had already procured in Butte county. He simply said he had them bought, mostly bought by the lump on the tree. He said he had bought and sold all crops of fruit on those orchards for years. He offered us 20 cars, more or less, anywhere from 18 to 23. He said there should be 20 cars of seedlings and about 3 cars of sweets, as near as he could estimate it, and that there was no doubt in his mind that there would be 20 cars at least, including the sweets." From the foregoing it is perfectly apparent that the understanding of the parties was that the purchase related to the fruit grown on certain trees and that the quantity mentioned in the contract was simply an estimate of the number of car loads. The evidence further shows that on account of dry weather the quantity of the fruit fell far below expectations. Of this appellant was informed by letter before any of the fruit was delivered.

It is clear that, if the pleadings had been properly framed, the court would have been entirely justified in reforming the said written contract so as to express the real intention of the parties and in awarding plaintiffs judgment in accordance with said reformation. As the evidence of said intention was admitted without objection it hardly becomes appellant now to contend for the first time that the evidence was not within the issues made by the pleadings.

It is not necessary, however, to hold, and we do not hold, that the point cannot be made, as we are satisfied the trial court was warranted in finding that "said defendant received and accepted all of said nine car loads of oranges so sold and delivered to it by plaintiffs as aforesaid and said defendant paid to said plaintiffs the full amount due therefor under the terms of said contract, excepting only the sum of four hundred and seventy-seven and $^{82}/_{100}$ ($477.82) dollars, being the price due for the last car load of oranges so sold and delivered to defendant and received and accepted by it under the terms of said contract," and that defendant did not suffer damage "in the sum of three hundred and forty-five and $^{60}/_{100}$ ($345.60) dollars, or any other sum or at all by reason of the failure of said plaintiffs to perform said contract, or any contracts or the consequent inability of said defendant to deliver the oranges so sold, or for both of said reasons or for any other reasons, or at all." The foregoing implied findings, together with the admissions of the pleadings, are sufficient to support the judgment.

Appellant calls attention to the ruling of the court in sustaining the objection of respondents to certain questions asked by defendant. But, as appellant admits that the conversation called for by the questions "was entirely immaterial and irrelevant," we feel called upon to do no more than to agree with the admission.

The contention of respondents that the specification that "the evidence does not support the judgment in this," etc., is not sufficient to warrant a review of the evidence, need not be considered, as we think upon the merits respondents should prevail.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

CALIFORNIA REPORTER

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158 Cal. 367

PACIFIC HEATING & VENTILATING CO. v. WILLIAMSBURGH CITY FIRE INS. CO. OF BROOKLYN. (S. F. 5,337.)

(Supreme Court of California. Sept. 14, 1910.)

1. INSURANCE (§ 146*)—POLICIES—CONSTRUCTION.

While an insurance policy, like other contracts, is to be construed and given effect according to its language and terms, its provisos and exceptions are to be strictly construed against the insurer, and liberally in favor of the insured, and any ambiguity or reasonable doubt is to be resolved in favor of insured and against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292–298; Dec. Dig. § 146.*]

2. INSURANCE (§ 421*)—FIRE POLICY—EXCEPTIONS—EARTHQUAKES.

A policy insuring against loss by fire, providing that insurer shall not be liable for loss caused "directly or indirectly" by either of certain causes, and then, after a semicolon, "or for loss * * * occasioned by or through * * * earthquake," excepts from the policy, as regards loss through earthquake, only such as is caused "directly" as well as proximately thereby; and so not a loss from fire set by earthquake to a distant building, and communicated to the insured building through the burning of intermediate buildings.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1126, 1134, 1136, 1140–1143; Dec. Dig. § 421.*]

3. INSURANCE (§ 421*)—EXCEPTED LOSSES—CODE PROVISIONS.

Civ. Code, § 2628, providing that, when a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted, does not have the effect of excepting from a fire policy a loss caused by fire set by earthquake to a distant building and communicated through intermediate buildings to the insured building, where the exception of the policy is only loss directly caused by an earthquake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1126, 1134, 1136, 1140–1143; Dec. Dig. § 421.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the Pacific Heating & Ventilating Company against the Williamsburgh City Fire Insurance Company of Brooklyn. From an order denying a motion for new trial, defendant appeals. Affirmed.

Otto Irving Wise and T. C. Van Ness, for appellant. Vogelsang & Brown and L. A. Redman, for respondent. Charles S. Wheeler and J. F. Bowie, amici curiæ.

PER CURIAM. This appeal was first considered by the District Court of Appeal for the First District, which affirmed the order appealed from. Thereafter, on motion of the appellant, the cause was transferred to this court for hearing and determination.

The opinion filed by the District Court of Appeal was prepared by Cooper, P. J. It reads as follows:

"This action was brought to recover upon a fire insurance policy issued by defendant. Plaintiff had judgment, and the court denied a motion for a new trial, and this appeal is from the order.

"The policy was an agreement by defendant, in consideration of the premium paid, to indemnify the plaintiff against loss of the insured property by fire to the amount of the policy. The question turns upon the following provision in the policy, to wit: 'This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano, earthquake, or hurricane, or other eruption, convulsion, or disturbance; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.' The defendant in its answer alleged that the fire and the consequent loss were occasioned by and through earthquake, and that but for such earthquake the fire and loss would not have occurred. In support of such defense, the defendant offered to prove that on the day the insured property was destroyed by fire, to wit, on April 18, 1906, an earthquake occurred, and that 'a fire caused by said earthquake started in and broke out upon the premises occupied by Mack & Co., wholesale druggists, situate on the east side of Fremont street, known as Nos. 13–19 Fremont street; that said fire thereafter spread southerly from building to building, to and destroyed the property insured under the policy herein sued on, said property being situate in block No. 389 in which the building occupied by Mack & Co. was situate.' To this offer the court sustained plaintiff's objection, and the question is thus squarely presented as to whether or not the offered evidence was admissible under the issues. A policy of insurance is but a contract, and, like all other contracts, it must be construed according to the language and terms used therein in order to arrive at its true sense and meaning. Courts will not undertake to relieve parties from the express and plain stipulations into which they have entered. But, while this is true, it is also a rule well established by the courts that provisos and exceptions contained in a policy of insurance must be strictly construed against the insurer and liberally in favor of the insured. This rule is based upon the fact that the contract of insurance is drawn by the insurer, and in it are usually placed many exceptions, conditions, and forfeitures deliberately and purposely by the insurer so as to avoid liability, and the ordinary person in paying a premium and accepting a policy does not read, or, if he does read, he cannot understand the many conditions, exemptions, and exceptions contained therein. In fact such provisions, exceptions, and conditions in many cases, on account of their ambiguity, have been construed differently by the most eminent lawyers and the highest courts of the land. Therefore the courts endeavor to carry out the contracts as made by the parties, and, at the same time, prevent, if possible, the exceptions and conditions from wholly devouring the policy. It is therefore a fundamental rule that the insurer is in duty bound to use such language as to make the conditions, exceptions, and provisions of the policy clear to the ordinary mind, and, in case it fails to do so, any ambiguity or reasonable doubt must be resolved in favor of the insured and against the insurer. As said by the Supreme Court of this state in Nielsen v. Provident Savings, etc., Soc., 139 Cal. 332 [73 Pac. 168, 96 Am. St. Rep. 146] (where it was held that a provision in a statute in regard to life insurance policies to the effect that the reserve fund shall be applied as shall have been agreed in the policy, either to continue the insurance or to purchase a paid-up policy, and the insured died after a premium was due without having asked to have the reserve fund of $5.10 applied to either continue the policy, or to purchase a paid-up policy, must be so construed that the reserve fund, which was sufficient to pay the premium for the days the insured lived after his premium became due, kept the policy alive and valid up to the time of the death of the insured): 'The spirit of the statute requires a broad meaning to be given to it for the benefit of the insured.'

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"In the light of what has been said, we will examine the condition or exception in this policy, as it reads, with relation to its context so as to arrive at its correct construction. The plaintiff desired to have his property insured against the peril of fire, and with this in view procured the policy. By its plain terms the company agreed to pay him a certain sum in case of the destruction of his property by fire. His property was destroyed by fire, and the defendant thus became liable unless saved by the exception in the clause hereinbefore quoted. The first part of the exception, to wit, 'this company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority,' ends by a semicolon. It is thus plainly stated that the company shall not be liable for loss 'caused directly or indirectly' by the various things therein enumerated. As the damage in this case was not caused by any of the things enumerated in the first clause of the condition, it therefore is not subject to the comprehensive words 'caused directly or indirectly.' After the use of the above quoted words, and after the semicolon, occur the words 'or for loss or damage occasioned by or through any volcano, earthquake. * * *' The words 'damage occasioned by or through * * * any earthquake' by their fair interpretation mean such damage as is caused 'by or through an earthquake.' What was the cause of the plaintiff's loss or damage? It was fire, the peril which he had insured against. When the earthquake occurred, and the vibrations of the earth ceased, the plaintiff's property had not been damaged, nor had he lost it. His property remained intact, and it had not been set on fire by the earthquake. He had suffered no loss by the earthquake or through the earthquake. He afterwards lost his property by fire, which was the direct and proximate cause of his loss.

"It is true that appellant claims that the earthquake caused the fire in the building occupied by Mack & Co., and that this fire caused the fire in the adjoining building, and that this caused the fire in the next adjoining building, and so on until finally it reached and burned the property of the plaintiff. If we go back from cause to cause, we can trace the parent cause to the earthquake which was the remote cause of the fire. But the plain common-sense reading of the policy would convey no information to plaintiff that he could not recover if the cause of the cause of the cause of the fire was an earthquake. He could understand by reading the policy that if an earthquake should by its violence set his building on fire that he could not recover the loss; but it would be difficult for any one to understand that the plaintiff agreed that the defendant might be exempt from a fire the remote cause of which was an earthquake.

"Suppose a statute should make it a crime for any one to cause a building to be burned. A. becomes the father of a mischievous boy. He buys matches and leaves them on his dining room table. The boy of his own volition takes the matches and sets fire to the building. A. in one sense caused the fire as he was the remote cause of it. He became the father of the boy, he bought the matches, and left them where the boy could get them. Was the fire caused or occasioned by or through A. under such circumstances? According to the theory of appellant, if a very slight shock of earthquake had upset a lamp and thus set fire to a building, and this building should communicate the fire to an adjoining building, and thence from building to building until the whole city had burned, not a dollar of insurance could be recovered if the policies each contained the clause under discussion. We do not think that either the plaintiff or the defendant ever contemplated making any such contract. It would certainly require the most clear and unambiguous language to justify any court in placing a construction upon a policy of insurance that would have such result. The company, by its own words, in the first part of the clause has provided that it shall not be liable for loss in certain cases caused either 'directly or indirectly' by the things therein enumerated. It then, after a semicolon, used other language. It dropped the words 'directly or indirectly,' and in lieu thereof used the words 'by or through.' Was it the intention that the words 'by or through' should have a different meaning from the words 'directly or indirectly'? We think it clearly appears that it was not intended by the use of the words 'by or through' that the defendant was not to be held for any loss indirectly caused by earthquake, volcano, hurricane, or any of the terms used after the words 'by or through.'

"Appellant calls our attention to section 2628 of the Civil Code, and insists that it is exempt under said section. There are two sections of the Civil Code bearing upon the question discussed, and they must be read together. Section 2626: 'An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.' Section 2628: 'When a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.' It will be noticed that section 2626 makes the insurer liable when the peril insured against was the proximate cause of the loss, although a peril not contemplated may have been the remote cause. In this case the peril insured against was fire. The peril not insured against was earthquake. The defendant is liable although the earthquake was the remote cause of the loss. What is the meaning of section 2628? As applied to this case the peril specially excepted is fire directly caused by an earthquake. If what has been said heretofore is logical and correct, the policy only excepted loss by a fire directly caused by an earthquake. The excepted peril—that is, loss by fire caused directly by an earthquake—did not occur. The question therefore as to whether or not the loss would have occurred but for an excepted peril which never occurred is a false quantity. It is not necessary to hold that the company by providing that it should not be liable for fire losses directly caused by an earthquake can read the provisions of section 2628 into the proviso, and thus claim an exemption much broader than that stipulated for in the policy. It certainly would be carrying the exception to a great length to hold that the plaintiff agreed that the defendant should not be liable for fire loss directly caused by earthquake, and that, by reason of the section, the defendant is not liable for a fire indirectly caused by an earthquake. No rule of construction would justify us in holding that the section broadens the scope of the original exception. The exception was made in the contract of insurance and must be held to control, as it was the deliberate words of the parties used by them in making the contract. The rule herein announced is supported by analogous cases in many jurisdictions.

"In Winspear v. Insurance Co., 6 Q. B. Div. 42, the terms of the policy provided 'that it should cover any personal injury caused by accidental, external and visible means, if the direct effect of such injury should occasion his death;' and it further provided that it should not extend to 'any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.' The insured was seized with an epileptic fit, and fell into a stream, and was there drowned while suffering from the fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.

"In Lawrence v. Insurance Co., 7 Q. B. Div. 216, the policy provided: 'This policy covers injuries accidentally occurring from material and external cause appearing upon the person of the insured, where such accidental injury is the direct and sole cause of the death of the insured, but it does not insure in case of death from fits * * * or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, or whether causing such death directly or jointly with such accidental injury.' The insured, while at a railroad station, was seized with a fit, and fell forward off the platform across the railway, when an engine and carriages which were passing went over his body, and killed him. It was held that the death of the insured was caused by an accident within the meaning of the policy, and that the insurers were liable.

"In Mfg. Ind. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620, an action was brought on a policy of insurance. It was contended that, while suffering from an attack of heart disease, the insured fell into a stream in which he was fishing, and was drowned. The trial court assumed that the fall was due to weakness of the heart, and proceeded on this assumption to construe the policy. The policy provided that the company should not be liable if death was caused by 'any bodily injury happening directly or indirectly in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any cause where the accidental injury was not the proximate and sole cause of disability or death.' It was held that death was caused by drowning, and not from disease, and Judge Taft, delivering the opinion, said: 'We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole and proximate cause.'

"It was said by Judge Seawell of the superior court in the case of Baker & Hamilton against this same defendant, in construing the same provision in one of the defendant's policies: 'The primary fires may have been due to unskillful or defective wiring, or to improper construction of the buildings in which they were installed, or both. It was known to the parties when they entered into the contract that the defendant was to be liable for a loss of which fire and not earthquake was the proximate cause. It is unreasonable to hold that in accepting the policy plaintiff should have understood that he assumed the consequences of the negligence of other persons, over whom he had no control, at a point far distant from the insured property.' In another case of Baker & Hamilton against this same defendant (157 Fed. 280), it was said by Judge Whitson, in considering the same clause in a like policy: 'Having seen that this exception relates to the origin of the fire, and that there must be a direct connection between the earthquake and the starting of the fire, it seems reasonably clear that it was the intention of the defendant to exempt itself from liability if an earthquake should be the immediate, proximate, and direct cause of a fire which destroyed the property. That might occur in a good many ways. Earthquake might cause a fire in the building by short-circuiting of the wires, or by a gas explosion, or by throwing inflammable material into contact with the fire of a furnace, or the like, and this would be an earthquake-caused fire. But if such a fire should start in a building a mile away, and be thence communicated from building to building until it reached property not directly so affected, a fire originating would be indirectly caused by earthquake, and not directly.' In another case, of Willard against this same insurance company, Judge Van Fleet construed the policy in the same way; and his ruling was affirmed in an opinion delivered by the United States Circuit Court of Appeals, 164 Fed. 404 [90 C. C. A. 392, 21 L. R. A. (N. S.) 103]. It is not necessary to quote from that case or from other authorities. The cases cited fully support the construction we have given to this policy."

Our further examination has satisfied us that the views expressed in the foregoing opinion are correct. In answer to certain suggestions made by appellant in its petition for a hearing of the cause in this court, we may add that we do not understand the opinion now approved by us to hold that, under the facts stated in defendant's offer of proof, the earthquake was as matter of law and for all purposes to be regarded as a remote rather than the proximate cause of the loss. The conclusion reached by the Court of Appeal is based on the peculiar phraseology of this particular policy, which makes a distinction between loss caused "directly or indirectly" by certain means other than earthquake and "loss or damage occasioned by or through" earthquake. The omission of the words "directly or indirectly" from the clause dealing with earthquake justifies a limitation of that clause to loss occasioned directly, as well as proximately, by earthquake. The grounds and the result of this construction are more fully and very satisfactorily set forth in the opinion of the United States Circuit Court of Appeals in Williamsburgh City F. I. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103, one of the cases cited by Mr. Justice Cooper.

The order is affirmed.

158 Cal. 355

In re HIGGINS' ESTATE. (L. A. 2,607.)

(Supreme Court of California. Sept. 7, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 111*)—ATTORNEY'S FEES—WHEN PROPERLY ALLOWED.

Code Civ. Proc. § 1616, authorizing allowance of attorney's fees in administration, entitles an attorney only to such sums as are properly allowable to the executor or administrator as necessary expenses in discharging his duties, and under section 1619, to warrant an allowance of such fees for litigation of the executor or administrator, the litigation must have been such as was necessary for him to prosecute or defend.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448-462; Dec. Dig. § 111.*]

2. EXECUTORS AND ADMINISTRATORS (§ 256*)—PROBATE—FINDINGS—CONCLUSIVENESS.

On objections to an allowance of fees to attorneys who resisted a will contest, a determination below that it was necessary and proper for the executor to resist the contest is not conclusive.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 256.*]

3. EXECUTORS AND ADMINISTRATORS (§ 111*)—ATTORNEY'S FEES—PROPRIETY AS CHARGE AGAINST ESTATE.

Under Code Civ. Proc. §§ 1299, 1312, one could defend a will as executor, but if the defense is solely for his own benefit as a devisee or a legatee, and cannot operate beneficially as to others interested in the estate, he must bear the costs and charges, and hence fees of attorneys who successfully resisted a will contest were improperly allowed against the estate where the contest was in effect between the executor as a beneficiary and another beneficiary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 462; Dec. Dig. § 111.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

In the matter of the estate of Thomas J. Higgins, deceased. From an order allowing attorney's fees, Cornelia B. Chick and another appeal. Reversed.

See, also, 156 Cal. 257, 104 Pac. 6.

E. H. Lamme and Puterbaugh & Puterbaugh, for appellants. Wright, Schoonover & Winnek, for respondent.

ANGELLOTTI, J. This is an appeal from an order made on the application of certain attorneys under section 1616 of the Code of Civil Procedure fixing the sum of $2,000 as their compensation for extraordinary legal services in resisting a contest before probate of the will of deceased, and directing the payment of the same by the executor of the will from the moneys in his hands belonging to the estate.

The deceased left an estate consisting entirely of community property. He left surviving him his wife, Phoebe B. Higgins, a daughter, Cornelia B. Chick, and two sons, Albert E. Higgins and Herbert R. Higgins. By the terms of his will he purported to give to his wife her one-half of said community property, and divided the other one-half as follows: One-sixth to said Cornelia, two-sixths to said Albert, and three-sixths to said Herbert. The effect of the will was therefore simply to take from Cornelia one-half of the share to which she would have succeeded as an heir if deceased had died intestate and to give the same to Herbert. Herbert was named in said will as the executor thereof. He offered the will for probate. Objections to its admission to probate on the grounds of undue influence and incompetency were presented by Cornelia and Albert, and these objections were answered and contested by Herbert and the widow. The petitioning attorneys were employed by the proponent, Herbert, to represent him in said contest, and it is for the services rendered under such employment that compensation from the estate was allowed by the order appealed from. The proponent prevailed upon the contest, and the will was admitted to probate. The application of the attorneys for payment for their services from the funds of the estate was opposed by Cornelia and Albert, and the appeal from the order making such allowance is by them.

As was substantially said in Estate of Hite, 155 Cal. 448, 452, 101 Pac. 448, an attorney can obtain by an application for fees for legal services made under section 1616 of the Code of Civil Procedure only such sums as are properly allowable to the executor or administrator as necessary expenses in the discharge of his duties. The question, therefore, is whether the trial court would have been warranted in concluding that the executor was entitled to recover from the estate the fee that he had paid or for which he had become liable to the attorneys employed by him to resist the contest of the will for the services rendered by them under such employment. In view of the provisions of section 1619 of the Code of Civil Procedure to warrant an allowance for attorney's fees for litigation of the executor or administrator, the litigation must have been such as was "necessary for the executor or administrator to prosecute or defend." In Estate of Hite, supra, it was held that the lower court was fully warranted in refusing to make any allowance to the executor in a case where the contest had been successfully resisted; the basis of the decision being that the court was justified in concluding that the case was one in which it was just and equitable that such expense should be borne by those who had a direct and beneficial interest in maintaining the assailed will, rather than by the estate generally, and that the estate had no such interest in the maintenance of certain codicils assailed by the contest as warranted the executor in defending the same at the expense of the estate. It was definitely declared that the executor named in a will is not bound to engage in litigation for the purpose of establishing the paper offered by him for probate, and, approvingly quoting from Woerner on Administration, that, if the executor "voluntarily assume the burden of a contest which properly belongs to the legatees or devisees, he must look to them, and not to the estate for reimbursement." It was conceded that it was for the probate court to determine whether the case was one wherein it was necessary and proper for the executor as such to have resisted the opposition to the probate. In this case the lower court has made such determination in favor of the executor, but its determination is not conclusive, and should be set aside if it is clear that it is entirely without support in the facts. The undisputed facts in this case are much stronger against the executor than those in the Hite Case. They show that the only person beneficially interested in maintaining the will was the executor himself. If maintained, he would receive three-twelfths of the estate of deceased instead of two-twelfths, and Cornelia would receive but one-twelfth instead of two-twelfths. In all other respects the disposition of the property of deceased would be unaffected by the result of the contest. The contest was thus practically nothing but a contest between the executor and Cornelia for one-twelfth of the estate of decedent. No one else was or could be beneficially interested. In view of the principles declared in the Hite Case, there was nothing in the facts of this case to furnish any support for a conclusion that the executor was warranted in defending this will at the expense of the estate. To hold otherwise would simply be to enable him by reason of his position as executor to subject the whole estate to such expenses as were incurred by him in litigation defended by him for his own sole benefit as a devisee and legatee under the assailed will. It cannot properly be held that it was necessary for him as executor to defend such litigation. While he undoubtedly had the legal right under our statute to defend the will in his capacity as executor (Code Civ. Proc. §§ 1299, 1312; Estate of Hite, supra), if such defense was solely for his own benefit as a devisee and legatee and could not operate beneficially as to any other person interested in the estate, he must bear the costs and charges of maintaining it. The general reasoning in support of our conclusion has been so recently stated in Estate of Hite, supra, that it is unnecessary to discuss the question further. If there be anything in Estate of Riviere, 8 Cal. App. 773, 98 Pac. 46, that is in conflict with what is said in Estate of Hite, supra, the latter case must of course control. But, as we understand Estate of Riviere, supra, the point decided by the learned District Court of Appeal was simply that an attorney's fee may, under some circumstances, be allowed an executor for service rendered by attorneys employed by him in resisting a contest before probate, where the contest is unsuccessful, and the will is finally admitted to probate. This we are not disposed to dispute. The circumstances may well be such as to make such an allowance entirely equitable as to all persons interested in the estate. But, if expressions in that case can reasonably be construed as going further than this, they cannot be considered as authority.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The order appealed from is reversed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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158 Cal. 328

JOHN R. GENTLE & CO. et al. v. BRITTON et al. (L. A. 2,160.)

(Supreme Court of California. Sept. 3, 1910.)

1. Mechanics' Liens (§ 279*)—Time (§ 10*)—Consent of Owner—Notice by Owner to Prevent Lien.

Under Code Civ. Proc. § 1192, authorizing an owner to prevent a lien by giving notice within 10 days after obtaining knowledge of the work that he will not be responsible therefor, the actual owner may object formally to work done on his property under contract with the record owner within 10 days after discovering that the work is under way, and intervening holidays do not curtail the privilege under section 13, providing that when any act of a secular nature is appointed by law to be performed on a particular day, which falls on a holiday, the act may be performed on the next business day, and, where he does not exercise the right at that time, he must affirmatively show to defeat the lien prima facie established that holidays extended the time for protest, and that protest was made after the holidays ended.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 279;* Time, Dec. Dig. § 10.*]

2. Mechanics' Liens (§ 76*)—Consent of Owner—Notice by Owner to Prevent Lien.

The doctrine on which Code Civ. Proc. § 1192, authorizing an owner to prevent a lien by giving notice within 10 days after obtaining knowledge of performance of work on his premises that he will not be responsible therefor, rests, is that of estoppel, and an owner having either by his own act or that of another, with his consent or knowledge, procured the improvement of property and received the benefit thereof, has created an equitable lien to secure the payment of the value of the labor and materials.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 104–107; Dec. Dig. § 76.*]

3. Mechanics' Liens (§ 78*)—Consent of Owner—Notice by Owner to Prevent Lien.

The knowledge of an owner which is sufficient to place him in default for failure to give the notice required by Code Civ. Proc. § 1192, authorizing an owner to prevent a lien by giving notice within a specified time after obtaining knowledge of the construction of the improvement on his property, need not be absolute, and it is enough that it puts a prudent man on inquiry.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 78.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. MECHANICS' LIENS (§ 78*)—CONSENT OF OWNER—NOTICE BY OWNER TO PREVENT LIEN.

Code Civ. Proc. § 1192, permitting an owner to prevent a lien on his property by giving notice within 10 days after knowledge of the construction of an improvement on his premises that he will not be responsible therefor, does not fix any limitation as to the stage of the work at the time at which the notice must be given, and the statute is complied with by posting a notice on the same day the improvement began, provided that is within the specified number of days after obtaining knowledge either of the construction or intended construction.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 78.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Consolidated action by John R. Gentle & Co. and another against Amy E. Britton, otherwise known as Amy E. Manning, and others. From a judgment for plaintiffs, defendant named appeals. Affirmed.

J. Marion Brooks, for appellant. G. C. De Garmo, for respondents.

MELVIN, J. A rehearing was granted after an opinion in this case had been handed down by the District Court of Appeal. The principal reason for allowing said rehearing was that in the complaint of John R. Gentle & Co. it was shown that the work, which was the basis of the liens mentioned in this action, was completed May 19, 1906, while plaintiff showed at the trial only that appellant, Amy E. Britton, went to the property "in May, 1906," and, according to the appellant, from all that appears in the record the work may have been finished prior to that time. Upon further examination of the transcript, however, we find that appellant herself admitted the contrary fact because she testified that when the work was brought to her attention in the month of May, 1906, she "forbade the same." Obviously she could not forbid something that was already accomplished.

The actions were based upon certain work performed upon property of which appellant Britton was the record owner. This was occupied by one Mainzor, and the contracts for the work were made by the said Mainzor. It was found by the court that Amy E. Britton knew of the improvements described in the complaint, but that she failed to post notices on the premises or to otherwise notify the plaintiff that she would not be responsible for the work done upon her property, as required by section 1192 of the Code of Civil Procedure. During all of the time that the work was in progress and the materials were being furnished, a number of successive legal holidays were declared by the Governor. This fact, according to the contention of appellant's counsel, postponed the time for Amy E. Britton to post her notices under section 1192 of the Code of Civil Procedure until after the completion of the improvements on her property, "at which time," he says, "the posting would be a nugatory and vain act, not required by law." In support of this point he cites section 13 of the Code of Civil Procedure, which provides: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." As this court has said: "Whether a day which the law authorizes to be fixed upon a particular day may be said to be a day appointed by law is at least doubtful." Baxter v. Vineland Irr. Dist., 136 Cal. 193, 68 Pac. 601. But, even if we should concede that the continuance of the holidays during all of the time when the work was being done postponed appellant's right to avail herself of the notice prescribed by section 1192 of the Code of Civil Procedure, we cannot see how the completion of the work would render her act nugatory when the holidays had ended. It seems to us that, if the existence of the holidays postponed her privilege, she would still be under the necessity of posting notice upon the first secular day after her discovery of the activities of the laborers and materialmen who subsequently became lien claimants. The question of the effect of the holidays might arise if she were attempting to show the posting of notices or the recording of protest under section 1192 of the Code of Civil Procedure on the first day succeeding the holidays, but that question is not presented here. Under that section she certainly had the privilege of objecting formally to the work within 10 days after her discovery that it was under way, and the intervening holidays would not curtail that privilege. Baxter v. Vineland Irr. Dist., supra. She did not exercise her right at that time, and, having shown that fact, plaintiff established a prima facie case. If the holidays extended her time for protest, and if she had made her due and formal objection after they ended, that would be a matter for her to show affirmatively. This she did not do.

This opinion is not to be construed as an intimation that we consider the existence of legal holidays a postponement of the necessity for the posting of notice in order to avoid a lien upon property by one who discovers that work is in progress upon his land. It has simply been unnecessary to decide that question here.

The opinion of the District Court of Appeal is adopted in part as follows:

"This is a consolidated action to foreclose four mechanics' liens. Judgment was for each of the claimants for the amount prayed for, and the defendant owner appeals from the judgment and from an order denying her motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"It is contended by appellant that the judgment should be reversed because the improvements were made at the instance and request of a person other than the record owner, and that the owner was without knowledge that the alterations and repairs had been made until after they were completed; or, if notice was given to her, or knowledge of the improvements brought home to her in time, that, by reason of the holidays proclaimed by the Governor, commencing April 18, 1906, and continuing until after the completion of the work, she was excused from serving the notice provided by section 1192 of the Code of Civil Procedure until the cessation of such holidays. The claims of lien are all based upon the contracts made with one E. Mainzor, who is alleged to be the reputed owner of the premises upon which the work was done. The material was furnished and the labor performed at the times and for the sums following, to wit: Gentle & Co., between April 9 and May 19, 1906, $159.20; Baker & Co., between April 10 and May 19, 1906, $54.60; C. S. Bunnell, between February 17 and June 23, 1906, $120.65; Ritchey & Grotthouse, between February 2 and June 21, 1906, $89.31. It is alleged in the complaints that knowledge that the improvements were being made was obtained by appellant in March, 1906, but that she failed to give the notice provided for by section 1192. The finding of the court in this respect is that appellant received such knowledge 'during the month of May, 1906, instead of March, 1906.' In all other respects the allegations of the complaints are found to be true, and the allegations of the answer of defendant Amy E. Britton to be untrue, and these findings are supported by the evidence.

"The doctrine upon which section 1192 of the Code of Civil Procedure rests is that of estoppel, which is indeed the underlying principle of the entire theory of the mechanic's lien. The owner of real property having, either by his own act or that of another with his consent or knowledge, procured the improvement of such property and received the benefit of the labor or material of another thereby, is deemed to have created an equitable lien upon the premises to secure the payment of the value of such labor and materials. He is like the owner of property who stands knowingly and silently by and sees another person sell such property to an innocent purchaser who believes the seller to be the owner, and so believing parts with value for it.

"The knowledge upon the owner's part which is sufficient to place him in default for failure to give the notice required need not be absolute. It is enough that it would put a prudent man upon inquiry. Evans v. Judson, 120 Cal. 282, 284, 52 Pac. 585. It is not important, then, whether Mrs. Britton received her notice through the agent, Fred Woy, or not. This would only be important if it were sought to consider the knowledge of Woy as the knowledge of appellant, but this is not the case. Woy discovered that the improvements were being made in May. He notified appellant by letter in the same month, but no day of the month is stated as to either and the finding is also indefinite in this respect.

"The statute as originally enacted did not contain the clause, 'intended construction,' and the time for posting the notice was fixed at three days after knowledge of the construction, alteration, or repair. This must then be construed to mean of the progress of the work, which could not have been earlier than the commencement of the work, and it has been held that where an owner had knowledge of the 'intended construction' and did not give the notice within three days thereafter, but gave such notice within three days after the commencement of the work, he was entitled to the protection of the statute. Birch & Co. v. Magic Transit Co., 139 Cal. 496, 500, 73 Pac. 238.

"The law does not say that upon the posting of the notice, the owner will not be liable for any labor performed or material furnished thereafter, but that, if he fails to post such notice within the statutory time after knowledge that the improvement was being made, it shall be held to have been constructed at his instance. There is no limitation in respect to the stage of the work at the time at which the notice must be posted. The statutory provision would be complied with by a posting on the same day the improvement was begun, if this were within three days after knowledge was obtained, either of the construction or intended construction. And, if done within three days after knowledge received, we see no reason why it would not be timely upon any day when the work on the improvement was in progress. * * *

"While these are the matters chiefly urged in appellant's brief, we have examined the other specifications of insufficiency of evidence to sustain the findings, but find nothing justifying a reversal. The evidence in the statement is meager and stated principally in effect, except the notices of lien introduced, which are set out in full. The latter are not open to the criticism made as to their form; and, as to whether they varied in statement from the proof, there is nothing in the record from which this can be determined, the summarized statement of the evidence introduced by plaintiffs being in effect that they proved their cases in conformity with the pleadings. The court so found, and no error appears in the record."

Judgment and order affirmed.

We concur: LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

158 Cal. 359

JUDD v. LETTS. (L. A. 2,451.)

(Supreme Court of California. Sept. 8, 1910. Rehearing Denied Oct. 7, 1910.)

1. Master and Servant (§ 183*)—Injuries to Servant — Fellow-Servant Rule — Statutes—Construction.

Civ. Code, § 1970, relating to fellow servants, as amended by St. 1907, c. 97, provides that the employer shall be liable for injury to a servant from the negligence of a co-employé in another department of labor, or employed on a machine, railroad train, switch signal point, locomotive engine, or other appliance than that on which the employé injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders on any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment. *Held*, that the words "on any railroad, or in the operation of any mine, factory, machine shop or other industrial establishment" should not be construed as qualifying all the preceding clauses so as to restrict the department of labor rule to railroads, mines, factories, machine shops, or industrial establishments, but that the rule should be extended to labor activities generally.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 373; Dec. Dig. § 183.*]

2. Master and Servant (§ 196*)—Fellow Servants—Statutes.

Under Civ. Code, § 1970, providing (prior to its amendment by St. 1907, c. 97) that an employer should not be liable for injuries to employés caused by the negligence of a fellow servant, a common employment existed between servants when each was employed in the same general business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 486; Dec. Dig. § 196.*]

3. Master and Servant (§ 183*)—Injuries to Servant—"Department of Labor."

Under Civ. Code, § 1970, as amended by St. 1907, c. 97, providing that the fellow-servant rule shall not prevent recovery for injuries to a servant by the negligence of a servant in a different department of labor, the question whether employés are engaged in the same department should be determined by inquiring inter alia whether they are habitually associated or brought together in the performance of their duties, whether they are under the immediate direction and control of the same superior, and whether the duties of one have any relation to or connection with those of the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 373; Dec. Dig. § 183.*

For other definitions, see Words and Phrases, vol. 2, p. 1989.]

4. Master and Servant (§ 287*)—Questions for Court and Jury—Departments of Labor—Co-Employés.

Where the facts on an issue as to whether an injured employé and the employé by whose negligence the injury has been caused are engaged in different departments of labor are disputed, or, if undisputed, are such as to reasonably permit contrary inferences, the question is for the jury, but should be decided by the court when reasonable minds could not differ as to the conclusion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1057; Dec. Dig. § 287.*]

5. Master and Servant (§ 183*)—Injuries to Servant—Fellow Servants—"Department of Labor."

Plaintiff, an employé in the ladies' suit department of a department store, was injured by the alleged negligence of the elevator operator while plaintiff at the close of a day's work was ascending to the fourth floor to obtain her hat and other belongings, preparatory to departure from the store. *Held*, that plaintiff and the elevator operator were engaged in different departments of labor as a matter of law, within Civ. Code, § 1970, as amended by St. 1907, c. 97, providing that the fellow-servant rule should not apply as between servants engaged in different departments of labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 373; Dec. Dig. § 183.*]

6. Appeal and Error (§ 1050*)—Review—Admission of Evidence—Prejudice.

In an action for injuries to a saleslady in a department store by the alleged negligence of the elevator operator, defendant was not prejudiced by evidence that there were various departments in the store with the names of some of them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

7. Witnesses (§ 318*)—Corroboration—Prior Statements.

Defendant could not support the unimpeached testimony of his own witness by proof that she had made similar statements at another time in an affidavit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. § 318.*]

8. Trial (§ 304*)—Misconduct of Jury—Request for View.

A suggestion by one of the jurors during the trial that the jury be sent to view a passenger elevator in question, supported by a statement that he had talked with some of his associates, and that several of them were of the same mind, did not constitute prejudicial misconduct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 725-727; Dec. Dig. § 304.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Frances Augusta Judd against Arthur Letts. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Lawler, Allen, Van Dyke & Jutten and R. P. Jennings, for appellant. Jones & Drake, for respondent.

SLOSS, J. The plaintiff recovered a judgment for personal injuries. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The defendant conducted, in the city of Los Angeles, a retail store known as "The Broadway Department Store." The business was carried on in a four-story building. Three passenger elevators were operated therein for the use of customers and employés of the defendant. On February 21, 1908, the plaintiff, who was employed by defendant in the ladies' suit department, on the second floor of said store, had occasion, after completing her day's work in that department, to ascend to the fourth floor, where she had left her hat and other belongings at a place provided for that purpose. One of the elevators stopped at the second floor, and plaintiff entered it. The operator started to ascend, and, before the next floor had been reached, the plaintiff's left leg was in some way drawn between the elevator and the shaft and casings thereof, inflicting serious injuries upon her. The contention of the plaintiff was that the mishap was caused by the negligent action of the elevator operator in closing the door of the elevator too soon after plaintiff's entrance, thereby catching her dress in the door. He then, as was claimed, started the elevator upward before plaintiff's dress could be released. There was testimony in support of this theory, and the jury, as appears from its verdict, accepted such testimony as true. This court cannot, therefore, under its settled rule regarding conflicting evidence, give favorable consideration to the appellant's contention that the finding of negligence on the part of the elevator operator is without support.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The principal point of controversy arises over the following instruction given to the jury: "Although you may believe from the evidence that the servant of the defendant, who was operating the elevator at the time in controversy here, was a co-employé, with the plaintiff in the general business of operating defendant's Broadway Department Store, yet you are instructed that he was engaged in another department of labor from that of the plaintiff, and, as a matter of law the negligence, if any, of the servant operating the elevator, was the negligence of the defendant." The correctness of this instruction depends upon the interpretation to be given to section 1970 of the Civil Code, as amended in 1907. St. 1907, p. 119. Prior to 1907, the section read as follows: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé or unless the employer has neglected to use ordinary care in the selection of the culpable employé." The amendment added this proviso: "Provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employé injured, or of a person employed by such employer having the right to control or direct the services of such employé injured, and also when such injury results from the wrongful act, neglect or default of a co-employé engaged in another department of labor from that of the employé injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employé injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment. * * *" While the proviso is framed in a manner that may leave a doubt concerning the proper relation of some of the phrases, we think it quite clear that the intent of the amendment was to take from all classes of employers the benefit of the fellow-servant rule, in cases where the employé injured and the one at fault are engaged in different departments of labor. The appellant argues that the concluding words of the proviso, "upon any railroad, or in the operation of any mine, factory, machine shop or other industrial establishment," qualify all the preceding clauses following the words, "and also." So arguing, he claims that the Broadway Department Store is not a railroad, mine, factory, machine shop, or other industrial establishment, and that therefore the "department of labor" exception has no application. There is no rule of grammatical construction which requires that the final clause be given the effect claimed. The interpretation thus urged would, we think, unduly limit the effect of the proviso.

This brings us to a consideration of the meaning of the phrase "another department of labor." The general rule exempting employers from liability for injuries sustained by one servant through the negligence of another servant in the same common employment has been declared, in the absence of any statute on the subject, by all the courts applying the doctrines of the common law. The decisions are by no means in accord with respect to the fundamental reason or basis for the rule, and this phase of the subject has called forth the expression of a multitude of varying views. With a discussion of these we need not here concern ourselves. So, too, the courts have differed in their attempts to define the relation of common service. In the absence of any statutory limitation of the doctrine, there have been in some jurisdictions decisions denying to the employer exemption in cases where the injured employé and the one whose negligence was asserted were not "consociated" in the same "department," or "line of employment." C. & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Railroad Co. v. Carroll, 6 Heisk. (Tenn.) 347; U. P. R. R. Co. v. Erickson, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137; Relyea v. Railroad Co., 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817. In this state no such modification had ever, prior to the amendment of section 1970, been recognized. That section, as it formerly stood, was regarded as declaratory of the common law (Congrave v. S. P. R. R. Co., 88 Cal. 360, 26 Pac. 175), and, under its terms, a common employment existed when each of the servants in question was employed "in the same general business" (Mann v. O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149).

It would seem clear from these considerations that the purpose of the amendment to section 1970 was to modify, in the interest of those employed, the rigor of the rule which, in many cases, denied them relief for loss or injury sustained without their fault. The enactment is remedial in character, and should be construed liberally with a view to carrying out the object sought. Such appears to have been the tendency of the courts in dealing with similar statutes. 2 Labatt, Master & Serv. § 639. Referring to a statute which used the expression "branch or department," the Supreme Court of Ohio said: "The section, however, makes no attempt to define the terms 'department' or 'branches,' but these terms should not be limited so as to embrace merely those large divisions created for convenience in administering the affairs of the company. On the contrary, it is more reasonable to suppose that they relate to those minute ones which concern the daily duties of the employés." Railroad Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11. The term "department of labor" used in our statute has, in like manner, failed to receive definition at the hands of the Legislature, and must, therefore, be construed by the courts according to the ordinary significance of the words used, taken in connection with the apparent purpose of enactment. In seeking the intent of the amendment, we are not so closely limited as is a court which undertakes, without legislative sanction, to restrict the operation of the fellow-servant rule. In those jurisdictions which, by force of judicial declaration alone, refused the benefit of the rule where employés were engaged in different departments, it may well have been thought necessary to interpret the phrase "different departments" narrowly. In undertaking, without statutory sanction, to limit the scope of a docrine of general application, the courts naturally proceed with more caution than would be appropriate where the limitation has been made a part of the policy of the state by express legislative declaration. While the decisions of the courts which, of their own motion, enunciated the so-called "department rule," are instructive, they are not conclusive here, and we shall not undertake to review them, or to declare whether they tend to support the appellant's contention.

It would be difficult, if not impossible, to formulate a definition of the phrase "department of labor" in such terms as to furnish an exact test by which to determine, on any given state of facts, whether two employés are in different departments. In a general way it may be said that the question of identity of department is to be determined by inquiring, among other things, whether the employés in question are habitually associated or brought together in the performance of their duties, whether they are under the immediate direction and control of the same superior, and whether the duties of one have any relation to or connection with those of the other. Where the facts are disputed, or, if undisputed, are such as to reasonably permit contrary inferences, the jury should be permitted to determine whether the servants were engaged in the same department of labor. But, where the facts are such that reasonable minds could not differ as to the conclusion, the question becomes one of law for the court. 2 Labatt, Master & Serv. §§ 494, 504; C. & E. I. R. R. Co. v. Driscoll, 176 Ill. 330, 52 N. E. 921; Swadley v. M. P. R. R. Co., 118 Mo. 268, 24 S. W. 140, 40 Am. St. Rep. 366; MacCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707. In Morgan v. J. W. Robinson Co., 107 Pac. 695, the only case in which we have had occasion to consider the effect of the amendment to section 1970, the court had no hesitation in declaring that, as matter of law, the employés there involved (i. e., a carpenter engaged in the construction of a building and a man operating a freight elevator used in a retail store) were engaged in different departments of labor. We are satisfied that the same result must be reached on the facts here shown. The plaintiff's only duties were those connected with the sale of cloaks and suits. The operation of the passenger elevator was an entirely separate and distinct branch of service. There was no relation between the two beyond the fact that, at the close of her day's service, the plaintiff was permitted, for her convenience, to use the elevator in going from her place of work to the dressing room. It could not be said that she and the elevator boy were engaged in the same department of labor without perverting the ordinary meaning of words and destroying the effect of the amendment. The court rightly instructed the jury with reference to this point.

The other errors assigned by the appellant are of slight importance, and will be briefly discussed. Plaintiff and other witnesses were permitted, over defendant's objection, to testify that there were various departments in defendant's store, such as a clothing department, a grocery department, a jewelry department, and others. This testimony, if inadmissible as calling for the conclusion of the witness, could not have prejudiced the appellant. In the first place, the fact stated was obvious enough from the mere title—Broadway Department Store—given by defendant to his establishment. Furthermore, the question of identity of department was material only in so far as it affected the employment of plaintiff and of the elevator operator. Whether other classes of employés were engaged in different departments was of no consequence whatever.

Mrs. Mary Greathouse was called as a witness on behalf of the defendant, and testified, in effect, that plaintiff's skirt had not been caught in the elevator door. On cross-examination she stated that she had, at the instance of the defendant, made an affidavit stating how the accident occurred, and that, in that affidavit, she had not said that she had been unable to see whether the dress was caught or not, but, on the contrary, had said that everything was clear. Thereupon the defendant, at the request of plaintiff's attorneys, produced the affidavit. The plaintiff's attorneys inspected it, but did not offer it in evidence. On redirect examination the defendant sought to introduce the paper in evidence, and plaintiff's objection to the offer was sustained. The ruling was correct. If the affidavit had conflicted with the witness' testimony at the trial, the paper might, after proper foundation laid, have been introduced by the adverse party, but this would have been permissible for the purpose of impeachment only. It was not so introduced, and the defendant could not support the unimpeached testimony of his own witness by proof that she had made similar statements at another time. Such statements, made out of court, were clearly incompetent.

Finally, the appellant urges that a new trial should have been granted for misconduct of the jury. During the trial, one of the jurors suggested that the jury be sent to view the elevator, and added that he had talked with some of his associates and that several of them were of the same mind. Further inquiry drew from the juror in question the explanation that, while one of the attorneys was drawing a diagram, he, the juror, had said that he would rather see the elevator, whereupon one or two of his associates "merely nodded a head." This appears to have been all that occurred. After discussion between court and counsel, in the absence of the jury, the court ruled against defendant's contention that there had been misconduct. It would be rather extreme to hold that the action complained of constituted a violation of duty on the part of the jurors, under section 611 of the Code of Civil Procedure. But, if it did, it is impossible to see how the formation or the expression of a desire to view the premises could have prejudiced either party in the slightest degree. People v. West, 73 Cal. 345, 14 Pac. 848; People v. Kramer, 117 Cal. 647, 49 Pac. 842.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.

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14 Cal. App. 111

PEOPLE v. BOSSERT. (Cr. 231.)

(Court of Appeal, First District, California. Aug. 17, 1910. Rehearing Denied Sept. 16, 1910; Denied by Supreme Court Oct. 10, 1910.)

WITNESSES (§ 2*)—CRIMINAL LAW—CONSTITUTIONAL RIGHTS.

Under Const. art. 1, § 13, guaranteeing accused persons process to compel attendance of their witnesses, it was prejudicial error to refuse to compel the attendance of accused's witnesses, and, in lieu thereof, to permit their testimony given at a former trial to be read.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 2-4; Dec. Dig. § 2;* Criminal Law, Cent. Dig. § 1343.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Henry Bossert was convicted of rape, and he appeals. Reversed and remanded.

James A. Hall, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of the crime of rape perpetrated upon a female under the age of consent. He made a motion for a new trial, which was denied, and this appeal is from that order and from the judgment.

In the preparation of his brief counsel for defendant has not presented his 60-odd points in such a way as to facilitate the work of this court. Nearly all of his points relate to rulings on evidence, and invariably he has set out the question objected to, and coupled it with the statement that the holding of the court thereon, admitting or rejecting the testimony, as the case may be, was prejudicial error. In short, the brief is in effect little more than a statement that the defendant relies on each of the objections made by him, either to evidence, to instructions, or to the conduct of the district attorney and the court. The defendant's mode of presenting his case has entailed much unnecessary labor both upon the Attorney General and upon this court.

At the commencement of the trial the defendant, having theretofore learned that some of his witnesses were not present, moved the court to issue a bench warrant for them. This motion was based upon affidavits which contained all the requisite statements entitling the defendant to the process of the court to compel the attendance of his witnesses and showed that their testimony was material. The district attorney resisted the motion, and offered to permit the testimony of these witnesses taken at a former trial to be read to and considered by the jury as testimony in the case. The court at this time declined to pass upon the motion and directed the case to proceed. Later and at the beginning of defendant's side of the case this motion was renewed, and the offer of the district attorney repeated, whereupon the court, to save expense to the county and to avoid inconvenience to the witnesses, denied the motion, and the testimony of the witnesses in question was read to the jury.

The witnesses lived in an adjoining county and therefore were within reach of the jurisdiction of the court (sections 1329, 1330, Pen. Code); and we fully agree with the defendant that, under the law in this state, it was error on the part of the court prejudicial to him to compel him to submit his case to the jury without the presence of his witnesses and the benefit of their oral testimony. The testimony of witnesses given in court is much more effective and far superior to that read to the jury in the form of a deposition. For example, the testimony of two witnesses reduced to writing, and of a contradictory character, might seem to be equally credible, whereas if they had testified in court their appearance and bearing on the witness stand might have enabled the jury to determine that one was testifying truly and the other was not. Touching this subject Blackstone, in his Commentaries, says: "In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclination of the witnesses, in which points all persons must appear alike when their depositions are reduced to writing, and read to the judge in the absence of those who made them, and yet as much may be frequently collected from the manner in which the evidence is delivered as from the matter of it." 2 Cooley's Blackstone, pt. 1, p. 373. Speaking on the same subject-matter this court, in People v. Fong Chung, 5 Cal. App. 591, 91 Pac. 106, quoted from an early California case, where it was said: "The value of oral testimony over all other is too well understood to suppose for a moment that such * * * statements of what it would be will have the same weight on the minds of the jury as the testimony of the witness if he had been examined before them in open court." See also Starkie on Evidence (9th Ed.) 727, 728, and State v. Berkley, 92 Mo. 41, 48, 4 S. W. 24.

On account of the superior value of such testimony to an accused, and in order to cure a defect in the common law in this regard, the Constitution of the state—like the Constitutions of nearly all other states of the Union—provides that defendants in criminal prosecutions shall "have the process of the court to compel the attendance of witnesses in his behalf." Section 13, art. 1, Const. See, also, section 686, Pen. Code. On the same subject Mr. Wigmore, in his work on Evidence, at section 2191, observes: "This history of the law securing for accused persons the right to compulsory process for their witnesses shows that the purpose of the statutes was to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed both by parties in civil cases and by the prosecution in criminal cases. The Bills of Rights in most of the Constitutions have incorporated this right, because those clauses of the Constitutions were intended to sanction permanently the more fundamental features of just and liberal criminal procedure, particularly in the parts which had at various times in the past been found liable to abuse. The Constitutions in this instance provided nothing new or exceptional; but gave solid sanction in the special case of accused persons to the procedure ordinarily practiced and recognized for witnesses in general." See, also, sections 575 and 1415 of the same treatise, and State v. Jennings, 81 Mo. 196, 51 Am. Rep. 236. The right of an accused to the personal attendance of his witnesses in court has been discussed a great many times in cases where material witnesses within the jurisdiction of the court have failed to appear at the trial, and the defendant, guilty of no lack of diligence in the matter, has been denied a continuance of the case upon the admission of the prosecution that the absent witnesses would testify as claimed by the defendant.

In the case of State v. Baker, 81 Tenn. 326, 332, after discussing at length the disadvantages suffered by a defendant compelled to submit his case without the benefit of the personal appearance of his witnesses at the trial, the court says: "While the constitutional provision that the defendant 'is to have compulsory process for obtaining witnesses in his favor' may not imperatively demand their presence in any case, yet * * * it would ill accord with the spirit of that right, when the witnesses are within the reach of the process of the court, if the defendant is compelled to take a mere written statement as the equivalent of the personal appearance contemplated by the use of the process guaranteed to him by the Constitution." In the case of State v. Berkley, supra, the court said that, if it was necessary "to speak of the inestimable value to the accused to have the testimony of his witnesses delivered ore tenus before the tribunal where the accused" was to be tried, it argued "a great want of attention to, or familiarity with, that historic struggle which finally led to the right in question being embalmed in our American Constitutions, both state and federal." The court, continuing, said: "The right is an absolute one. It is not the subject of diminution, barter, or exchange. The importance of its being maintained cannot be overestimated." The court quotes with approval from 1 Burr's Trial, 178, 179, where Chief Justice Marshall, speaking on this subject, says: "The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow necessarily from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied by means of rendering it effectual. * * * The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such trial. * * * The Constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth amendment to the Constitution gives to the accused, 'in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor.' The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter." In State v. Salge, 2 Nev. 321, the court held —basing its opinion upon the right of the defendant to the personal appearance of his witnesses—that, if the defendant was entitled to a continuance on account of the absence of material witnesses, it was error to compel him to go to trial on admissions of what those witnesses would swear to if present. Finally, in People v. Fong Chung, supra, the district attorney, in response to a motion for a continuance, offered to concede that the absent witness would testify to the material things set forth in the affidavit read in support of the motion, whereupon the court, in view of said offer, denied the continuance. There it was said that the defendant had a constitutional right to have his witnesses orally examined in court, and, in the absence of a showing that the motion was made in bad faith, that he was entitled to a reasonable time to secure their attendance.

The defendant in the case at bar had regularly subpœnaed the witnesses in question. Their testimony was material and important to him. Nevertheless the court held that he was not entitled to the process of the court compelling their attendance, and forced the defendant to submit his case to the jury without the benefit of their oral testimony. By this ruling it is clear that the defendant was deprived of a constitutional right, for which the judgment and order must be reversed. It is so ordered, and the cause remanded for a new trial.

We concur: COOPER, P. J.; HALL, J.

158 Cal. 334

FIRST NAT. BANK OF COVINA et al. v. RUDDOCK CO. et al. (L. A. 2,430.)

(Supreme Court of California. Sept. 6, 1910. Rehearing Denied Oct. 6, 1910.)

1. Bills and Notes (§ 132*)—Railway Right of Way Notes—Defenses.

The maker of notes "to defray the cost of securing the right of way for the Covina Extension of the Pacific Electric Railway" cannot defeat them on the theory of a departure from the route between two points, nor on the theory that the road was not built by the company it was to have been built by, where the primary object was to procure a road connecting those two points, and it was understood that the exact route would be determined later.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 323; Dec. Dig. § 132.*]

2. Evidence (§ 457*)—Railway Right of Way Notes—Construction of Provisions.

In an action on notes to procure a right of way for the "Covina Extension of the Pacific Electric Railway," the question as to what the quoted term meant was one of fact, to be determined from all the circumstances surrounding their execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.*]

3. Bills and Notes (§ 132*) — Railway Right of Way Notes—Liability.

If notes given to procure a right of way for an electric road required the road to be built by a particular company, the condition was met by construction by a company whose stock was owned by the other company.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 323; Dec. Dig. § 132.*]

4. Bills and Notes (§ 132*) — Railway Right of Way Notes—Defenses.

The maker of notes to procure the "Covina Extension of the Pacific Electric Railway" could not defeat them on the theory the road was to be built beyond that town, the quoted phrase implying a road merely "to" that town, and where a movement to extend the line beyond was abandoned before the notes were given.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 132.*]

5. Eminent Domain (§ 79*)—Right of Way—Right to Compensation—Waiver.

Even if a landowner's oral agreement to waive compensation for a railway right of way could have been repudiated, it became binding on his conveyance of the right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205–214; Dec. Dig. § 79.*]

Beatty, C. J., dissenting.

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the First National Bank of Covina and others against the Ruddock Company and others. From a judgment for plaintiffs, defendant C. H. Ruddock appeals. Affirmed.

Stephens & Stephens and D. K. Trask, for appellant. Gibson, Trask, Dunn & Crutcher, for respondents.

LORIGAN, J. Plaintiff, as assignee of a body constituting the Citizens' Right of Way Committee of the city of Covina, brought this action against the defendant Charles H. Ruddock to recover on two promissory notes executed by him to the committee and recovered judgment thereon, and from said judgment and a denial of his motion for a new trial said Ruddock appeals.

It appears that a large number of persons whose property and personal interests in and about the city of Covina would be benefited and advanced by the construction of an electric road which would connect the city of Los Angeles with the city of Covina appointed a committee whose duty it should be to obtain the construction of such a line, and to that end secure the necessary funds and procure a right of way over which the said electric road to Covina should be constructed. The defendant Ruddock, along with many others, executed notes to the treasurer of the committee to defray the expense of such right of way; the main inducement for their execution being the benefits which would accrue to their lands by reason of the construction and operation of an electric road between the two cities. Ruddock, in aid of such purpose, executed the two notes sued on, one of which is as follows: "Covina, Cal., March 25th, 1903. For value received I promise to pay upon demand to F. M. Douglass of the Citizens' Right of Way Committee, the sum of $3,097.75 to defray the cost of securing the right of way for the Covina extension of the Pacific Electric Railway. Ruddock Company, By C. H. Ruddock." The other note was similar in tenor to the first, but for the sum of $2,377.50, and dated April 28, 1903. The proceeds of all the notes secured by the committee were to constitute a fund to procure a right of way which, when procured, was to be given free to the railroad company constructing said railroad as soon as an electric railway should be constructed and put into operation between said cities of Los Angeles and Covina.

Within the time agreed on for the construction of the said road, the committee procured that portion of the right of way necessary to be procured by them, which was between Vineland and Covina, and through their efforts a corporation known as the Los Angeles Interurban Railway Company constructed an electric road of modern design and with modern appliances and equipment and operated by electricity, which, since its construction, has been continuously operated by the Pacific Electric Railway Company, over the right of way procured by the said committee, and from said city of Los Angeles through Vineland to the city of Covina. The notes executed by Ruddock were assigned to plaintiff, and, the former having failed to make payment on demand, this action was brought to recover on them.

While the notes are signed by the Ruddock Company by C. H. Ruddock, they were so signed because at the time of the signing a corporation to be composed of the members of the Ruddock family owning lands in the vicinity of the contemplated extension of the electric road was under contemplation. The formation of this corporation was abandoned, and it is conceded by the defendant appellant that, if any liability on the notes exists, he is personally liable thereon. Several defenses were interposed by the defendant, all of which were held untenable by the trial court, and in this it is insisted that the court erred.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The first defense interposed by him was that, by the terms of his subscription notes, his payments were to be in aid of the extension of an electric road to Covina to be constructed by the Pacific Electric Railway, which meant the Pacific Electric Railway Company, which was then an organized corporation engaged in the construction of an extended system of railways radiating from the city of Los Angeles, and which, when the note was signed, had an electric line operating from Los Angeles to San Gabriel, from which point appellant claims "the Covina extension" was to be made. It is insisted, first, that his subscription being made in relation to an extension by a specified railroad—the Pacific Electric Railway Company—without any provision for its successors or assigns—the acceptance of the subscription and the performance of the conditions by the company which constructed the road, namely the Los Angeles Interurban Company, does not bind the defendant as subscriber unless he consented to them which he did not; and, second, that the extension was not built from San Gabriel to Covina as agreed.

As far as the point is made that a particular extension of the route from San Gabriel to Covina was stipulated for, it is apparent that the subscription notes had no reference to any route at all. It is undoubtedly true that when the subject of connecting the city of Covina with Los Angeles, a distance of 19 miles, was first agitated, the residents of Covina and vicinity had in contemplation an extension of the electric road then operated by the Pacific Electric Railway Company as far as San Gabriel, and contemplated an extension from the latter place through Covina and beyond, including possibly Pomona and Riverside. But in the subscription notes there is nothing specifically requiring that any particular extension route shall be taken. As far as the right of way committee and the residents in the vicinity of Covina, in whose behalf and their own the committee was acting, no definite action was taken at all as far as selecting a route is concerned until after these subscription notes were secured. It is quite apparent from the evidence in the case that what the Covina people wanted was an electric road which would put them in communication with the city of Los Angeles, and at the time the notes were secured by the committee, of which the defendant was a member, no route had been fixed upon or any arrangement made with any company relative to any definite route. In fact, until the route was finally selected upon which the electric road was built, several routes were under contemplation. It was realized that the selection of a route, if an electric company could be prevailed on to build at all, would be a matter to be taken up with the constructing company, and the route to be selected would be left largely, if not entirely, to that company. So these matters were left entirely to the right of way committee. When the committee consulted with Mr. H. E. Huntington, president of the Pacific Electric Railway Company, he assured them that he would build an electric road to Covina if he was given a free right of way. No assurances were made by him as to what route would be followed. The matter was for arrangement between the committee and Mr. Huntington. The latter did not make the offer as representing the Pacific Electric Railway Company of which he was president or the Los Angeles Railway Company of which he was also president. It did not purport to be the offer of any company, but of Mr. Huntington personally. All that the residents of Covina were solicitous about—referring now more particularly to those who signed subscription notes—was that there should be constructed a direct electric line between Los Angeles and Covina. This is all they were interested in and this is what they secured. There being nothing in the expression "Covina Extension of the Pacific Electric Railway" definitely fixing a route by which such extension should be made, the question of what was the meaning of these terms in the subscription notes was a question of fact to be determined from all the circumstances surrounding their execution. First Nat'l Bank v. Bowers, 141 Cal. 253, 74 Pac. 856. Evidence was addressed to the proposition, and the trial court found that this phrase "Covina Extension of the Pacific Electric Railway" was used in the subscription notes as a mere matter of convenience to indicate an extension of an electric railway from the city of Los Angeles to the city of Covina over a right of way to be subsequently procured by the company between those points, and upon which an electric road would be constructed, and this finding is sustained by the evidence.

As to the proposition that by the terms of the subscription notes the road was to be built by the Pacific Railway Company. The notes themselves contain no such provision. No company is named, and there is no agreement that the extension would be built by any company at all. It is true that, when the proposition was first considered by the residents and the right of way committee, it was contemplated that the road would be extended, as we have said, from San Gabriel, to which point the Pacific Electric Railway Company had built its road, on to the city of Covina, and that it would probably be built by the Pacific Electric Railway Company. The committee assumed that, if an extension was built, the extension would probably be made from San Gabriel as it would be more economical to build from that place to Covina than to build an independent line from Los Angeles to Covina. But as it is conceded that, when the notes were executed, no arrangement or agreement with any railroad company to build the extension had been made, this probably affords the reason why no constructing company was mentioned in the notes. In fact, it is obvious from the terms of the subscription notes and the entire circumstances surrounding their execution that it was really a matter of no moment who should build the road or over what route it should be constructed. The main object to be attained was to connect the city of Covina with the city of Los Angeles by a direct route, and, as long as this end was accomplished, it was immaterial who actually constructed the road. The desired end would be attained as well by having it built by one company as by another. The main and controlling purpose being to have the road built probably accounts for the absence of any specified route or the mention of any constructing company. The success of the project and the method of its accomplishment was to be left to the judgment of the right of way committee, and the form of the subscription notes was drafted so as to interfere the least with their judgment and without any limitations attending the payment of the subscriptions, save that they should be applied to obtaining the right of way and having an electric railroad constructed thereover between the city of Los Angeles and the city of Covina. But if it can be said that the subscription notes of the defendant provided in effect, though they did not in terms, that the railroad was to be constructed by the Pacific Electric Railway Company, it is apparent from the findings, which are supported by the evidence, that the road was in reality built by that electric company.

After the committee secured subscription notes sufficient in its judgment to furnish a fund to purchase a right of way for the contemplated road, it entered into negotiations with H. E. Huntington, president of the Pacific Electric Railway Company, to have an electric road constructed. The matter was taken up personally with him, and, as we have said, there was not until then any arrangement between the committee and any railroad company or individual for the construction of the road. The arrangement was with Huntington and simply amounted to an agreement that, if the committee obtained a free right of way, he would have the road built. They secured the right of way, and he caused the railroad to be constructed and equipped by the Los Angeles Interurban Company. When the road was built by this company, the right of way was conveyed to it. At the time the Los Angeles Interurban Company constructed it, the Pacific Electric Railway Company was the owner of all the capital stock of the Los Angeles Interurban company, and had guaranteed a payment of its bond issue amounting to $10,000,000. Under these circumstances, as the Pacific Electric Railway Company was the sole owner of all the stock of the Los Angeles Interurban Company, the road necessarily was built at the expense of the former company. After its completion it was actually operated, and upon the trial of this action was being operated, from Los Angeles to Covina by the Pacific Electric Railway Company. While it is true that these respective corporations are distinct and separate entities, as a matter of fact, they constitute but one company, the Pacific Electric Railway Company, which actually built, or caused to be built, "the Covina Extension," and is operating it as an integral part of its entire system of electric railways. This being true, it appears to us that, if it should be assumed that the Pacific Electric Railway Company was by the terms of the subscription notes to build the road, this condition has been actually met. This disposes of the main defense interposed by defendant against his liability upon the notes.

As a further defense, it is claimed by defendant that the notes were also given in consideration of the railroad being built beyond Covina, to a tract of land owned by defendant to the east thereof, which was not done. The court found that there was no merit in this claim, as there was no agreement to that effect. This finding is supported by the terms of the subscription note itself. There is nothing in it calling for an extension beyond Covina. The phrase "Covina Extension of the Pacific Electric Railway" quite naturally implies simply an extension to the city of Covina. It could not reasonably be construed as an extension beyond it. It is apparent too from the evidence in the case, as far as it was addressed to ascertaining the meaning of the terms used in the subscription note that when the project of obtaining an extension to Covina was first contemplated, the matter of having the road run through Covina to Riverside was under consideration. It appears, however, that no immediate assistance could be obtained along the route beyond Covina to Riverside so that project was early abandoned and long before the notes were given, and the efforts of the residents of Covina and of the committee were thereafter concentrated solely towards securing an extension to Covina alone.

Defendant further claimed that a deduction to the extent of $3,369 for land taken as part of the right of way through his land should have been allowed him as an offset against the claim on his notes. The right of way committee in determining the amount which should be allowed the persons through whose land the right of way for the railroad should be acquired fixed amounts to be allowed as compensation to defendant and others for rights of way through their lands. The evidence discloses that, about the time Ruddock and the other subscribers to the fund to procure a right of way executed their notes, it was agreed that the entire amount of the subscription should be placed in a fund to defray the expense of securing a right of way between Vineland and Covina, including the Ruddock portion of the right of way. Ruddock was an active and energetic member of the right of way committee and a strong advocate of the contemplated extension of the electric road to Covina, as he and his family owned some 700 acres of land in its vicinity which would be prospectively enhanced in value by the construction of the road. Subsequent to the fixing by the committee of the amount of compensation to be paid to the defendant, and about the time of the execution of his notes, he declared to the committee with which he was in conference that he wanted no compensation for the Ruddock right of way, but would waive his right to any compensation therefor and grant the right of way free in addition to giving the amounts represented by his notes. Thereafter the Ruddock family with the defendant conveyed their lands in the vicinity of Covina through which the right of way was to run to the United Investment Company, the majority of the capital stock of which they held, and which company, in accordance with the promise made by said Ruddock and by his authority and at the request of the committee, conveyed the right of way for said electric road to the Los Angeles Interurban Company which constructed it. Conceding that the oral agreement of Ruddock to waive his compensation for damages for the right of way was not binding upon him and he might have repudiated it, still, having carried out his prior promise to relinquish any claim therefor by actually conveying the right of way, this constituted a confirmation of his original waiver to compensation and precluded him from asserting any claim for it.

It is strenuously insisted by his counsel that no such promise was made by Ruddock, and that the conveyance executed to the Los Angeles Interurban Company was obtained by fraud practiced on the officers of the United Investment Company making the conveyance. The evidence is quite full and clear as to the promise to waive compensation for the right of way and to donate such right, together with the sums represented by the notes, and there was sufficient, though it may be conceded not as clear, evidence that the conveyance was made by the company with his sanction and in conformity to his promise.

While we have disposed of this appeal on the merits, we have not overlooked various points made by appellant for a reversal consisting of alleged error in overruling the demurrer of appellant to the complaint, in denying his motion for a nonsuit, and in certain rulings on evidence.

We have fully considered these matters, but perceive no error in any rulings of the court respecting them.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

I dissent: BEATTY, C. J.

158 Cal. 352

GRUBB v. CHASE. (L. A. 2,428.)

(Supreme Court of California. Sept. 7, 1910. On Rehearing in Bank, Oct. 7, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 443*) — ACTION AGAINST ADMINISTRATOR — EVIDENCE.

Where the gist of an action against an administrator was the fraud perpetrated by his intestate, the fraud must be alleged and proved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1799; Dec. Dig. § 443.*]

2. EXECUTORS AND ADMINISTRATORS (§ 431*) —CLAIMS—PRESENTATION.

To maintain an action against an administrator for the fraud of his intestate, a claim therefor must be fully presented according to law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1664, 1679–1682; Dec. Dig. § 431.*]

On Rehearing.

3. NEW TRIAL (§ 131*)—MOTION—STATEMENT —STATUTES.

The objection that the proposed statement of plaintiff and amendments thereto by defendant on motion for new trial were not presented to the court within the time prescribed by Code Civ. Proc. § 659, is not available after settlement of the statement by the allowance of the amendments proposed on the hearing of the motion for new trial, and the court may not deny a new trial on the ground that plaintiff did not comply with section 659, though it acted originally under section 473, authorizing the court to enlarge the time to plead.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 267–269; Dec. Dig. § 131.*]

Department 2. Appeal from Superior Court, Riverside County; B. F. Bledsoe, Judge.

Action by William A. Grubb against Lucius K. Chase, administrator of Charles D. Foster, deceased. From an order denying a new trial, plaintiff appeals. Affirmed.

W. F. Palmer, L. D. Bechtel, and Palmer & Mahan, for appellant. Lafayette Gill and Louis W. Myers, for respondent.

MELVIN, J. Appeal from an order denying plaintiff's motion for a new trial. The action which was brought against an administrator was upon a common count for money alleged to be due as the purchase price of certain goods, wares, merchandise, stocks, securities, and choses in action sold and delivered by plaintiff to defendant's decedent. The questions of fact involved were determined by a jury. Judgment was for defendant, and plaintiff gave notice of motion for new trial. The proposed statement of plaintiff on motion for new trial was not filed within the time prescribed by statute, but it is here contended by plaintiff that relief was granted under the provisions of section 473 of the Code of Civil Procedure. The motion for new trial was heard, and subsequently the court denied it, one of the reasons for said denial being that the moving party had not complied with the terms of section 659 of the Code of Civil Procedure. The learned judge of the superior court, however, filed an opinion in which he gave as an additional reason for his ruling, and one that would have been sufficient without the other, that the proof adduced at the trial utterly failed to sustain the allegations of the complaint. In this behalf he wrote as follows: "The case to be made in suing an administrator is limited absolutely, under the decisions in this state, to the cause of action set forth in the claim filed against the estate. The claim filed against the estate in these cases was for money owing, as upon an express promise to pay, under an executed contract of sale. The case as made by the plaintiffs was one for damages in tort, as for false representations. The two are essentially dissimilar. For that reason, then, conceding that the court might have committed some errors in the giving of instructions, or the admission of evidence, still under no circumstances, under the pleadings as at present, could plaintiff recover. Such being the case, any error committed was purely of an abstract nature, and not prejudicial to the rights of the plaintiffs. Hamlin v. Pacific Electric Ry. Co., 150 Cal. 782, 89 Pac. 1109; Green v. Ophir, C. S. & G. M. Co., 45 Cal. 527."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant does not deny that the proposed statement for use on the motion for new trial was not filed nor presented to the court within the time prescribed by section 659 of the Code of Civil Procedure, but contends that having presented an affidavit showing dependence upon verbal stipulations of defendant's attorneys as an excuse for his delay, and the court thereafter having settled the statement by allowing all of defendant's proposed amendments, therefore relief was granted under the provisions of section 473 of the Code of Civil Procedure. Defendant objected to any settlement of the statement on the ground "that said proposed statement and amendments had not been presented to the court, or delivered to the clerk for the judge within the time allowed by law, in this: that defendant's proposed amendments to said proposed statement were not, nor was a copy thereof, presented to the court or delivered to the clerk for the judge within 10 days after said proposed amendments were served upon said plaintiff." This objection was available after settlement of the statement, when the motion for new trial came on for hearing, and it seems to have been sufficient for the court at that time. Therefore, it makes no difference whether the court acted originally under section 473 of the Code of Civil Procedure or not. We think the ruling finally made was justified under the authority of Henry v. Merguire, 106 Cal. 146, 39 Pac. 599, cited by the court at the time the motion for new trial was denied.

We are also in accord with the lower court upon the second ground for denying the motion. At the trial plaintiff's theory was that defendant's decedent, Foster, had promised to purchase sundry notes and certain stock in the Massachusetts Real Estate Company at a stipulated price equal to the face value of the notes, plus certain interest thereon, and the agreed value of $35 per share of the stock. This, plaintiff contends, was to be paid for in stock of the Mercantile Realty Company, worth par. The stock of the latter company was delivered, but it was not worth par. This, according to plaintiff, was not an executed contract, but defendant's decedent acknowledged in his lifetime that he was bound to give plaintiff the par value of the Mercantile Realty Company's stock by paying interest on the par value of said stock every six months as long as he lived, meanwhile fraudulently concealing the worthless nature of the stock which he had delivered. The mere statement of this proposition demonstrates the correctness of the trial court's determination. The very gist of plaintiff's action was the alleged fraud perpetrated upon him by Foster. Such fraud must be alleged and proved, and, in order that an action may be maintained against the administrator of an estate, a claim of this kind must be fully presented according to law. McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466.

It follows that the order from which the appeal was taken should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. In so far as the department opinion implies that the objection that the proposed amendments to plaintiff's statement on motion for a new trial were not presented by plaintiff to the court within the time prescribed by section 659, Code of Civil Procedure, was available to defendant after settlement of the statement upon the hearing of the motion for new trial in the superior court, notwithstanding that the court before settling the statement had relieved plaintiff from the effect of his default under section 473, Code of Civil Procedure, and notwithstanding that all such proposed amendments were allowed, we are satisfied that it is incorrect. The motion for a new trial was, however, properly denied for the other reason discussed in the opinion.

The petition for a rehearing is denied.

(158 Cal. 342)

CHENEY v. CANFIELD et al. (L. A. 2,270.)

(Supreme Court of California. Sept. 6, 1910. Rehearing Denied Oct. 6, 1910.)

1. CORPORATIONS (§ 298*) — ASSESSMENTS — WHEN TO BE MADE.

An assessment can be legally levied on corporate stock by the directors only at a regular meeting, or at a special meeting regularly called.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1298; Dec. Dig. § 298.*]

2. CORPORATIONS (§ 175*)—ASSESSMENTS—REQUISITES.

An assessment on corporate stock can be levied only on strict compliance with the charter and statutory provisions relative thereto.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 175.*]

3. TIME (§ 10*)—DIRECTORS' MEETINGS—LEGAL HOLIDAYS.

That a day fixed by the by-laws of a corporation for the regular monthly meeting of the directors fell on a holiday did not warrant a meeting the next day, where the by-laws made no such provision; Civ. Code, § 11, permitting an act appointed by "law or contract" to be performed on a particular day, which falls on a holiday, to be performed on the next business day, being inapplicable.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34–52; Dec. Dig. § 10.*]

4. TIME (§ 10*)—STATUTES.

Civ. Code, § 11, providing that when an act is appointed by law or contract to be performed on a particular day, which falls on a holiday, it may be performed the next day, is merely permissive and intended to preserve rights under a law or contract which may be imperiled by a holiday intervening.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34–52; Dec. Dig. § 10.*]

5. TIME (§ 10*) — PERFORMANCE OF ACTS — "LAW"—"CONTRACT."

In Civ. Code, § 11, permitting an act appointed by law or contract to be performed on a particular day falling on a holiday to be performed the next business day, the word "law" means some statutory provision or rule of law, and the word "contract" means a contract such as is defined by Civ. Code, §§ 1549, 1550—actual contracts entered into between all the parties.

[Ed. Note.—For other cases, see Time, Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 2, pp. 1513–1534; vol. 8, pp. 7615–7616; vol. 5, pp. 4014–4023; vol. 8, p. 7701.]

6. CORPORATIONS (§ 54*)—TIME (§ 10*)—"BY-LAW"—"CONTRACT."

The word "by-law" means those regulations which as one of its legal incidents a corporation is empowered to make affecting the management of its business, the control of its officers and agents, and the rights and duties of the members between themselves and between the corporation; and, while in a general sense by-laws constitute a contract under which the reciprocal rights and duties of the corporation and its stockholders are measured, they do not constitute such contract as makes a provision for directors' meeting an act to be performed under a contract within Civ. Code, § 11, permitting an act appointed by law to be performed on a particular day, which falls on a holiday, to be performed the next business day.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 54;* Time, Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 1, pp. 936–938; vol. 8. p. 7594.]

7. CORPORATIONS (§ 298*)—MEETINGS—VALIDITY.

Under a corporate by-law requiring regular monthly meetings to be held on certain days, and special meetings to be called on notice to the directors, a meeting held on a day following a regular holiday, which was the date of a regular meeting, was invalid where there was no adjournment from the regular day, and no notice to two of the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1298; Dec. Dig. § 298.*]

8. CORPORATIONS (§ 298*)—DIRECTORS—MEETINGS—WHO MAY ADJOURN.

Less than a quorum of a board of directors have no authority to adjourn a meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1302–1309; Dec. Dig. § 298.*]

9. CORPORATIONS (§ 169*)—STOCK—SALE FOR DELINQUENT ASSESSMENT—ACTION TO SET ASIDE.

Civ. Code, § 347, and Code Civ. Proc. § 341, limiting the time to sue to recover corporate stock sold for delinquent assessment on the ground of irregularity of the assessment, apply only where there has been some irregularity in the assessment or irregularity or defect in the notice of sale or the sale itself, and do not apply to void assessments.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 169.*]

Beatty, C. J., dissenting.

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by B. P. Cheney against C. A. Canfield and another. From a judgment for defendants, and from an order refusing a new trial, plaintiff appeals. Reversed.

Hunsaker, Britt & Fleming, for appellant. J. S. Chapman, Ward Chapman, and O'Melveny, Stevens & Millikin, for respondents.

LORIGAN, J. This action was brought by plaintiff to have a sale by the defendant corporation of 41,666 shares of defendant's corporate stock of which he claimed to be the owner declared void. The sale was made for a delinquent assessment, and defendant Canfield is the purchaser and holder of the stock. The defendants had judgment, and plaintiff appeals therefrom and from an order denying his motion for a new trial.

One of the main points presented for consideration here is the validity of the assessment upon which the sale of the stock was based. All the proceedings eventuating in the sale of the stock in question are based upon an assessment levied by defendant's board of directors on September 6, 1904.

It is insisted by appellant that the levy of this assessment was void for several reasons, but principally on the ground that the board of directors, he asserts, had no authority to levy it because the meeting at which they did so was neither a regular meeting of the board or a special meeting regularly called. It is the settled law that an assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board or at a special meeting thereof regularly called. Harding v. Vandewater, 40 Cal. 78; Thompson v. Williams, 76 Cal. 155, 18 Pac. 153, 9 Am. St. Rep. 187. As all proceedings whereby an assessment is levied upon the stock of a corporation, and under which a forfeiture of the stock of the stockholders may be had are in invitum, it is elementary law that they must be strictly followed. The levy of such an assessment can only be accomplished legally by a strict compliance with the statutory provisions relative thereto, or with the provisions of the charter of the corporation upon the subject. Herbert Kraft Co. Bank v. Orland, 133 Cal. 64, 65 Pac. 143; Ruck v. Caledonia Silver Mining Co., 6 Cal. App. 356, 92 Pac. 194.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The by-laws of the defendant corporation provide that regular meetings of its board of directors shall be held on the first Monday of each month, and special meetings may be called at any time, notice thereof to be given the directors personally or by mail. It was averred in the complaint that the meeting of the board of directors of September 6, 1904, at which the assessment was levied, was held at a time and on a day other than the time provided by the by-laws of the corporation and without previous or any notice to the members of the board; in effect, that the meeting at which the levy was made was neither a regular meeting of the board nor a special meeting regularly convened. This was denied in the answer, and the court found, that the board of directors of the corporation consisted of nine members, and that "the meeting of the board of directors on September 6, 1904, was held without any specific notice to the other two members of the said board, there being at said meeting but seven present, but it is provided by the by-laws of the Mexican Petroleum Company that regular monthly meetings of the said directors * * * shall be held on the first Monday of each month, and that no notice of said meeting is required, and the first Monday of September of the year 1904 was the 5th day of September, and was under the laws of the state of California a legal holiday. And when the board met on the said first Monday of September, 1904, no business was transacted because of its being a holiday, and the board met on the following day, and said assessment was levied and other business transacted. Prior to the said 6th day of September, 1904, said board of directors at a meeting adjourned from the regular monthly meeting in August met and there being no quorum present, adjourned said meeting to the 6th day of September, 1904." On this finding the trial court based its conclusion that the meeting of the board of directors on September 6, 1904, was a valid one and the assessment legally levied, being of the opinion, first, that although the by-laws of the corporation provided for a regular meeting of the board on September 5, 1904, which was the first Monday of the month, yet, as that date fell on a legal holiday, the board might meet on the following day with equal regularity and legal effect under section 11 of the Civil Code; secondly, that, whether it could or not, still the meeting on September 6, 1904, was a regular and valid meeting of the board because it was then held on the date to which the regular monthly meeting of the board in the August previous had been adjourned.

We do not think either of these conclusions correct. The fact that the first Monday of the month, fixed by the by-laws for the regular monthly meeting of the board of directors, fell on a holiday, did not warrant the board in meeting on the following Tuesday on the theory that under the section of the Code it could then hold the regular monthly meeting. The by-laws did not so provide, and section 11 of the Civil Code, which is invoked to uphold the validity of the meeting on that day, has no application. That section provides that, "whenever an act of a secular nature * * * is appointed by law or contract to be performed on a particular day which falls upon a holiday, it may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." It will be observed that there is nothing mandatory about the provision. Even as applied to an act appointed by "law or contract" to be performed upon a given day, it is merely permissive. It may or may not be done on the appointed day, as the party to perform it chooses or an opportunity presents. The section, however, even in its permissibility only applies to an act appointed by "law or contract" to be performed. While the by-laws of the corporation under discussion fix the first Monday of each month for holding the regular meetings of the board of directors, still a by-law is not a "law or contract" within the meaning of the Code section.

In speaking of an act provided by "law or contract" to be performed, the section, in as far as it refers to "law" means such an act as is required to be performed within a given time by authority of some statutory provision or rule of law. A provision similar to the one in the Civil Code is found in both the Code of Civil Procedure (section 13) and the Political Code (section 13). When the section of the Code relied on speaks of an act to be performed by "contract," it means contracts such as are defined by sections 1549 and 1550 of the Civil Code itself—actual contracts entered into between all the parties; contracts which are definitely such and by the terms of which conditions or provisions are to be complied with by the parties within a specified time with a possible forfeiture of rights thereunder for noncompliance. The term "by-law" has a well-known but limited and peculiar meaning. It is used to designate those regulations which as one of its legal incidents a corporation is empowered to make affecting the management of its business, the control of its officers and agents, and the rights and duties of the members of the corporation between themselves and between the corporation. To pass and make effective such by-laws the consent of all parties, as in actual and ordinary contracts, is not necessary, as a bare majority of the stockholders of the corporation may do so. Civ. Code, § 301. While in a general sense the by-laws with the articles of incorporation constitute a contract under which the reciprocal rights and duties of the corporation and its stockholders are measured, the by-laws of themselves do not constitute such a contract so as to make the provision with reference to directors' meetings an act to be performed under a contract within the contemplation of the Code section.

The duty of the board of directors to hold its regular meetings at stated times did not spring from any contract between them and the corporation, but arose from a provision of the by-laws passed for the purpose of properly conducting the business of the corporation. To whatever extent the by-laws may for certain purposes be considered as part of a contract between the corporation and its stockholders defining their respective duties, and rights as far as a provision therein declares when and how directors' meetings shall be held, it is simply what it purports to be—a by-law; a regulation pertaining to the administration of the business of the corporation and in no sense a contract. The extent and purpose of the Code provision is quite apparent. It is to extend the time for the performance of some act which is expressly enjoined by law to be performed by a given time which would fall upon a holiday; or to protect, relieve, or save one contracting party from a forfeiture or deprivation of a right by the other contracting party on account of noncompliance with the terms of a contract when noncompliance might be impracticable or impossible by reason of the required date of performance falling on a holiday. The purpose of the section was in aid of the preservation of rights, either under a law or contract, which might by the intervention of a holiday be imperiled, and was not intended and cannot be construed to mean, as is claimed in the present instance, to apply to the time for holding meetings of the board of directors so as to authorize stated meetings to be held at a date other than fixed in the by-laws simply because that date falls on a holiday.

It was entirely permissible for the board of directors to meet on the date fixed for its regular meeting and the by-laws required it to do so. There was nothing in the general law or in the by-laws prohibiting such meeting because the date fixed fell on a holiday. It was a matter of their own volition whether the members of the board should meet or not on the date stated, although their duty was to do so. The regular meeting of the board was not an act required to be performed by contract, and the board had no authority to meet at any other time than that fixed by the by-laws unless upon notice to all the directors, and, as the meeting here in question was not held on the date fixed and was subsequently held without notice to two of the directors such meeting was not legally held, the board so assembled was without authority to act at all, and the assessment here in question levied at that meeting was void unless the meeting can be held valid on other grounds. It will be observed that the court in addition to the finding we have just discussed found also that "when the board met on the said first Monday of September, 1904, no business was transacted because of its being a holiday, and the board met on the following day and said assessment was levied and other business transacted." As to this finding, there is no evidence that the board or any members of it met on the first Monday of September. In fact, in a note made in the minutes of the board by the secretary of the corporation, it is evident that they did not meet at all. This is immaterial, however, as it is not pretended that if they did hold a meeting on that day they adjourned it over until the next day—September 6th—when the assessment was levied. If they met on the first Monday as there was no adjournment over, the meeting on the next day without notice to all the directors was invalid.

Now as to the position that the meeting of September 6th can be sustained as an adjourned meeting of an adjourned meeting of the regular monthly meeting of the August previous. It might be an interesting question whether even a quorum of a board can make successive adjournments of a previous regular meeting, so that the last adjournment would be to a date beyond that fixed for the next regular meeting of the board by the by-laws, as appears to have been attempted here, but by less than a quorum of the board. Discussion of that proposition, however, is unnecessary because at the meeting in August when it is claimed that an adjournment was made until September 6th there was no quorum of the board present. The by-laws of the corporation provided that a quorum should consist of five members, while in fact there were but two members of the board present when the adjournment was attempted to be made, and they alone assumed to order it. There can be no question but that less than a quorum of a board of directors have no authority to adjourn a meeting to any date whatever. It was so held in Raisch v. M., K. & T. Oil Co., 7 Cal. App. 667, 95 Pac. 662, by our District Court of Appeal. The question there, as here, involved the validity of an assessment upon corporate stock. In the case referred to, the board levied it on a day to which less than a quorum thereof had at a previous meeting adjourned such meeting. It was held by the District Court of Appeal that less than a quorum of the board could not effect a valid adjournment. The court, after discussing the reasons why such power may not rest with less than a quorum, says: "The Code provides that the corporate powers, business, and property of all corporations must be exercised, conducted, and controlled by a board of directors, that a majority of the directors is a sufficient number to form a board for the transaction of business, and that every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act. Civ. Code, § 308. It is provided that: 'Unless a quorum is present and acting, no business performed or act done is valid as against the corporation.' Civ. Code, § 305. The adjournment was an act done, and hence, under the express provisions of the Code, it was not a valid act. It is significant in this connection that there is no provision of the Code to which our attention has been called authorizing a meeting of the directors of a corporation to be adjourned by a minority. * * * Counsel have been unable to cite us to any authority, either in this state or elsewhere, directly in point. We have examined the cases cited, but find nothing to aid us in the solution of the question involved here. We therefore conclude there was no power in the minority of the board of directors to adjourn the time of holding the regular meeting, and that the assessment was levied without authority, and is therefore void."

We think there can be no question but that the rule as announced by the District Court of Appeal is the correct one and in harmony with it the attempt of less than a quorum of the board of directors of the defendant corporation to adjourn the August meeting over to September 6th was ineffectual for any purpose, and the meeting on this latter date was invalid. The court found that the plaintiff was guilty of laches in bringing his action, and also that his right of action was barred by section 347 of the Civil Code and section 341 of the Code of Civil Procedure. Both these Code sections referred to make the same provision, namely, that "no action must be sustained to recover stock sold for delinquent assessment upon the ground of irregularity of the assessment, * * *" unless the tender of the amount for which the stock was sold at said time, and unless such action is commenced within six months after the sale of the stock. The sale of the stock in question here was made December 20, 1904. This action was commenced January 4, 1906. The sections referred to only apply where there has been some irregularity in the assessment or irregularity or defect in the notice of sale or the sale itself. The assessment in question here, as we have seen, was not merely an irregular assessment. It was absolutely void. Herbert Kraft Co. Bank v. Orland, 133 Cal. 64, 66, 65 Pac. 143. Hence these sections have no application. There is nothing in the evidence upon which the finding of laches can be sustained.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; MELVIN, J.

I dissent: BEATTY, C. J.

(158 Cal. 412)

VALENTI et al. v. SIERRA RY. CO.

(Sac. 1,676.)

(Supreme Court of California. Sept. 21, 1910. Rehearing Denied Oct. 20, 1910.)

1. DEATH (§ 71*)—EXPECTANCY OF BENEFICIARIES.

That one of the children of deceased had become of age before the trial of the action for her death, brought under Code Civ. Proc. § 377, by her husband and children jointly as her heirs, did not affect the admissibility of tables of life expectancy as far as fixing the probable duration of his life for the purpose of determining the damages sustained by him through his mother's death; the statute not limiting the right of recovery to minor children, and his right to recover for any pecuniary loss sustained by him by reason of her death not being limited to the term of his minority, but he being entitled to recover for the loss of any pecuniary benefit which he would with reasonable certainty have received from her after his arrival at majority.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 90; Dec. Dig. § 71.*]

2. CARRIERS (§ 280*)—DUTY TO PASSENGERS—DEGREE OF CARE—INSTRUCTIONS.

The instruction that a railroad company engaged as a common carrier in transporting passengers for reward is bound to use the utmost care and diligence for their safety is not incorrect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1106, 1109, 1117; Dec. Dig. § 280.*]

3. TRIAL (§ 252*)—INSTRUCTIONS.

While the abstract rule, as given in an instruction, that a railroad company engaged as a common carrier in transporting passengers is bound to use the utmost care and diligence for their safety, may be subject to the qualification that this degree of care and diligence is such only as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the road and transaction of the business of the carrier, the carrier can complain of its not being given only where there is evidence in the case to which it can be addressed, which is not the case where it is not questioned but that the collision of trains resulting in injury to a passenger was due to the negligence of the carrier, for which no excuse existed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596–612; Dec. Dig. § 252.*]

4. CARRIERS (§ 321*)—INJURY TO PASSENGER—NEGLIGENCE—INSTRUCTIONS—"BRAKES."

Though the evidence in an action for injury to a passenger from the slipping of a work train against a passenger train was that the work train was equipped with a Westinghouse brake and machinery, as well as with a steam brake, the instruction as to defendant being negligent if the train could not be held on the track by its "brakes" is not open to the criticism that with "brakes" should be included "braking appliances and machinery"; the term "brakes," as ordinarily understood, including all the mechanism employed to control the motion of the train, and the jury undoubtedly having so understood it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

5. Trial (§ 295*) — Instructions — Matters Left to Jury—Construction as a Whole.

The jury having already been fully instructed as to the degree of care required by law of defendant, and instructions being required to be considered as a whole, the degree of care required by law cannot be considered to have been left to the jury by the bracketed part of the instruction: "If, after considering the whole evidence in the case, [you should find that defendant had made such a showing as to the exercise of care required of it by law] as to leave the evidence on the issue of negligence in such condition that you cannot conclude that the evidence of negligence has been satisfactorily shown, it has met the requirements of law, and your verdict should be for defendant."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

6. Death (§ 104*)—Damages—Instructions.

The instructions in an action for death by the husband and children of deceased that, in determining the damages sustained by the husband, the jury could consider the pecuniary loss, if any, sustained by him in being deprived of the services, society, and comfort of his wife, and, in determining the pecuniary loss sustained by the children, they could consider the value of the mother's services to the children, her care and labor bestowed on them, her ability to care for, train, and assist them, and her efforts for their welfare, limit the recovery to pecuniary loss, and correctly state the law.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142–148; Dec. Dig. § 104.*]

7. Appeal and Error (§ 1004*) — Verdict — Damages.

A verdict in an action for death by the husband and children of deceased can be disturbed only when the recovery in view of the evidence is so excessive as to be apparently either the result of passion or prejudice of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1004.*]

8. Death (§ 99*)—Amount of Damages—Evidence.

Evidence in an action for death by the husband and four minor children of deceased, one a young girl, *held* to authorize a verdict of $14,000.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

Department 2. Appeal from Superior Court, Tuolumne County; L. W. Fulkerth, Judge.

Action by Frank Valenti and others against the Sierra Railway Company of California. From an order denying a motion for new trial, defendant appeals. Affirmed.

See, also, 151 Cal. 534, 91 Pac. 481.

S. D. Woods and F. W. Street, for appellant. Nicol & Orr and F. P. Otis, for respondents.

LORIGAN, J. This action was brought to recover damages from the defendant for the death of the wife of plaintiff Frank Valenti, and mother of the other plaintiffs (minors at the time of her death), alleged to have been occasioned through the negligence of the defendant in the operation of one of its trains. The jury returned a verdict in favor of plaintiffs for $14,000, upon which judgment was entered. Defendant moved for a new trial, and from the order denying it this appeal is taken.

No claim is made that the verdict is not justified by the evidence except to the extent that it is insisted that it is excessive; hence but a brief statement of the facts need be made. Marie Valenti, plaintiffs' intestate, on June 25, 1904, was a passenger on the regular daily passenger train of the defendant running from Oakdale, in Stanislaus county, to Angels Camp, in Calaveras county, and was killed as a result of a collision between a work train of defendant and the passenger train upon which she was riding. This work train consisted of an engine, oil car, and several flat cars, and had run into a siding to let the passenger train go by, and, immediately after it had passed, the engineer of the work train proceeded to back it out again upon the main track. At this point on the road the grade was very heavy, and in backing out the engineer was unable to control the train on account of defective brake equipment, and it rapidly descended the heavy grade, colliding with the rear end of the passenger train in which Mrs. Valenti was riding, and causing her death. It was the claim of appellant on the trial that one of the causes of the collision was the presence of oil on the rails—drippings from the oil tank in the work train—which rendered the rails so slippery that the work train could not be held thereon by its brakes. The jury, however, in answer to particular questions of fact, found that the collision was not occasioned by the presence of oil on the tracks, but that the work train and engine were not properly equipped with brakes to hold the train upon the track. So much for the statement of facts.

A reversal is sought on account of alleged errors committed by the court in rulings upon the admission of evidence, instructions to the jury, and on the ground that the verdict is excessive. This case was here before on appeal after verdict and judgment for plaintiffs (Valente v. Sierra Railway Co., 151 Cal. 534, 91 Pac. 481), and, while many alleged errors were discussed, a reversal was ordered for error in giving a particular instruction relative to the burden of proof.

Several questions which were then presented for consideration and decided adversely to appellant are again urged under the claim either that the suggestions of the court on the former appeal had not been complied with on the second trial, or that there are now presented additional points not then presented challenging their accuracy. In our opinion, however, the second trial seems to have been had with due regard to all matters discussed on the former appeal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In respect to the claim that there was error in rulings on evidence, but two points are made. As to one the ruling is so clearly correct that the matter need not be mentioned. As to the other, that the court improperly admitted in evidence Farr's Table of Life Expectancy to show the probable duration of the lives of the deceased and of the beneficiaries, we expressly held on the former appeal that this evidence was admissible, with the suggestion that the jury should be instructed, however, in connection therewith that in no event could damages be awarded a beneficiary beyond the probable duration of the life of the deceased. The trial court seems to have carried out the suggestion by appropriate instruction so that appellant's contention is without merit.

The particular claim of appellant that such tables were inadmissible as far as fixing the probable duration of Harry Valenti's life—one of the children plaintiffs—is without merit. Harry Valenti, when his mother was killed, was a minor, but had attained his majority when the present trial was being had. This fact did not, as counsel for appellant seem to assume, affect the admissibility of the tables for the purpose of determining the question of damages which may have been sustained by him through the death of his mother. This action was brought under section 377 of the Code of Civil Procedure by all the plaintiffs jointly—the husband and children—as heirs of the deceased, and the right of the son Harry Valenti as an heir to recover damages for any pecuniary loss he might have sustained by reason of the death of his mother did not apply only as to the term of his minority. The statute does not limit the right of recovery to minor children. The children as heirs of decedent were entitled to recover for the loss of any benefit or pecuniary value (as explained by the court in its charge to the jury) which they would with reasonable certainty have received from the mother after their arrival at majority, as well as during minority (Redfield v. Oakland C. S. Co., 110 Cal. 277, 42 Pac. 822, 1063), measured by what would have been the probable duration of the life of the mother.

Complaint is made by appellant of an instruction to the jury that "a railroad company engaged as a common carrier in transporting passengers for reward is bound to use the utmost care and diligence for their safety." This instruction differing somewhat in phraseology was before this court on the former appeal. While we held that it was perhaps too broad as stating an abstract proposition of law, we did not hold that it was in any manner an incorrect one. It is not. Boyce v. California Stage Co., 25 Cal. 469; Boone v. Oakland T. Co., 139 Cal. 494, 73 Pac. 243; Kline v. Santa Barbara R. Co., 150 Cal. 741, 90 Pac. 125.

But it is said that as an abstract proposition of law given in this case it was misleading; that from it the jury were warranted in concluding that a common carrier of passengers was an insurer of the safety of passengers, which is not the law; that as an abstract proposition it is subject to the qualification (which it is insisted should have been stated to the jury) that this degree of care and diligence which is to be exercised so as to avoid danger to passengers is such only as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the road and transaction of the business of the carrier. Conceding that the abstract rule as given by the court is subject to the qualification suggested, as it no doubt is, still appellant could only complain that it was not given if there was evidence in the case to which it could be addressed. As already stated, no question is made on this appeal but that the collision was due to the negligence and carelessness of the defendant for which no excuse existed, and hence there was nothing to which the qualification of the rule could apply, even if it had been given.

It is further insisted that in one of its instructions the court ignored a material part of the evidence in the case. In the instruction complained of the court told the jury that, "if they believed that the work or gravel train could not be held thereon (defendant's tracks) by its brakes and also found," etc., the defendant was guilty of negligence. The evidence showed that the train was equipped with a Westinghouse brake and machinery. It also had a steam brake. Counsel's criticism of this instruction is that the court should have included with "brakes" also "braking appliances and machinery." This criticism is overrefined. The term "brakes" included all the mechanism which was used to retard or stop the motion of the train. The term "brakes," as ordinarily understood, comprehensively includes all the mechanism employed for the purpose of controlling the motion of the train and the jury undoubtedly so understood it.

The court instructed the jury "if, after considering the whole evidence in the case, *you should find that the defendant had made such a showing as to the exercise of care required of it by law*, as to leave the evidence upon the issue of negligence in such condition that you cannot conclude that the evidence of negligence has been satisfactorily shown, it has met the requirements of the law, and your verdict should be for the defendant." This instruction was a modification of one requested by the defendant and refused. The modification consisted of the italicized portion. Appellant insists that by the italicized portion the court left it for the jury to determine what degree of care was required by law; a duty belonging exclusively to the court. The instruction without the modification correctly states the law (Valente v. Sierra R. R. Co., 151 Cal. 539, 91 Pac. 481), and we do not perceive any just criticism as to the modification. Instructions must be taken and considered as a whole. Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521. When the charge to the jury in this case is so considered, it is apparent that the court left nothing to be determined by them as to the degree of care required by the law. It had fully instructed them on this point, and, when it further instructed the jury as to what it should do if it found "the defendant has made such a showing as to the exercise of the care required of it by law," it referred to the rules of law previously given which defined such care, and the jury could not otherwise have understood it.

The court on the matter of damages instructed the jury that in determining the damages sustained by the husband they had a right to take into consideration the pecuniary loss, if any, sustained by him in being deprived of the services, society, and comfort of his wife, and in determining the pecuniary loss sustained by the children they had a right to consider the value of the mother's services to her children, her care and labor bestowed upon them, her ability to care for, train, and assist them, and her efforts for their welfare. There was nothing misleading, ambiguous, or indefinite in these instructions. There was nothing that would warrant the jury in believing, as suggested by counsel for appellant, that they could assess damages for anything else than for pecuniary loss or that they could consider any other elements in determining it than such as the court mentioned. The matters which the jury were told could be taken into consideration—services, society, care, comfort, etc., of the deceased as a wife and mother—they were instructed could only be taken into consideration for the purpose of determining the pecuniary loss sustained by the plaintiffs through her death. The instruction had relation to pecuniary loss only, and, as given, correctly stated the law in estimating damages therefor. Redfield v. Oakland C. S. Ry. Co., 110 Cal. 285, 42 Pac. 822, 1063; Keast v. Santa Ysabel G. M. Co., 136 Cal. 260, 68 Pac. 771; Johnson v. Southern Pacific Co., 147 Cal. 624, 82 Pac. 306, 1 L. R. A. (N. S.) 307.

It is claimed that the verdict for $14,000 was excessive. A verdict in this character of cases can only be disturbed where the amount awarded, in view of the evidence, is so excessive as to be apparently either the result of passion or prejudice on the part of the jury. It is not seriously claimed that the jury were under any such influences. Here the husband and four minor children—one a girl of tender years—suffered the loss of a devoted wife and mother through the negligence and carelessness of the defendant, and the verdict represents the loss which the jury determined they jointly sustained. The evidence shows that the deceased was a good and dutiful wife and mother, devoted to her husband and children, giving constant personal care and attention to their comfort and happiness, and devoting herself to the moral and educational training of her children, with the prospect of many years of life before her to be given to her home and family. In this case, as in cases of this character, the damages sustained are largely of a prospective nature. On proof of the family life at the time of the death of the wife and mother—her devotion to her husband and children evidenced by the constant discharge of her wifely and motherly duties—the jury were to determine the loss sustained by the husband and children in being deprived, through the negligence of defendant, of the continued benefit and advantage of her society, comfort, and care. Manifestly there can be no fixed standard by which that loss can be determined. Necessarily the law had committed its ascertainment to the discretion and sound judgment of the jury, and it cannot be said that for the loss of a devoted wife and mother and deprivation by the husband and minor children of the advantages and benefits which, from the evidence in this case, the jury were warranted in finding she would continue to bestow on them had she lived, that the verdict rendered by the jury is at all excessive.

These are all the points made which merit any consideration.

No error having been committed by the trial court in its rulings on the admission of evidence or in its instructions, and the point that the verdict is excessive being untenable, the order denying the motion of defendant for a new trial, which is all that is appealed from, is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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158 Cal. 396

ALCORN et al. v. GIESEKE. (Sac. 1,693.)

(Supreme Court of California. Sept. 21, 1910. Rehearing Denied Oct. 20, 1910.)

1. Principal and Agent (§ 97*)—Power of Attorney—Construction.

A power to sell and convey land subject to approval by the grantors authorizes a conveyance only for a pecuniary consideration approved by them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 355; Dec. Dig. § 97.*]

2. Words and Phrases—"Sale."

The word "sale" usually imports a money consideration.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6291–6306; vol. 8, p. 7793.]

3. Executors and Administrators (§ 314*)—Partial Distribution — Petitions — By Whom to be Made.

A decree of partial distribution can be made only on the petition of an heir, devisee, or legatee, and not on the petition of the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1279, 1280; Dec. Dig. § 314.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. DEPOSITIONS (§ 50*) — COMMISSIONS — TO WHOM ISSUABLE.

Under Code Civ. Proc. § 2024, authorizing a commission to take testimony in another state to issue to any notary public, judge, justice of the peace, or commissioner selected by the court issuing it, where no person is agreed upon by the parties, a commission may issue to any person whom the court deems a proper person to act, not being limited to the officers named in the statute.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 82; Dec. Dig. § 50.*]

5. DEPOSITIONS (§ 67*)—METHOD OF TAKING —SHORTHAND.

Under the express terms of Code Civ. Proc. § 2006, a deposition taken in another state may be taken in shorthand.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 147; Dec. Dig. § 67.*]

6. DEPOSITIONS (§ 76*)—CERTIFICATE OF OFFICER.

A certificate by a commissioner appointed to take a deposition in another state showing that he administered the oath to witness as commissioner is not affected because he signed the certificate as notary public as well as commissioner.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 191, 194; Dec. Dig. § 76.*]

7. PRINCIPAL AND AGENT (§ 123*)—POWER OF ATTORNEY—EXECUTION—APPROVAL.

Evidence *held* to sustain a finding that an attorney in fact conveyed land to settle litigation with the grantors' knowledge and approval.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 426; Dec. Dig. § 123.*]

8. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

9. PRINCIPAL AND AGENT (§ 170*)—POWER OF ATTORNEY—EXECUTION—VALIDITY.

A conveyance by an attorney in fact to settle litigation made with the approval of the grantors binds them, though the power authorized a sale only.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 639, 640; Dec. Dig. § 170.*]

10. APPEAL AND ERROR (§ 1097*)—LAW OF CASE—WHEN DOCTRINE APPLIES.

The doctrine of "the law of the case" only applies where the matters presented upon the second appeal are the same as were presented and disposed of on the first appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by James Ben Alcorn and another against E. Gieseke. From a judgment for defendant and from an order refusing a new trial, plaintiffs appeal. Affirmed.

See, also, 145 Cal. 62, 78 Pac. 343.

Wm. Craig (J. F. Ramage, of counsel), for appellants. S. M. Spurrier and Nicol & Orr, for respondent.

LORIGAN, J. This action was brought to quiet the title of plaintiffs to the N. E. ¼ of section 27, township 2 S., range 5 E., Mt. Diablo Base and meridian, situated in San Joaquin county. Judgment went for defendant, and plaintiffs appeal therefrom, and from an order denying their motion for a new trial.

The plaintiffs deraign title to two-thirds of the land in controversy as heirs at law of one Joseph McKinney, deceased, and as to the other third by virtue of a deed from one Dudley Sebree, the only other heir at law.

Some of the conceded facts in the case are that Joseph McKinney died in San Joaquin county in April, 1893, the owner of land in that and other counties, in the state, of the then aggregate value of $40,000. He left a will whereby he devised to one Olive A. Jennings the land here in controversy, together with a large amount of other real property, and made her his residuary legatee. This will was duly admitted to probate. The plaintiffs and Sebree were half-brothers of McKinney, residing in Kentucky at the time of the latter's death, and had not seen or heard from him for upwards of 30 years. They did not know of the death of McKinney, or that he had left any estate, until they were informed thereof by one J. H. Kyle, an attorney of Missouri, who visited them and imparted the information, and with whom they then entered into a contract employing him to represent their interests in the estate of McKinney, agreeing to pay him a contingent fee, based upon the amount of property recovered for them, of not less than $20,000. They also gave said Kyle a power of attorney which (omitting immaterial parts) declared that: "We do by these presents make, constitute, and appoint J. H. Kyle our true and lawful attorney for us and in our name, place, and stead, to sell, convey, make, execute, acknowledge, and deliver a good and sufficient warranty deed in our name or behalf, or any other such deed or conveyance as in his judgment he may deem fit or proper for such price or prices, and upon such terms and conditions as he may deem best, to any and all interest that we may have as half-brothers and heirs at law of Joseph McKinney, deceased, of and to the following described land, subject to our approval, to wit: [Here follows a particular description of lands and a comprehensive clause applying to all lands and personal property of the estate.] Giving him full power and authority (to appear in all courts and institute any character of suit with reference to the legality of any writing purporting to be the act of McKinney, deceased), to submit any matter in dispute respecting the premises to arbitration, and otherwise and generally to say, do, transact, determine, accomplish and finish all matters and things whatsoever concerning the complete recovery or alienation of any interest we may have legally or equitably in said premises or any other land, as aforesaid. Giving and granting unto our said attorney full power and authority (etc.), hereby ratifying and confirming all that our said attorney may or shall lawfully do or cause to be done by virtue hereof."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Having secured his contract of employment and the above power of attorney, Kyle came to California, and, after attempting ineffectually to make a compromise or settlement in behalf of plaintiffs and Sebree as heirs at law of McKinney with the beneficiaries under his will, employed counsel and in the name of plaintiffs and Sebree commenced in August, 1893, a contest of the will of McKinney, which subsequently, in May, 1894, resulted in a judgment revoking and annulling the probate of McKinney's will. Olive A. Jennings, the principal beneficiary under the will and the one most actively engaged in the attempt to sustain it, in due time appealed to the Supreme Court from said judgment. She also moved for a new trial, had her bill of exceptions settled, allowed and filed, and from an order denying her motion also took an appeal to this court.

In addition to the above, the court found that, prior to the time of filing such contest, Dudley Sebree, one of the heirs at law, came to San Joaquin county, and at all times thereafter during the pendency of said contest remained there; that subsequent to the taking of the appeal by Olive A. Jennings, and during the pendency thereof in the Supreme Court, the attorneys representing plaintiffs and said Dudley Sebree were of the opinion that the judgment revoking and annulling the probate of the will appealed from would probably be reversed by the Supreme Court, and that it would be to the best interests of plaintiffs and Sebree to compromise and settle said contest, and so advised Sebree and plaintiffs; that, with this opinion in view, they made overtures to said Olive A. Jennings and the other parties interested in the will as beneficiaries, and such negotiations were had between December, 1895, and June, 1896, that it was ultimately agreed that in consideration of the conveyance by plaintiffs and Dudley Sebree to said Olive A. Jennings of 560 acres of land belonging to Joseph McKinney in his lifetime, including the tract involved in this controversy, and the payment by her of the sum of $500, said Olive A. Jennings would cause her appeals to be dismissed; that the probate of said will should stand revoked, and that a decree of the court declaring McKinney to have died intestate, and said plaintiffs and Dudley Sebree to be his sole heirs at law, should be made final; that prior to the effecting of such compromise the plaintiffs and Sebree were advised and informed of its terms and consented and agreed thereto; that thereafter, in pursuance of such settlement and adjustment, said Olive A. Jennings dismissed her appeals and a decree of the court declaring that McKinney died intestate and plaintiffs and said Sebree to be his sole heirs became final; that, in pursuance of such settlement, the plaintiffs and Sebree through said J. H. Kyle as their attorney in fact made on June 26, 1896, a deed of conveyance to said Olive A. Jennings of said 560 acres of land, which was duly recorded; that said 560 acres of land conveyed to Olive A. Jennings were at the time of the conveyance thereof of the value of about $7,000, and such conveyance was the only consideration for the dismissal of her appeals and the extinguishment of any claim she had as residuary legatee to the property of McKinney; that said settlement and adjustment of the contest were in all respects fair; that plaintiffs were informed of such settlement and adjustment and of said conveyance by Kyle to said Jennings of said 560 acres of land, and they, together with Dudley Sebree, consented to and approved such conveyance, and at all times thereafter and until the month of July, 1900, plaintiffs and Dudley Sebree continued to recognize, approve, and acquiesce in said conveyance of said land to said Olive A. Jennings, and at all times since June. 1906, have recognized and consented to said stipulation whereby the said contest was settled by the dismissal of said appeal of the said Olive A. Jennings.

It was further found by the court that by the terms of the compromise and settlement with Olive A. Jennings, of which plaintiffs and Sebree were informed and advised and to which they agreed and consented, a decree of distribution to Olive A. Jennings of said 560 acres of land was to be obtained in the estate of McKinney by the attorneys for plaintiffs and Sebree, the latter to petition for letters of administration of the estate; that Sebree was appointed and qualified as administrator, and on August 7, 1897, filed, as administrator of the estate of McKinney, a petition for partial distribution of the lands of the estate (there still remaining considerable personal property); that the petition set forth the terms of the compromise with Olive A. Jennings, and asked that there be distributed to her the 560 acres deeded to her under the compromise and other lands to the heirs; and that said petition subsequently coming on for hearing a decree of partial distribution as to all the lands of the estate was made, including a distribution to Olive A. Jennings of the said 560 acres. The defendant, by mesne conveyance, subsequently acquired the land involved in this action, being a part of the 560 acres conveyed to Olive A. Jennings under the compromise agreement and distributed to her under the decree of partial distribution in the McKinney estate.

On the merits of the appeal it is insisted by appellants, first, that no title or interest belonging to them in the estate of McKinney could be conveyed by their agent Kyle except for a pecuniary consideration, and an approval thereof by an instrument in writing executed by them and their coheir Sebree, hence the deed from Kyle to Jennings of the land involved, being the result of a compromise of litigation and not a sale, was void; second, that the decree of partial distribution under which the property was distributed to Jennings was void; third, that the evidence was insufficient to sustain the finding of the court as to the approval of, consent to, and ratification by plaintiffs and Sebree of the conveyance by Kyle to Jennings; and, fourth, that, even if these findings in this respect are sustained by the evidence, they did not amount to an approval, authorization, or ratification of the deed within the law.

It may be conceded without discussion that, looking exclusively to the provisions of the power of attorney, Kyle could not make a conveyance of any of the lands affected thereby except for a pecuniary consideration approved by plaintiffs and Sebree. The word "sale" usually imports a money consideration, and this was the effect of the holding of this court on an appeal in an action involving a consideration of this same power of attorney. Alcorn v. Buschke et al., 133 Cal. 655, 66 Pac. 15. It may equally be conceded that the decree of partial distribution was void because the court had no jurisdiction to entertain it on the petition of the administrator, the statute only authorizing it on the petition of an heir, devisee, or legatee. It was so decided as to this very proceeding on partial distribution. Alcorn v. Buschke, supra; Alcorn v. Brandeman, Howard, and Gieseke, 145 Cal. 62, 78 Pac. 343. See, also, In re Letellier, 74 Cal. 311, 15 Pac. 847.

These points being eliminated, we approach the question as to the sufficiency of the evidence to sustain the findings as to an approval, consent, and ratification by plaintiffs and Sebree of the conveyance from Kyle to Jennings and a consideration of the legal effect of such findings, if they are to stand.

In determining the sufficiency of the evidence, it is necessary to consider the objections urged to the deposition of the witness Kyle, who acted as agent under the power of attorney in disposing of the land to Jennings. The findings under consideration are based mainly on the testimony of this witness taken by deposition, and to the admission of which deposition appellants objected. The deposition was taken in the state of Missouri on behalf of defendant upon a commission issued by the trial court after proper notice to the plaintiffs. No commissioner being agreed upon by the parties, the court appointed L. W. Good of Clinton, Mo., as commissioner to examine said witness on oral interrogatories. The deposition was taken before the commissioner appointed; the examination being taken down by a shorthand reporter appointed by the commissioner for that purpose. The commissioner certified to the taking of the deposition both as notary public and commissioner, and duly returned it to the county clerk of San Joaquin county. The order of court appointing L. W. Good commissioner did not appoint him as a notary public to take the deposition, but appointed him individually as commissioner to do so.

The objections urged by the appellants against the admission of the deposition in evidence were, first, that the commission could not be issued to L. W. Good simply as an individual commissioner; second, that the commissioner had no authority to appoint a stenographer to take the testimony of the witness; third, that L. W. Good as notary public could not administer the oath to the witness Kyle or certify to the deposition as such notary. These objections were overruled by the court and the deposition admitted in evidence. As to the first objection, it was claimed thereunder that by section 2024, Code Civ. Proc., the court could only issue a commission to take the testimony of a witness outside the state to a notary public, judge, or justice of the peace or commissioner of deeds in a sister state appointed as such by the Governor of the state, under section 811 of the Political Code. There is no merit in this claim. Section 2024 provides that the commission may be issued to "a person agreed on by the parties, or, if there is no agreement, it may be issued by the court or judge to any notary public, judge or justice of the peace or commissioner selected by the court or judge * * * issuing it." There is nothing in the section requiring it to be issued to a commissioner of deeds. It may be issued to any person whom the court deems a competent and proper person to act. Counsel for appellants doubtless make the claim that, when the section refers to a commissioner, it must mean a commissioner of deeds from the fact that under the practice act (St. 1851, c. 5) § 433, before the amendment thereto by the Code of Civil Procedure in 1872, it was expressly provided that the commission, if not directed to a judge or justice of the peace, must run to a commissioner appointed by the Governor of the state to take affidavits and depositions in other states. In 1872, however, when section 2024 of the Code was enacted, that provision of the practice act was amended, and ever since has stood, in the particular under discussion, as it stands now, and was obviously amended so as to allow the selection of any individual commissioner whom the court might deem capable and competent to act. There is nothing in the other objections. Section 2006, Code Civ. Proc., expressly sanctions the taking of depositions in shorthand. The certificate of L. W. Good showed affirmatively that he administered the oath to the witness Kyle as commissioner, and, as far as his certificate to the deposition is signed by him as notary public and also as commissioner, his signature as notary public is immaterial—his signature as commissioner being alone legally sufficient.

Now as to the finding of approval and consent of plaintiffs and Sebree to the compromise and settlement of the litigation in the estate of McKinney and to the conveyance of the land in controversy to Jennings by their agent Kyle in conformity to such compromise. There can be no question but that, although the attorneys for plaintiffs and Sebree had obtained a decree annulling the will of McKinney, they were extremely doubtful of having it sustained on appeal, and that the overtures for a compromise with Olive Jennings came from the attorneys for plaintiffs after a conference with Kyle and Sebree, who were here in California. Neither Olive Jennings nor her attorneys had sought a compromise. They had rejected the efforts to do so before the action to set aside the will was brought, and from the decree doing so had perfected and were prosecuting her appeals when a compromise was suggested. As to that compromise and the relation of plaintiffs and Sebree to it, it is true that the finding is supported in the main by the testimony of Kyle. This, however, does not of itself detract from its force or sufficiency. No question is made of the credibility of Kyle as a witness. He was the representative of the plaintiffs and Sebree, engaged and acting for them to secure the estate, and it is only natural that the facts relative to the matter should come from him and from the plaintiffs and Sebree. They were matters of such a character as to be peculiarly within the knowledge of these parties.

The evidence shows that Sebree was in San Joaquin county when the negotiations for a compromise with Jennings were had, was fully informed of the negotiations therefor, and actively participated in the consummation of the compromise to the extent even of furnishing three hundred dollars to bring it about. He was present at the execution of the deed by Kyle to Jennings, and in his verified petition for partial distribution of the land set forth the terms of the compromise with her, and asked distribution to her of the 560 acres in controversy. These facts are confirmed, not only by the testimony of Kyle, but by the testimony of other witnesses. From Kyle's testimony it appears that when the first overtures for a compromise were made by himself and the attorneys of record, with the consent and approval and active co-operation of Sebree, he wrote to the plaintiffs in Kentucky of the fear of the attorneys representing them as to the result of the appeals by Jennings, and the efforts which he and the attorneys and Sebree were then making to effect a compromise with Jennings and the terms offered, which involved a conveyance to her of part of the property of the estate, in consideration of the dismissal of her appeals. This initial effort at a compromise was without result. About a year subsequent the effort was again renewed on behalf of plaintiffs and Sebree by Kyle and the attorneys and Kyle informed plaintiffs of the renewed effort. In reply to these letters, the plaintiffs wrote Kyle that they were satisfied and approved of the action he was taking to effect the compromise. When the compromise was actually effected upon the terms offered to Jennings, and of which Kyle had written the plaintiffs, and of which they approved, the latter again wrote them to that effect—that he had consummated the compromise by conveying to Jennings 560 acres of land in consideration of her dismissing her appeal, which she had done. In response to this letter of advice on the subject, plaintiffs wrote him that they were satisfied with his action, and were grateful to him for his services in the matter. This evidence fully sustains the findings made by the court that the conveyance to Jennings was with the knowledge, consent, and approval of the plaintiffs. It is true that Kyle could produce no letters received from the plaintiffs on the subject, but this was explained by him to be impossible on account of their destruction in the burning of his residence in Missouri. It is also true that the plaintiffs denied the reception of any letters from Kyle on the subject, or their writing any approval or consent to the conveyance or authorizing the compromise, and denied any knowledge of the conveyance to Jennings until after it was made.

While counsel for appellants devote much time to a discussion of the evidence as addressed to this finding, particular consideration of it would not be at all profitable aside from the general way in which we have referred to it. Aside from this immediate transaction, there is no question but that Kyle acted fairly towards the plaintiffs and Sebree, and fairly expended his efforts in an endeavor to secure for them the estate of their deceased half-brother. It is in evidence that he did write to them on matters of the estate, and that Sebree, who was on the ground, was in constant communication with his brothers, between whom the most intimate relations existed. There was no reason why either Kyle or Sebree should withhold information as to a proposed settlement at the time it was being negotiated, or of its terms that it had been effected, as they were all acting in what they deemed was the best interests of the plaintiffs and Sebree. There is no reason why the trial court should assume that the testimony of Kyle was untrue, that he had surreptitiously made a compromise and conveyed the property of plaintiffs and Sebree to effect it. There was no occasion for clandestine action on his part. Sebree was on the ground, and, as one of the heirs and principals in the power of attorney to Kyle, was participating in the efforts to compromise with Jennings on the basis of a conveyance to her, and there was no reason why Kyle, under these circumstances, should withhold information from or neglect to inform the other heirs of his efforts with a view of obtaining their consent and approval with Sebree's to a conveyance for that purpose. On the contrary, it was only natural he should do so, particularly as his power of attorney did not in terms authorize him to convey the land for purposes of a compromise, or to make any conveyance at all except with the approval of the plaintiffs and Sebree. As far as the testimony of plaintiffs is concerned, it appears that they learned of some compromise having been made right after it was actually effected in June, 1896. Who informed them of it does not appear, although the only persons communicating with them were Kyle and Sebree. After acquiring information of it, it appears that they made no protest or objection, either to Kyle or any one concerned or interested in the compromise, or took any action with reference to it, until this suit to quiet title to the property conveyed under the compromise was instituted in 1900. The court had a right to conclude that this long acquiescence by plaintiffs in the compromise after knowledge of it proceeded from the fact testified to by Kyle that preliminary to the conveyance by him to Olive Jennings he had advised plaintiffs of the negotiations for a compromise of the litigation on the basis of such conveyance to her, and that the plaintiffs had consented and approved of it, and that the conveyance was made for that purpose and with their consent and approval. But, as we say, there can be no good reason for discussing the evidence in detail, or indulging in deductions therefrom as to the finding of consent and approval by plaintiffs of the conveyance to Jennings by Kyle in consummation of the compromise, because it can only result in accentuating the fact that there was a radical conflict in it as to the essential facts necessary to support the finding in that respect, and, under such circumstances, it is a familiar rule of law that this court cannot disturb a finding when based upon conflicting evidence.

As it appears that the finding is supported by the evidence, there can be no doubt about the law applicable to the facts as found. As far as the plaintiffs are concerned, considering their claim (aside from the interest derived under the conveyance from Sebree), it is disposed of by the fact that they expressly and in writing consented to and approved of the conveyance of this land to Jennings by Kyle as their agent for the purpose of effecting a compromise of the litigation in the McKinney estate. While respondents, in addition to the claim of express consent and approval of the conveyance to Jennings, invoke also the doctrine of equitable estoppel, we perceive no reason for devoting any time to it. If the conveyance had been made by Kyle of his own volition, and without any authority from or approval by the plaintiffs, a different question might arise and a consideration of the doctrine of equitable estoppel become pertinent. The validity of the conveyance can be fully sustained, however, under the finding that it was made by the express consent and approval of the plaintiffs. Counsel for appellants have not suggested any reason why this is not true. In fact, no valid reason can be given. The power of attorney was for the benefit of plaintiffs and Sebree, and, while it empowered Kyle to convey the lands of the McKinney estate, any such conveyance was in terms subject to their approval. We are not here dealing with a contract between the plaintiffs and Sebree and Kyle, but with an instrument conferring a power of sale upon the latter, to be exercised for the benefit of the former, and the exercise of which, by the terms of the instrument, was within their control. While the instrument authorized Kyle to sell and convey any of the property in which they were interested for such prices and upon such terms and conditions as he might deem best, such sales or conveyances were to be subject to their approval. Under these circumstances, they could authorize a conveyance on any terms or for any purpose they might elect, and for any consideration they deemed satisfactory to themselves. However much Kyle might be constrained by its terms as to any conveyance he might make in the exercise of his powers, undoubtedly the plaintiffs could consent or authorize a conveyance under it by him for any purpose or consideration satisfactory to them. They authorized him to convey the land to Jennings in consideration of the abandonment of her appeals and consequent acquisition of the estate of McKinney by them free from any claim on her part. There is no question but what Jennings parted with substantial rights, and that a valuable consideration passed from her to the plaintiffs for the conveyance to her of this land. Plaintiffs had the power and authority to direct their agent Kyle to make the conveyance for the purpose of effecting a compromise, and we can perceive no reason why any question can be made about the legal sufficiency of their act as sustaining the validity of the conveyance as directed by them. The only question in the case is whether they had originally consented to and approved of a conveyance to be made by their agent Kyle and actually made by him with such consent and approval, and, the court having found that they did, this would seem to leave no further room for dispute.

As far as the claim of plaintiffs to one-third of the property in question is based on the conveyance from Sebree to them, but little need be said. There cannot be the slightest question but that Sebree knew all about the negotiations which resulted in the compromise and conveyance. He actively participated in bringing the compromise about, contributed from his own funds to a settlement with other claimants in order to effect it, and was present when the affair was concluded and the dismissal of the appeal obtained from Jennings and the deed to her made by Kyle. The evidence may not show that Sebree expressly consented to or authorized a conveyance, but the circumstances detailed warranted the court in finding that the deed was made with his consent and approval. Aside from this, it further appears that in pursuance of one of the terms of the compromise agreement Sebree, as administrator of the estate, filed a petition for partial distribution in which he asked distribution to Jennings of the property embraced in the deed. The petition set forth, among other things, that Sebree and plaintiffs were the sole heirs of McKinney, and the fact that a compromise of the litigation over the estate between them and Jennings had been effected under an agreement whereby there was to be distributed to the latter of the property of the estate of McKinney to which they would otherwise be entitled those lands set forth in the petition, and that she was entitled to this distribution, agreeable to their compromise, as the consideration for having dismissed her appeal from the judgment revoking the will of McKinney. After notice and a hearing a distribution to Jennings was made as prayed for. Conceding that said decree was void, at least as to the plaintiffs, as was held in Alcorn v. Buschke and Alcorn v. Brandeman, supra, still, as to Sebree, who signed and verified it and who intended it to be effective, it was a clear recognition and approval of the compromise agreement and the conveyance to Jennings made under it, and operated as a ratification of the act of his agent Kyle in making the deed, if there could be any reasonable ground for doubt as to the full consent of Sebree to its execution by Kyle at the time it was made.

The findings of the court that the proposed compromise and settlement between plaintiffs, Sebree and Jennings, of the litigation between them, which included the execution of the conveyance in question by their agent, Kyle, was had with the knowledge, consent, and approval of the plaintiffs and Sebree, previously had and given, and was actually consummated with such knowledge, consent, and approval. Being sustained by the evidence, the court was clearly right in holding that the deed to Jennings made in pursuance thereof was unimpeachable, and, as to her successor, the respondent here, was equally good and valid.

In concluding this matter, it may be said that as far as the claim of appellants is that the decisions in Alcorn v. Buschke, supra, and Alcorn v. Brandeman, Howard and Gieseke, supra, are the law of the case on this appeal, they are clearly in error. In the cases relied on, the appeals were from judgments entered after demurrers to the complaint were sustained. The only questions passed on were as to the authority given Kyle under the power of attorney, because it was alleged that the deed to Jennings was made without consideration and without the knowledge or consent of plaintiffs or Sebree, and without the approval of either of them; also the validity of the decree of partial distribution. The doctrine of "the law of the case" only applies where the matters presented upon the second appeal are the same as were presented and disposed of on the first appeal. The answer of the defendant to the complaint after reversal of the judgment in Alcorn v. Brandeman, Howard, and Gieseke denied that the deed to Jennings was without the knowledge or consent of plaintiffs or Sebree or without consideration, affirmatively alleged both consent and approval of plaintiffs and Sebree to the conveyance, and that it was supported by a valuable consideration. Under these circumstances, it is clear that the rule of "the law of the case" has no application.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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158 Cal. 410

ALCORN et al. v. BRANDEMAN. (Sac. 1,678.)

(Supreme Court of California. Sept. 21, 1910. Rehearing Denied Oct. 20, 1910.)

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by James Ben Alcorn and others against Henry Brandeman. From a judgment for defendant, and from an order refusing a new trial, plaintiffs appeal. Affirmed.

See, also, 145 Cal. 62, 78 Pac. 343.

Wm. Craig (J. F. Ramage, of counsel), for appellants. Thos. S. Louttit, Clark & Louttit, and W. W. Middlecoff, for respondent.

PER CURIAM. Plaintiffs appeal from the judgment in favor of the defendant, and from an order denying their motion for a new trial. This action was brought to quiet title to a tract of land in San Joaquin county, and involves the validity of a conveyance made by one Kyle as attorney in fact for plaintiffs and one Sebree to Olive A. Jennings, under whom defendant claims.

This appeal presents practically the same questions as are involved in the case of James Ben Alcorn et al. v. E. Gieseke (Sac. No. 1,693, this day decided) 111 Pac. 98, affirming the judgment and order of the trial court. The defendants in both cases claim under Jennings to two separate portions of a larger tract conveyed to her by the deed whose validity is involved, and on the authority of Alcorn v. Gieseke the judgment and order in the present appeal are affirmed.

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158 Cal. 411

ALCORN et al. v. HOWARD et al. (Sac. 1,694.)

(Supreme Court of California. Sept. 21, 1910. Rehearing Denied Oct. 20, 1910.)

Department 2. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by James Ben Alcorn and others

against C. A. Howard and Amy P. Howard, administratrix, substituted defendant. From a judgment for defendants, and from an order refusing a new trial, plaintiffs appeal. Affirmed.
See, also, 145 Cal. 62, 78 Pac. 343.

Wm. Craig (J. F. Ramage, of counsel), for appellants. S. M. Spurrier and Nicol & Orr, for respondents.

PER CURIAM. Plaintiffs appeal from the judgment in favor of the defendant and from an order denying their motion for a new trial. This action was brought to quiet title to a tract of land in San Joaquin county, and involves the validity of a conveyance made by one Kyle as attorney in fact for plaintiffs and one Sebree to Olive A. Jennings, under whom defendant claims.

This appeal presents practically the same questions as are involved in the case of James Ben Alcorn et al. v. E. Gieseke (Sac. No. 1,693, this day decided) 111 Pac. 98, affirming the judgment and order of the trial court. The defendants in both cases claim under Jennings to two separate portions of a larger tract conveyed to her by the deed whose validity is involved; and, on the authority of Alcorn v. Gieseke, the judgment and order in the present appeal are affirmed.

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14 Cal. App. 131

PEOPLE v. PIA. (Cr. 254.)

(Court of Appeal, First District, California. Aug. 19, 1910. Rehearing Denied by Supreme Court Oct. 13, 1910.)

1. Criminal Law (§ 412*)—Evidence—Declarations—Admissibility.

Where, on a trial for rape, the evidence showed that at and for some time prior to the commission of the offense two women, one of whom was prosecutrix, were employed in an office, evidence of a declaration by accused made about a month before the attack that he intended to have intercourse with the woman who worked in the office, by force, if necessary, was admissible to corroborate the proof that he raped prosecutrix who came within accused's description; and the fact that the declaration was made so long before the offense went only to the probative force of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 894; Dec. Dig. § 412.*]

2. Indictment and Information (§ 125*) — Duplicity—Rape.

An information charging that accused assaulted prosecutrix with intent to have sexual intercourse with her, and that by force and violence and against her will he feloniously accomplished that act, charges only the crime rape.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Guiseppi Carlo Pia was convicted of rape, and he appeals. Affirmed.

James C. Sims, Leonard Stone, and E. B. Martinelli, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of the crime of rape. He moved for a new trial, which was denied, and he was thereupon sentenced to imprisonment in the state prison for life. His motion in arrest of judgment was also denied, and this appeal is from the orders denying his said motions and from the judgment.

The first point urged in support of the appeal is the admission of certain testimony given by the witness Basilio Calzascia claimed to have been erroneously admitted. Prior to the calling of this witness, the evidence introduced showed that at the time of the commission of the offense charged and for some time previously two young women were employed in the office of the "Marin Journal" at San Rafael, one of whom was the prosecutrix Mary Elizabeth Grapes. In this state of the evidence the witness Calzascia testified, over the objection and exception of defendant, that about a month before the date of the attack charged he overheard two conversations, one between the defendant and Luigi Gamba, and the other between the defendant and a man named Milano; that in the first of these conversations the defendant spoke of the "girl who works for the Marin Journal," and in the second he said in effect that he intended to have sexual intercourse with her, if not with her consent then by force. Defendant now contends that, as the conversations testified to do not clearly show that the prosecutrix was the girl referred to, they had nothing to do with the case and were therefore inadmissible. This position is untenable. The testimony showed that the defendant intended under certain circumstances to commit the crime of rape on one of two certain women, and it tended to corroborate other evidence in the case to the effect that he committed an offense of this character against the person of the prosecuting witness, who was one of the two persons coming within the description employed by the defendant to designate the object of his contemplated attack. In the case of People v. Harlan, 133 Cal. 16, 65 Pac. 9, the defendant had declared that he was procuring a conveyance to go to a place named for the purpose of having sexual intercourse with a "little girl," without stating who the girl was. The Supreme Court, in sustaining the ruling of the trial court admitting this declaration, said: "This declaration illustrated the intention and purpose of the defendant, and its relation to the case is apparent when we consider that the other evidence in the case tends to show that in the afternoon of the same day of the declaration the defendant with false promises enticed the prosecutrix into a conveyance, * * * and drove her to the place where the crime was committed. The fact that the defendant procured the horse and buggy for the purpose of enabling him to have sexual connection with a 'little girl' would in some measure corroborate other evidence tending to show that he subsequently accomplished that purpose."

In Massey v. State, 31 Tex. Cr. R. 371, 20

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

S. W. 758, speaking on a like subject, the court said: "The intended victim need not be named if the subsequent facts show with reasonable probability to whom he (defendant) referred, or the threat was such as to evidence a determination to rape some person—not a particular one—that night." In Barnes v. State, 88 Ala. 204, 7 South. 38, 16 Am. Rep. 48, the syllabus (which correctly states the point decided) is as follows: "In a prosecution for rape, declarations made by the accused three months before the commission of the crime, tending to show his desire to have carnal knowledge of the prosecutrix, as well as his belief that she would not yield to his wishes, are relevant, as affording to the jury a basis for inferring that he had gratified his passion in the manner charged in the indictment." See, also, Ricks v. State, 48 Tex. Cr. R. 229, 87 S. W. 345; 4 Elliott on Evidence, § 3103; People v. Hayes, 9 Cal. App. 301, 99 Pac. 389; State v. Hoyt, 47 Conn. 518, 36 Am. St. Rep. 89; Kerr on Homicide, 462.

The fact that the declarations were made by the defendant a month before the commission of the offense was a matter which went to the probative force of the testimony, but not to its admissibility.

Defendant claims that the information in this case states two separate public offenses in the same count, to wit, an assault with intent to commit rape and the crime of rape. The information charges that the defendant assaulted the prosecutrix with the intent to accomplish an act of sexual intercourse with her, and by force and violence and against her will he did feloniously accomplish that act. It is plain that this information charges but one offense, namely, that of rape, and that the court committed no error in denying the motion in arrest of judgment.

The evidence supports the verdict.

The judgment and orders appealed from are affirmed.

I concur: HALL, J.

COOPER, P. J. I concur in the judgment. Under our system, questions of fact are solely for the determination of the jury, and this court is not at liberty to set aside the verdict of a jury where there is sufficient evidence in law to support it. I have no hesitation, however, in saying that after carefully reading the testimony, I have grave doubts as to whether or not the defendant was the party who committed the atrocious crime. The evidence as to his identity is not at all satisfactory, but it satisfied the jury and the trial judge who presided while the witnesses were testifying; and, if the defendant is the party, the verdict is correct.

It too often happens that in cases of this kind, where public clamor is great, that the jury are influenced by such public clamor and excitement to give a verdict that they would not give under ordinary circumstances. If anything should hereafter transpire by which the defendant's innocence can be established, the remedy is with the executive.

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14 Cal. App. 88

WATSON v. DINGLEY. (Civ. 768.)

(Court of Appeal, Third District, California. Aug. 11, 1910.)

Appeal and Error (§ 396*)—Notice.

It was not necessary that appellant serve notice of an appeal taken under Code Civ. Proc. § 953a, but it was necessary that, within 10 days after notice of entry of the judgment, he give notice as required by that section, requesting that a transcript of the testimony, etc., be made up, and for failure to give such notice the appeal will be dismissed, under District Court of Appeal Rule 2.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2099; Dec. Dig. § 396.*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by W. M. Watson, administrator, against A. S. Dingley. From a judgment for plaintiff, defendant appeals. On motion to dismiss the appeal. Appeal dismissed.

Will A. Dower, for appellant. Maddux & Maddux, for respondent.

CHIPMAN, P. J. Motion to dismiss defendant's appeal on the ground that appellant has failed to file a transcript of the record on appeal within the time prescribed by law and the rules of this court.

It appears from the certificate of the clerk that on December 15, 1909, judgment was duly made and entered in favor of plaintiff and against defendant for the sum of $671.75 and $24.60 costs and on that day notice of said decision was duly served and filed. On January 5, 1910, defendant served and filed notice of intention to move for a new trial, and on February 14, 1910, served and filed notice of appeal from the judgment in said action and an undertaking on appeal. It further appears that the proof of service of notice of appeal has been filed. No bill of exceptions or statement on motion for new trial has been left with the clerk to be delivered to the judge who tried the case, and no bill of exceptions or statement has been settled or filed, and the clerk has never been requested by the defendant to certify to a transcript of the record. The notice of motion to dismiss the appeal was filed July 1, 1910, of which due service was made.

It was not necessary for defendant to serve his notice of appeal, which was apparently taken under section 953a, Code Civ. Proc., but it was necessary that he give notice, as required by that section, requesting "that a transcript of the testimony offered or taken * * * and all matters to which the same relate, be made up and prepared. Said notice must be filed within 10 days after notice of entry of the judgment, order or decree." Defendant makes no appearance here, and it appears without conflict that he failed to give the notice required by said section. Under rule 2, it becomes our duty to grant the motion. Union Lumber Co. v. Metropolis Construction Co., 110 Pac. 329.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is ordered that the appeal be dismissed.

We concur: BURNETT, J.; HART, J.

14 Cal. App. 145

GRIFFITH v. LOS ANGELES PAC. CO.

(Civ. 815.)

(Court of Appeal, Second District, California. Aug. 19, 1910. Rehearing Denied Sept. 17, 1910; Denied by Supreme Court Oct. 13, 1910.)

1. EVIDENCE (§ 558*) — EXAMINATION — EXPERTS.

A cross-examination of a medical expert which permits a showing of the contents of standard medical books is permissible only to show what the authors thereof have declared on the subject, when the expert has based his opinion wholly or in part on his reading of medical books, and then only when the statements in such books are not in harmony with his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.*]

2. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

Where a physician testifying that he found an anesthetic area about the lower portion of the spinal column of plaintiff's body, more pronounced on the right side than on the left, expressly declared that he had neither heard nor read of a case where there was a spinal injury with resulting paralysis of one side of the body only, the sustaining of an objection to a question on cross-examination whether medical authorities did not state that paralysis of spinal origin must exist on both sides was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4145; Dec. Dig. § 1048.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Thomas J. Griffith against the Los Angeles Pacific Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. McKinley and Gurney E. Newlin (Roy V. Reppy, of counsel), for appellant. N. R. Rutherford, Jr., and E. B. Drake, for respondent.

JAMES, J. Plaintiff was a passenger on one of the cars operated by defendant when a collision occurred between the car upon which plaintiff was riding and another car running on the same track in the opposite direction, by reason of which plaintiff suffered severe physical injuries. Damages in the amount of $35,200 were claimed in this action, and by a verdict of a jury the sum of $7,500 was awarded to plaintiff. At the trial it was admitted by defendant that plaintiff was injured through its negligence; the only issue submitted to the jury being as to the extent of plaintiff's injuries and the amount that he should recover therefor. A motion for a new trial was made by defendant, and from the order denying the motion this appeal is taken. But one ruling of the trial court is presented for review.

O. M. Justice, a physician, was called as a witness on behalf of plaintiff, and testified that he found symptoms of spinal injury when he examined plaintiff, and gave it as his opinion that such an injury had been sustained, and that it was of a permanent character. As a foundation for his opinion, he testified that he had found an "anesthetic area" about the lower portion of the spinal column of plaintiff's body; that this area was more pronounced on the right than on the left side. It was defendant's contention that there was no spinal injury, and the cross-examination of the witness Justice was along a line calculated to obtain admissions from him inconsistent with the opinion which he had expressed. The witness had not referred to any medical work or works, either specifically or in a general way, up to the time the cross-examination was commenced. Upon cross-examination he testified that: "Paralysis of spinal origin as a rule exists on both sides. I cannot say that it always does, but I have never heard of a case, nor do I recall one, where paralysis of spinal origin was on one side only. Nor do I remember reading any such case." He was then asked: "Q. What books have you read on this subject?" to which he replied: "A. I think probably the one I would adhere to more strongly than any other is Dana, possibly." This question then followed: "Q. Doesn't Dana state that—and every other authority that you have ever read—that paralysis of spinal origin must exist on both sides?" An objection interposed by plaintiff's counsel to this question was sustained. The sole error assigned by defendant is on account of the ruling of the trial court in not permitting an answer to be made to the question. The rule affecting the examination of an expert medical witness, which permits a showing of the contents of the books of standard authors skilled in that particular profession, is limited. It is permissible only to show what such authors have declared upon a subject, when a witness has based his opinion wholly or in part upon his reading of books of that character. Fisher v. Southern Pacific R. Co., 89 Cal. 400, 26 Pac. 894; Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091. And then only when statements found in such books are not in harmony with the testimony of the witness. Here the physician expressly declared that he had neither heard nor read of a case where there was spinal injury with resulting paralysis of one side of the body only. An answer in the affirmative to the question propounded by defendant's counsel would not have contradicted in any degree any testimony of the witness based upon his reading of works of medical authors, for he admitted that he had read nothing in support of his opinion as to the character and effect of the injuries caused to plaintiff's spine. The ruling of the trial judge was therefore without prejudicial error.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 67

PEOPLE v. CURRIE. (Cr. 128.)

(Court of Appeal, Third District, California. Aug. 9, 1910.)

1. Rape (§ 40*)—Female Under the Age of Consent—Relations with Other Men—Evidence.

On a trial for rape on a female under the age of consent, her relations with other men to show unchastity are generally immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 59; Dec. Dig. § 40.*]

2. Witnesses (§ 330*)—Impeachment.

Where prosecutrix under the age of consent testified on her examination in chief as to her pregnancy to corroborate her testimony that accused had intercourse with her on February 24th or 25th, while her child was born October 31st following, accused to discredit her testimony could show on her cross-examination that her pregnancy might have been due to her relations with other men.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106–1108; Dec. Dig. § 330.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Steve Currie was convicted of rape, and he appeals. Reversed.

L. N. Peter, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was tried upon an information for the rape of a female under the age of consent, was convicted, and sentenced to imprisonment in the state prison for the term of 18 years. He appeals from the judgment of conviction, and from the order denying his motion for a new trial.

The conviction rests upon the uncorroborated testimony of the prosecutrix whose narrative of the facts is by no means conclusive, but not such as to justify its entire rejection as "inherently improbable" as it is characterized by defendant. She testified that the crime was committed the 24th or 25th of February, 1908. She testified in chief that she was afterwards examined by Dr. Rutledge, and that he found her to be pregnant. She was asked on cross-examination to whom she first told of the assault and replied: "Never told any one. The doctor came and found out for himself. Q. Was that the first time Currie had ever taken any liberties with you? A. Yes sir." She testified that she gave birth to a child on October 31, 1908, at a hospital in Sacramento, and the attending physician testified to the date, and also that the child "was full nine months old," and that, had it not been nine months old, there would "have been peculiarities about the child or mother to show that it was born sooner than provided for." On cross-examination of the prosecutrix defendant endeavored to show that prior to the alleged relation with defendant she had had illicit relations with persons other than defendant, and particularly with a young man who was named, and she was also asked the direct questions: "Had you had sexual intercourse with any other person except Currie up to that time? Did you ever have any opportunity prior to the 24th or 25th day of February, 1908, to become pregnant?" Other questions were asked along this line, to all of which the objection of the district attorney was sustained. Counsel for defendant stated to the court that the purpose was to show that according to the laws of nature "it was utterly impossible that she could have had sexual intercourse on the date she gave"; also, "to show that the pregnant condition to which she referred in her direct testimony must have been due to somebody else besides this defendant." The trial court resolutely refused the testimony for these or any purposes.

It is well settled that in cases of this character, where the prosecutrix is under the age of consent, her relations with other men as tending to show want of chastity are immaterial. Here, however, the district attorney had brought out the fact in chief that she was found to be pregnant after defendant's intercourse with her as she testified; the object being to corroborate her testimony by that important fact. She had testified that defendant had never, previously to February 24th or 25th, had sexual intercourse with her. It also appeared by her own testimony that she gave birth to an eight-pound child on October 31, 1908, about eight months after the alleged assault upon her. Defendant had a clear right to discredit her testimony by showing on cross-examination whether her pregnancy was due to her relations with defendant or might not have been caused by some other person. In testifying to her pregnancy as an evidence of defendant's guilt, defendant had the right to test the truthfulness of this damaging fact by the means taken at the trial, and it was prejudicial error to deny him this right. In the recent case of People v. Davenport, 110 Pac. 318, this question was considered, and the court said: "As we have already seen, the evidence would not be admissible for the purpose of showing her unchastity at the time of the alleged offense, but, if it had a logical tendency to rebut any unfavorable inference against the defendant that might be drawn from any act testified to on the direct examination, it should have been admitted for that purpose." See, also, People v. Fong Chung, 5 Cal. App. 587, 91 Pac. 105; People v. Ah Lean, 7 Cal. App. 626, 95 Pac. 380.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Other errors are assigned, but, as they may not occur upon the retrial of the case, should it be tried again, it is not necessary to notice them.

The judgment and order are reversed.

We concur: BURNETT, J.; HART, J.

14 Cal. App. 123

PEOPLE v. PALASSOU. (Cr. 255.)

(Court of Appeal, First District, California. Aug. 18, 1910. Rehearing Denied Sept. 16, 1910. Denied by Supreme Court Oct. 13, 1910.)

1. CRIMINAL LAW (§ 178*)—FORMER JEOPARDY—PRIOR INFORMATION—DISMISSAL.

Where an information for homicide was dismissed because accused was not brought to trial within 60 days, such dismissal was no bar to another information for the same offense under Pen. Code, § 1387, providing that the dismissal of a prosecution shall not be a bar if the offense is a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 326-329; Dec. Dig. § 178.*]

2. CRIMINAL LAW (§ 296*)—FORMER JEOPARDY—PLEA—DIRECTION OF VERDICT.

Where a former prosecution against accused, which was dismissed, was not a bar to a subsequent prosecution as a matter of law, the court properly directed the jury to find a verdict for the people on a plea of former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 679-681; Dec. Dig. § 296.*]

3. CRIMINAL LAW (§ 834*) — REQUEST TO CHARGE—MODIFICATION.

Where, in a prosecution for homicide, the court charged, as requested, that statements made by deceased and testified to by her daughter could not be considered except as showing the conduct of accused at the time the statements were made, the court did not err in eliminating from such instruction argumentative matter as to the effect of the evidence, and that the statements could not be considered as tending to prove their truth or of any other fact than the one for which they were admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

4. HOMICIDE (§ 158*)—EVIDENCE—THREATS.

Where, in a prosecution for wife murder, the state claimed that accused gave the blow that killed deceased, while accused claimed that she died because of a fall with which he had nothing to do, evidence of prior threats made by defendant against deceased could be considered by the jury in determining whether or not the blow given by accused was intentional and unlawful, or accidental.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

5. HOMICIDE (§ 159*) — EVIDENCE — PREVIOUS HOSTILE ACTS.

Where, in a prosecution for wife murder, defendant claimed that deceased died as the result of a fall with which he had nothing to do, while the state claimed death resulted from a blow which accused struck, evidence that on a prior occasion within a year prior to the homicide accused came home angry, and assaulted and mistreated his wife several times, was admissible as bearing on defendant's motive, and whether the death was the result of defendant's blow, or an accident.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 297-300; Dec. Dig. § 159.*]

6. CRIMINAL LAW (§ 1178*)—APPEAL—QUESTIONS NOT ARGUED.

Objections to the admission of evidence referred to only by giving the folios of the transcript where the rulings might be found, but not argued, will be deemed waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Peter Palassou was convicted of manslaughter, and he appeals. Affirmed.

Carroll Cook and Wm. Tomsky, for appellant. Attorney General U. S. Webb, C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

COOPER, P. J. Defendant appeals from a judgment convicting him of the crime of manslaughter and from the order denying his motion for a new trial.

The court correctly refused the instruction requested by defendant's counsel, by which it was sought to leave the jury to pass upon the question as to whether or not the special pleas, interposed by defendant, of a former acquittal and of once in jeopardy had been proven, and in lien thereof instructed the jury to find for the people upon both such pleas. There was no conflict in the evidence, which was to the effect that the defendant had upon the prior occasion been in jail, charged with the same offense for which he was here tried, and was upon his own motion discharged and the information dismissed because he had not been brought to trial within 60 days as required by law. This was not a bar to a future prosecution under a new information for the same offense (Pen. Code, § 1387; In re Bergerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528), and the court had the right to instruct the jury to find a verdict for the people upon the pleas (People v. Ammerman, 118 Cal. 28, 50 Pac. 15).

It is claimed that the court erred in eliminating certain parts of defendant's requested instruction numbered 34, and in giving the instruction with the omission of the said parts. The instruction as requested and as given related to the testimony of defendant's daughter Emelie as to certain statements made by deceased, who was the mother of Emelie and the wife of defendant, the statements having been made at a time when Emelie went to her mother after hearing her mother cry from the effects of an assault defendant had just made upon her. The jury were told by the instruction as given that the statements made by the deceased in the presence and hearing of the daughter were admitted for the sole purpose of showing the conduct of the defendant at the time such statements were made. The eliminated portions of the instruction contained matter argumentative and charging as to the effect of the evidence. In the eliminated portion the court was requested to tell the jury that the statements heard by the daughter and to which she had testified could not be considered by the jury as "tending to prove their truthfulness or any other fact than the one for which they were admitted." The instruction as given plainly charged the jury that the statements could not be considered by the jury for any other purpose except for the one purpose of showing the conduct of the defendant at the time of such statements. This was certainly as favorable to defendant as he had the right to expect under the circumstances.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court refused to give the following instruction asked by defendant: "Any evidence introduced here on this trial as to threats previously made by the defendant cannot be used or considered by the jury in determining whether a blow was inflicted by the defendant or not. Such evidence must be limited by them to the question of intent and motive"—and such refusal is now claimed as error. In our opinion—conceding there was a conflict in the evidence as to whether or not defendant gave the blow which killed the deceased, or conceding there was a conflict in the evidence as to whether death was accidentally produced or produced by a blow from defendant—the jury had the right to take into consideration the threats previously made by defendant. The jury had the right to consider any prior threats made by defendant in determining the question as to whether or not the blow given by the defendant was intentional and unlawful, or accidental. The court elsewhere instructed the jury that, if the deceased came to her death by reason of a fall with which defendant had nothing to do, he could not be convicted; that, if the deceased died as the result of a blow inflicted by defendant, he could not be convicted of murder in any degree unless the jury should find beyond all reasonable doubt that the blow was given with malice aforethought, and with the intent to kill.

It is said in the brief of appellant that the court allowed "a vast amount of evidence to be introduced as to other transactions remote and entirely disconnected from the acts with which he was charged." The only instance to which our attention is particularly called in the brief as to other remote and disconnected transactions is as to a question asked defendant's daughter Emelie while being examined in chief by the district attorney. The witness had testified as to certain conduct and acts of defendant and as to certain acts of cruelty to deceased by defendant, such as threatening to choke her upon one occasion when he caught her around the neck, throwing a plate at her, and upon one occasion taking a knife and threatening to "cut her insides out." The witness was then asked the following question: "Did you upon any other occasion during the year preceding than you have mentioned hear your father do anything, or hear your father say anything, to your mother with reference to what he was going to do to her?" The question was objected to upon the ground that it was leading, incompetent, and irrelevant, and not within the issues. The objection was overruled, and the witness answered as follows: "Yes, sir. One day my father came home from the milk wagon about 3 o'clock. He was angry over something, and he went and kicked my mother in the side, and threw her over and dragged her all around the place. Then he left her and came down into the stable about 4 o'clock. I started to do some work, and he went back home again the second time. Mamma was sitting in the chair. I watched him through the barn to see if he was going to strike her the second time, and he went up again and caught her around the neck, and he dragged her again around on the floor, and I went and told him to leave her go. He came back to the stable the second time. He went back a third time to the house and my brother and I followed him. Just as we got in the room we heard mamma scream. We went up the front way and he had her in the bed, and he was choking her. He had her on the floor." The court correctly overruled the defendant's objection to the question, and committed no error in denying a motion to strike out the answer of the witness. The evidence was not allowed for the purpose of showing a distinct and unconnected crime, but for the purpose of showing the course of conduct of the defendant towards his wife on prior occasions which ultimately culminated in her death. Such conduct and such acts leading up to and directly connected with the crime with which the defendant is charged would certainly shed light upon the questions as to the defendant's motive, and as to whether or not the death was the result of defendant's blow or of an accident. It is not a case of where the court allowed proof of a separate and distinct crime not connected with the offense for which the defendant was being tried. And the courts have uniformly held that evidence which shows a motive or throws light upon the facts and circumstances leading up to the particular crime is admissible, although the acts and conduct on prior occasions may have of themselves constituted a distinct crime.

Our attention not being called to the other alleged rulings upon the admission of evidence except by reference to folios of the transcript where it is said the erroneous rulings may be found, we do not deem it our duty to search for and discuss the other rulings which have not in any way been discussed by counsel. Particularly is this so in this case, where counsel for appellant states in his brief that the alleged erroneous rulings are all in regard to the same class of evidence as the ruling we have just discussed.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

14 Cal. App. 75

TREADWAY v. BOARD OF DIRECTORS OF VETERANS' HOME OF CALIFORNIA et al. (Civ. 710.)

(Court of Appeal, Third District, California. Aug. 11, 1910. Rehearing Denied by Supreme Court Oct. 10, 1910.)

1. Statutes (§ 78*)—Special Laws.

St. 1897, c. 101, as amended by St. 1905, c. 373, and by St. 1907, c. 267, creating a state home for aged and indigent soldiers and sailors, providing for the admission of such soldiers and sailors, and declaring that undisposed pension money of soldiers who die intestate while members of the home shall go to enumerated relatives, etc., though a special law for a special purpose, is not within Const. art. 4, § 25, prohibiting special legislation in enumerated cases, including statutes affecting the estates of decedents, etc., since the act does not affect the estates of deceased persons, or change the law of succession, but merely extends to soldiers and sailors the benefits of the home on specified conditions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 83; Dec. Dig. § 78.*]

2. Army and Navy (§ 52*)—Soldiers' Homes—Regulations.

The Legislature may directly, by the act creating a soldiers' home, or indirectly, by delegating the power to the governing body of the home, prescribe the conditions on which the persons provided for may become members of the home.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 100–102; Dec. Dig. § 52.*]

3. Army and Navy (§ 52*)—Soldiers' Homes—Regulations.

St. 1907, c. 267, providing that soldiers applying for admission to the soldiers' home must agree that their pension money shall be paid to the treasurer of the home to be held for their use while members, and on their death intestate while members to be paid to the home subject to the right of enumerated relatives if called for within a specified time, is a reasonable regulation and valid.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 100–102; Dec. Dig. § 52.*]

4. Executors and Administrators (§ 53*)—Assets—Pension Money—Statutes.

Because of the federal statute and Code Civ. Proc. § 690, subd. 20, exempting from execution pension money received by a pensioner of the United States, the public administrator of a deceased pensioner may not maintain an action for the possession of pension money to subject it to the payment of his fees and commissions and the fee of his attorney.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 53;* Exemptions, Cent. Dig. § 34.]

5. Executors and Administrators (§ 45*)—Assets—Pension Money—Soldiers' Homes—Regulations.

Where a soldier on admission to the soldiers' home created by St. 1897, c. 101, expressly assented to the regulations of the home, which required the payment of pension money to the treasurer of the home, to be held for the soldier's use during life, and on his death intestate to be paid to enumerated relatives, and he paid his pension money to the treasurer, his administrator could not recover the money in the hands of the treasurer, because of the trust created by the soldier's assent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 296; Dec. Dig. § 45.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by C. C. Treadway, as administrator of William Zawadill, deceased, against the Board of Directors of the Veterans' Home of California and C. De Colmesnil, treasurer. From a judgment for plaintiff, defendants appeal. Reversed.

Frank L. Coombs, for appellants. H. L. Johnston, C. E. Trower, and L. E. Johnston, for respondent.

CHIPMAN, P. J. Plaintiff brings the action as administrator of the estate of William Zawadill, deceased, to recover from defendants the sum of $500, alleged to have been on deposit with the treasurer of the Veterans' Home of California to the credit of and subject to the order and disposition of said deceased at the time of his death, to wit, on the 7th day of January, 1908. The answer admitted the due appointment of plaintiff as administrator of the estate of said deceased, but denied that deceased at his death had any money in the hands of said defendant, treasurer as aforesaid, subject to the orders or disposition of the deceased, except that said defendant had in his possession and control the sum of $517.05, "which said sum consisted of a balance, at the time of the death of said William Zawadill, held by the treasurer of said home for the purposes and for the reasons hereinafter set forth." It is further averred that defendant, the Veterans' Home of California, is a state institution, created by and existing under the act of the Legislature of the state of California, approved March 11, 1897, entitled "An act to accept from the Veterans' Home Association the conveyance of, and to vest the title in the state of California, to the tract of land in Napa county known as the Veterans' Home, with the improvements and furnishings thereon, to make the same a state home for United States soldiers, sailors and marines, and to provide for the government thereof by the state." In substance it is further averred that the said Zawadill on November 29, 1903, made his application in writing to be admitted to said home, as a member thereof, subject to and in conformity with the laws of the state, relating to such matters, at that time in force, and under the by-laws, rules, and regulations of the said home, and as a condition thereof, and in consideration of the benefits to arise therefrom, he did then and there agree with the board of directors of said home and with the said home to be governed by and to abide by the laws of the state, the by-laws, rules, and regulations of said home, then existing or that might thereafter, by changes or by amendment or otherwise, be in force relating thereto; that in the month of December, 1903, the said board of directors considered said application and, finding the said applicant qualified to become a member of said home, duly and regularly admitted him to said home as a member thereof, and he then became, and ever since, to the time of his death, was such member, and "subject in all matters, and especially in the matter of the disposition of the moneys claimed by plaintiff herein, to the laws of the state of California, the by-laws, rules, and regulations of said Veterans' Home of California, at said time and subject to such new laws, by-laws, rules, and regulations in force at the time of his death." It is then averred that while such member the said Zawadill, in various amounts and at divers times, deposited with the treasurer of said home, to be kept and retained by said treasurer and disposed of in the case of the death of said Zawadill, in accordance with the laws of the state, and the by-laws and rules and regulations relating to said home, the aggregate sum of $517.05, in pension moneys, as mentioned in his said application; that he died intestate on January 7, 1908, leaving said sum in the hands of said treasurer as a balance to be held and disposed of according to the laws of the state and the by-laws and regulations of said home as they existed at the time of the death of said Zawadill, and the said treasurer now holds said money in accordance therewith and in accordance with said application of said deceased for membership, "and as a trust fund to be paid in accordance with section 10 of the said act of the Legislature of the state of California creating said Veterans' Home, as amended, which amendment was approved March 16, 1907, and in accordance with the by-laws, rules, and regulations of said home, passed, and adopted in accordance with said amendment," which said amended by-laws, rules, and regulations were adopted and in force prior to the death of said deceased. The answer makes the said application and certain of the said by-laws, rules, and regulations, part of the answer as "Exhibits A," "B," and "C."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Regulations of the home in force when deceased became a member, as shown by Exhibit A, declare that every worthy officer, soldier, sailor, or marine, who is a bona fide resident of this state and who honorably served in the army or navy of the United States during the war with Mexico, the Civil War (or any prior war), and who is in indigent circumstances, and by reason of age, infirmity, or wounds received in service is incapable of self-support, shall be entitled to admission into the home, subject to the laws of the state of California and to the regulations prescribed by the board of directors for its control and management. It is further provided that a candidate for admission must make a formal application signed by himself, and such application must be favorably acted upon by said board before he can be admitted, and the application must be accompanied by evidence satisfactory to the board of the facts stated by the applicant, to wit: As to his residence in this state, his service in the army or navy of the United States during the late Rebellion, the Mexican War, or other wars prior thereto, or the Spanish and Philippine Wars. "If a U. S. pensioner, he must file with his application his pension certificate, and a consent or agreement to transfer to the home the amounts received by him as pensioner, while a member of the home, under the following rules and regulations, now in force, or such other rules and regulations as may be established by the board of directors, to wit: Members of the home who are pensioners shall, upon receipt of pension, or by the twenty-fourth day of each pension month, pay over to the commandant, or to such officer as he may designate, all of his pension money. In case of death of a pensioner, any balance of pension money remaining in the hands of the treasurer of the home at the date of the pensioner's death shall be paid to his widow, minor children, or dependent mother or father in the order named, and, should no widow, minor child, or dependent parent be discovered within one year from the time of the death of the pensioner, said balance shall be paid to the post fund; to be used for the common benefit of the members of the home under the direction of the board of directors subject to future reclamation by the relatives hereinbefore designated, upon application filed with the board of directors within five years after the pensioner's death. Failure or refusal of any member to make payment at the time specified, and as provided, shall be considered a violation of the rules, and the commandant is hereby directed to give such offending member an honorable discharge from the home. Any member so discharged shall not be readmitted within six months from the date of his discharge." Before admission the applicant must sign the following: "I further stipulate and agree, as a condition consequent upon my admission to the said home, that I will, if a United States pensioner, or whenever I become such, on and after each recurring pension pay day, or at such times as may be fixed by the board of directors of said home, sign and execute the necessary vouchers and other papers for the collection of the pension money due me, and indorse the check issued in payment thereof; and I hereby authorize and empower the commandant of said home to transmit said check, or the proceeds thereof, to the treasurer of the home, to hold and dispose of the same as provided by its bylaws, and the rules, regulations and orders which have been or may hereafter be established by its board of directors." Exhibit B is a copy of the "Agreement with the Board of Directors of the Veterans' Home of California," entered into by said deceased, as follows: "I, William Zawadill, having made application for admission to the Veterans' Home of California, location Napa county, do hereby agree to fully comply with the by-laws of said home, if permitted to become a member thereof, and to obey and abide by all the orders, rules and regulations made by its board of directors or officers, and to promptly and cheerfully perform all the duties required of me as a member of said home. I further agree, as a condition consequent upon my admission to the said home, that I will, if a United States pensioner, or whenever I become such. [Then follows the concluding stipulation provided for by Exhibit A.] Witness my hand this 29 day of November, 1903. William Zawadill. Signed in presence of: W. F. Wallace." A communication signed by the secretary of the home and directed to the then commandant read as follows: "In consideration of the above agreement and stipulation the application of William Zawadill for admission to the Veterans' Home has been duly approved, and therefore, on presentation of this, you will admit him to membership therein."

Exhibit C sets forth certain pertinent regulations of the home, being a part of amended and revised regulations adopted in 1907 after the amendment of the act of 1897, and prior to the death of deceased, namely, Nos. 148, 149, 150, 161, and 170. Sections or paragraphs numbered 148 and 149 relate to the qualifications and condition on which the applicant may enter the home, and are substantially the same as set forth in Exhibit A. Regulation 150 relates to the residence of the applicant, his service in the army or navy, his indigent circumstances and need of aid or the benefits of the home in consequence of physical disability, name, age, etc., much the same as set forth in Exhibit A, and further: "That he has no relatives able to maintain him who are liable for his support under the laws of California." Regulation numbered 161 reads: "In case of the death of a pensioner or member of the home, any pension or other money due him and remaining in the hands of the treasurer shall be paid directly, and without probate, to his widow, minor children, or mother or father, in the order named, if demand is made within one year; otherwise the same shall escheat to the home, subject to future reclamation by the above relatives for a period of five years." The foregoing are alleged to be all the rules and regulations of the home pertinent to any issue in the case. A general demurrer to the amended answer was sustained, and plaintiff had judgment as prayed for in the complaint upon the default of defendants to make further answer.

By the act of 1897 (St. 1897, p. 106) the state took over all the property of the Veterans' Home Association, a private corporation, "for the purposes of a home for aged and indigent ex-soldiers, sailors and marines of the United States army and navy." Section 1. "Said property shall continue to be used as a home for aged and indigent ex-soldiers, sailors and marines." Section 2. The act provides for a governing board of directors who "shall have power to manage said home and administer its affairs, make by-laws for the government of the board, * * * adopt rules and regulations for the government of said home, which rules and regulations shall conform, as near as possible, to the rules and regulations by which the United States Soldiers' Home and branches thereof, are governed." Section 5 provides for the organization of the board, duties of officers, etc. Other sections relate to matters of administration not here material. Section 10 requires that all money received by the directors or any officer (except such as is paid by the state for disbursement), including pension moneys belonging to the pensioners of the home, and all other trust moneys, shall be immediately paid over to the treasurer of the board, who shall forward to the state treasurer all moneys, except pension moneys and other trust funds, the canteen fund and the emergency fund.

Section 12 provides that "no person shall be admitted to reside in said home (families of officers and employés excepted) who is not an honorably discharged United States soldier, sailor or marine" requires one year's residence in the state. "The board may make such additional rules governing the admission of applicants as in its judgment may be deemed just and proper and for the best interests of the home."

Section 16 provides that the board might receive applicants from states or territories upon condition that they pay "for their maintenance and support the same rate per capita that the maintenance and support of said home shall cost the state of California per capita." This section was repealed by the act of 1905.

This act was amended in some respects by act of March 20, 1905 (St. 1905, p. 471). Section 1 of the act amends section 2 of the act of 1897 and provides as follows: "Said property shall continue to be used as a home for aged and indigent United States ex-soldiers, sailors and marines. The home shall be a state home, under the exclusive management and control of the state, by a board of directors, to be appointed by the governor" and fixes the term of their office. Section 2 amends section 3, and prescribes the oath to be taken by the officers of the home. Section 3 amends section 5, and provides for the organization of the board and its employés and their compensation. Section 4 amends section 7, and relates to making reports to the Governor. Section 5 amends section 10 and reads substantially as section 10 of the act of 1907 (St. 1907, p. 330), to be noticed later. Section 7 amends section 12 and relates to admission to the home and requires of ex-soldiers, sailors, and marines a residence in the state of six months. "The board may make such additional rules governing the admission of applicants and may prescribe conditions precedent upon which they may enter, and the conditions on which they remain, as in its judgment may be deemed just and proper for the best interests of the home." Section 8 amends section 13 and relates to traveling expenses; and section 9 repeals sections 14 and 16.

The act of 1907 (St. 1907, p. 330) consists of one section, as follows:

"Section 1. Section ten of an act approved March 11, 1897, entitled 'An act to accept from the Veterans' Home Association the conveyance of, and to vest the title in the state of California, to the tract of land in Napa county known as the Veterans' Home, with the improvements and furnishings thereon, to make the same a state home for the United States soldiers, sailors, and marines, and to provide for the government thereof by the state,' as amended by an act approved March 20, 1905, is hereby amended to read as follows:

"Sec. 10. All moneys received by the directors, or any officer of the home (except such as may be paid to them by the state for disbursement), including pension moneys belonging to the pensioners in the home, and all other trust moneys, shall be immediately paid over to the treasurer of the home."

Then follows a provision requiring the treasurer of the home on or before the 10th day of each month to forward to the state treasurer all moneys then in his possession, "except pension and other trust funds" and some other special funds. "Said moneys shall be immediately deposited by the State Treasurer to the fund hereinafter designated 'Fund for the support and maintenance of the Veterans' Home of California.' Any balance of pension money held by the board, or by its authority upon the death of a pensioner, or any moneys belonging to members of the home, shall, upon their death, be held as a trust fund, to be paid by the board, directly, without probate, or by its order, to the widow, minor children or mother or father of the pensioner or member in the order named; and should no widow, minor child, or parent be discovered within one year from the time of the death of the pensioner, or of the member, said balance, or moneys, shall be paid to the post fund of the home, to be used for the common benefit of the members of the home under the direction of the board, subject to future reclamation by the relatives hereinbefore designated in the order named, upon application filed by the one entitled to the same within five years after the death of said pensioner, or member." The act then provides for the disposition of any personal effects of the deceased by public sale after one year, the proceeds to go to the post fund to be used for the common benefit of the members, "as hereinabove provided for pension and other moneys, and subject to future reclamation within the period of five years from the date of the death of the member as hereinbefore mentioned. The board of directors shall make rules and regulations to carry this into effect: Provided, however, that nothing in this act shall in any way conflict with the right of any member of the home to dispose of his property, including such pension moneys, by last will."

It seemed necessary to set forth somewhat fully the averments of the answer, including the application of deceased, the rules and regulations of the home, together with the statutory provisions relating thereto, for the several acts of the Legislature and the rules and regulations made in pursuance thereof and the application for membership of the deceased are to be read together in determining the questions presented. Respondent's position is, as was doubtless the view taken by the trial court, that the act of 1907 is unconstitutional, and any regulations of the home pursuant thereto are necessarily void. The feature of the law and regulations thus assailed is the provision which makes disposition of the pension money of a member of the home who dies intestate.

It is conceded that the Legislature had the power to create this home, and that there is no other similar state institution. Board of Directors v. Nye, 8 Cal. App. 527, 97 Pac. 208, where the subject is exhaustively treated. It can hardly be said that the act creating the home is a general law, for it applies to no other similar institution. It is essentially a special law enacted for a special purpose, and, it seems to us, does not present the case "where a general law can be made applicable." Board of Directors v. Nye, supra. We may, therefore, dismiss respondent's first objection. Special laws are not inhibited by the Constitution, except as provided by article 4, § 25, and its several subdivisions, of which latter subdivisions 12 and 30 only are claimed to apply. In no other respects are the laws or regulations relating to the home called in question. Conceding, then, the power to create the home as a state institution, why may not the Legislature, either directly by the provisions of the act, or indirectly by delegating the power to the governing body of the home, prescribe the conditions and terms upon which the persons provided for by the law may become members of the home? The law does not purport to affect "the estates of deceased persons" or "change the law of descent or succession" and was intended for no such purpose. It merely extends to the class of persons indicated the benefits and privileges of the home on certain conditions. In the particular complained of applicants agree that their pension money shall be paid to the treasurer of the home from time to time as received, to be held for their personal benefit and use while members, but in case of their death while members, and without having made other disposition of it, any balance unexpended shall go to the home for the benefit of all the members, subject to the right of certain named persons to this balance if called for within a stated period—five years. It cannot be said that this regulation is harsh or burdensome or ungenerous, for the applicant is supposed to be in indigent circumstances when admitted, having no one under any legal obligation to support him, and it is only when the member dies intestate that the law operates to dispose of any balance to his credit, and to this he agreed when admitted as a member. No question can arise as to the rights of creditors, for the United States statute protects the pension from execution, and the statute of this state makes the following exemption: "All money received by any person, a resident of this state, as a pensioner of the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned, or invested by him." Code Civ. Proc. § 690, subd. 20. The only object, therefore, which the public administrator can have in getting possession of this pension money is to subject it to the payment of his fees and commissions and the fee of his attorney. The law wisely provides that this may not be done.

But, if we are mistaken in this view of the law, there is still another ground relied on by defendant, which, we think, justified the defendant in refusing to turn over this money to plaintiff. It will be observed that section 10 of the act of 1907 and the act of 1905 is but giving legislative approval in terms of the rules and regulations of the home in force when the deceased became a member, and to which he gave his express consent. Looking back to the provisions set forth in Exhibits A and B, it will be seen that the agreement under which the deceased became a member of the home has been fully executed. The pension money is held by the treasurer of the home under this agreement, and it came into his possession and is held subject to conditions precedent to the admission of deceased as a member of the home. Respondent concedes that the directors of the home and treasurer became trustees of Zawadill during his lifetime, but it is contended "that upon his death they held such property as trustees for the legal representatives, creditors and heirs of the said Zawadill."

It seems to us that the principles announced in Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659, and Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, fit this case and should control it. In the Booth Case Mrs. Frances A. Bell, a widow, at her death had certain money on deposit in defendant bank. In her lifetime she executed and delivered to the bank an order, in the matter of this deposit, reading: "Pay to the individual order of either Cornelia E. Booth or Aurelia L. James, or myself. [Signed] Frances A. Bell." Verbally she stated to the teller of the bank "that she wanted to fix the account so that in the event of her death her sisters, who were in the East, could draw the money without the estate being probated." The account was changed to meet Mrs. Bell's directions. She continued to draw from the fund in her lifetime, leaving a balance at her death, to recover which was the purpose of the action. The executors of Mrs. Bell's will were made defendants "because of a claim by them of a right to receive and control said money as part of the estate." It was held that a trust was thus sufficiently created as to the trustor and the beneficiaries, under section 2221 of the Civil Code, and as to the trustee was sufficiently created under section 2222 of the same Code. It was also held that the mutual consent of the trustor and trustee created a trust of which the beneficiaries may take advantage, in so far as it has not been rescinded or revoked, also that the power of the trustor to withdraw the deposit does not affect the validity of the trust as to the remainder thereof; and it is immaterial whether such power be considered a power of revocation under section 2280 of the Civil Code, or a trust in favor of so much of the fund as she might withdraw and in favor of her sisters, as to the remainder. The Code does not require that the beneficiary shall be informed of the trust, and it is well settled that no set form of words is necessary to create a trust of personal property. It was said in the opinion: "I do not think it necessary to determine whether the control over the fund reserved by Mrs. Bell is to be regarded as a power of revocation, or whether the whole transaction is to be regarded as a trust in her favor of so much of the fund as she might see proper to withdraw in her lifetime, and of the remainder for her sisters. In either case the practical result is the same; for a power of revocation of the whole may be exercised as to a part, and, when so exercised, does not affect the remainder."

It would be difficult to express more clearly the intention of the trustor than is such intention expressed in the present case. Faithful to his agreement and to the regulations to which he had given his written consent, he confided his pension to the keeping of the treasurer of the home, reserving the right to withdraw it in his lifetime, but with directions that, should he die intestate, any balance in the hands of the treasurer should be disposed of as specifically directed. This he had the right and the power to do. The Supreme Court said in Nichols v. Emery, 109 Cal. 323, 331, 41 Pac. 1089, 1092, 50 Am. St.

Rep. 43: "A man may desire to make disposition of his property in his lifetime to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, suggesting the bitterest feeling, springs up over wills, such a desire is natural. And when it is given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent."

The judgment is reversed, with directions to overrule the demurrer to the answer.

We concur: BURNETT, J.; HART, J.

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14 Cal. App. 89

JENKINS et al. v. WILLIAMS, County Auditor. (Civ. 707.)

(Court of Appeal, Third District, California. Aug. 17, 1910. Rehearing Denied by Supreme Court Oct. 13, 1910.)

1. COUNTIES (§ 178*)—PUBLIC IMPROVEMENTS —BONDS—ORDER.

Pol. Code, § 4088, authorizes a county to issue bonds for bridges, and declares that the county board shall specify the purpose for which the indebtedness is to be incurred, the amount of the bonds to be issued, the rate of interest, etc., and shall provide for submitting the question to the electors. It requires the board before issuing the bonds to provide by ordinance for an annual tax to be used for the payment of principal and interest of the bonds. *Held*, that the order of the board providing for bonds subject to ratification by the electors without which the election would be of no validity is jurisdictional, and that such order, when published, forms an essential part of the propositions to be submitted at the election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

2. COUNTIES (§ 161*) — BONDS—PURPOSE—ORDER OF SUPERVISOR.

Under Pol. Code, § 4088, authorizing the issuance of county bonds for roads, bridges, etc., pursuant to an order of the supervisors ratified by a subsequent election, the order specifying the improvements to be made has all the force of an ordinance; and hence, though the ballot voted at the election ratifying the bonds contains but a general statement of the amount and purpose of the bonds to be issued, the money obtained from a sale of the bonds must be devoted specifically to the purposes particularized in the order.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 220; Dec. Dig. § 161.*]

3. COUNTIES (§ 161*)—IMPROVEMENT BONDS—EXPENDITURE OF PROCEEDS.

Where an order for the issuance of bonds provided that the proceeds should be devoted in specified amounts to the improvement of separate designated bridges, the fact that the bonds for bridge purposes constituted a single fund, and not a separate bonded indebtedness for each bridge to be constructed, did not relieve the county board of its obligation to expend the proceeds in accordance with the distribution in the order.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 220; Dec. Dig. § 161.*]

4. COUNTIES (§ 161*)—BONDS—BRIDGE FUND —APPLICATION.

Where county bonds were issued under an order of the supervisors for their issuance to make repairs of a specified amount on each of certain named bridges, the auditor properly set apart the fund received from the sale of the bonds to pay for the repairs as specified in the order, and had no power to issue a warrant to be paid out of the fund for any one bridge in excess of the amount designated for that bridge.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 220; Dec. Dig. § 161.*]

5. COUNTIES (§ 161*)—BONDS—BRIDGE FUND —APPLICATION OF SURPLUS.

Pol. Code, § 4088, provides for the issuance of county bonds for roads, bridges, etc., and declares that the revenue derived from the sale of the bonds shall be applied to the purpose specified in the order of the board of supervisors and no other, and, if there shall be any surplus, it shall be applied to the payment of the bonds. *Held*, that where an order for the issuance of bridge bonds specifically stated the amounts to be expended on designated bridges, and there was a surplus unexpended in the construction of one of the bridges, such surplus must be applied to the payment of the bonds, and could not be used for the repair of other bridges.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 220; Dec. Dig. § 161.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Mandamus by M. A. Jenkins and another against L. P. Williams, as auditor of the county of Sacramento. Judgment for plaintiffs, and defendant appeals. Reversed.

Eugene Wachhorst, Dist. Atty., for appellant. Devine & Butler, Snook & Church, and Devlin & Devlin, for respondents.

CHIPMAN, P. J. This was an action to compel defendant by mandamus to draw his warrant for the sum of $503.16 in favor of plaintiffs on the county treasurer of Sacramento county. Plaintiff had judgment, from which and from the order denying his motion to set aside and vacate the judgment defendant appeals.

It appears from the finding marked "IX" that the board of supervisors on August 6, 1907, duly passed an order declaring that it was necessary that a bonded indebtedness be incurred "for the purposes hereinafter stated," and, to that end, the board ordered that a special election be held "for the purpose of submitting to the qualified electors of the county of Sacramento the question of issuance of bonds for the purpose of creating an indebtedness of six hundred and sixty thousand dollars for the purpose of erecting and constructing a new county courthouse, and in connection therewith a new county jail, in the said county of Sacramento; and also for the sum of six hundred thousand dollars for the purpose of building and constructing roads and highways in said Sacramento county; and also for the sum of two hundred and twenty-five thousand dollars for the purpose of building and constructing bridges in said Sacramento county." Said amounts above specified and said purposes so stated are more particularly designated and described as follows, to wit: "First. The sum of $660,000.00 to be expended" in the erection of a courthouse and county jail. "Second. The sum of $600,000.00 for the purpose of building roads and highways in said county of Sacramento, as follows, viz.: Sacramento to Folsom, 21 miles—$105,000.00." Then follow six other roads, specifically named, their length and amount to be expended on each, making in all $600,000. "Third. The sum of $225,000.00 for the purpose of building and constructing bridges in said county of Sacramento as follows, to wit: Michigan Bar bridge, repairs, $3,000.00. New steel bridge over Cosumnes river at Bridge House, Sacramento county, $18,000.00. Twelfth Street American river bridge, repairs, $5,000.00. New Morman Island bridge (one-half), $15,000.00. * * *" Of these several bridges there are 30 in all, the building or repair of which amounted to $225,000, varying in sums from $63,000, the highest, to $500, the lowest. "All of said bonds for the several purposes hereinbefore enumerated shall be of the denomination"—then follow description, time to run, etc. "The said special election to be held throughout the county of Sacramento, * * * for the purpose of submitting to a vote of the qualified electors of Sacramento county the above and foregoing propositions, is hereby fixed for Tuesday, the 10th day of September, A. D. 1907."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Findings X and XI are: That the board duly published notice of this election by proclamation in which the purpose of the election was set forth fully and in the terms and language substantially of the foregoing order made by the board. The election was duly called and held and the ballots used at said election were in form and substance as follows:

Bonds for the sum of $660,000.00, to be expended in the construction and erection of a new court house and in connection therewith a new county jail, in said county of Sacramento	Yes.
The same	No.
Bonds for the sum of $600,000.00 to be expended in building and constructing roads and highways in said county of Sacramento	Yes.
The same	No.
Bonds for the sum of $225,000.00 to be expended in building and constructing bridges in said county of Sacramento	Yes.
The same	No.

The election was in favor of the bonded indebtedness and bonds were issued and sold in accordance therewith.

It further appears, by finding XII, that the sum of $225,000 was raised from the sale of said bridge bonds, as aforesaid, and the same paid into the treasury of the county; "that thereupon the said sum of $225,000 was by the auditor of said county of Sacramento, to wit, the respondent above named, without any order therefor having been made by the board of supervisors of said county of Sacramento, placed in his books in several and separate funds and in amounts corresponding to the estimated cost of the several bridges."

Appellant invites attention to finding IX and finding XII, and claims that the auditor was acting under the order of the board of supervisors in placing the bridge funds in several accounts corresponding with the amounts designated by the board to be expended in each instance. Appellant therefore claims that finding XII is not supported by the evidence.

It was further found that the amount used in the construction of several of said bridges fell short of the amount apportioned for the building of the same, and "that there is therefore now in the treasury of the said county of Sacramento more than the sum of $503.16 as a surplus from the cost of construction and work and labor performed on said several bridges." It was also found that there remains in the treasury of said county the sum of $86,741.47, the same being the total of all sums unexpended for work upon the several bridges in the said county to the date of the filing of the petition. It was undisputed and the evidence was that all the bridges had not as yet been constructed, and it did not appear how much money would be required to complete them, but it did appear that, after the completion of the new Morman Island bridge, there was a surplus of over $503.16, apportioned for that bridge. It appears, also, that the board entered into a written contract with plaintiffs to pay them $5,388 to perform the work on the "Twelfth Street American river bridge, repairs," and that they completed the work, were paid $5,000 and no more, and that they duly presented their claim to the board for $503.16, to be paid out of this bridge bond fund, which was allowed and ordered paid but defendant refused to issue his warrant therefor.

The conclusion of law found by the court was that plaintiffs are entitled to a writ commanding defendant to pay the said claim of $503.16 "out of the moneys in his hands from the sale of bonds for bridges," and such was its judgment.

The statute under which the board proceeded is found in section 4088 of the Political Code (St. 1907, p. 382, county government act). So much of the section as is necessary to be now considered reads as follows: "* * * Any county may incur or refund a bonded indebtedness for any purposes for which the board of supervisors are herein authorized to expend the funds of said county, or for the purpose of building or constructing roads, bridges or highways. Such indebtedness shall be incurred in the following manner, to wit: The board of supervisors thereof shall by order specify the purpose for which the indebtedness is to be incurred, the amount of bonds they propose to issue, the rate of interest, * * * and shall further provide for submitting the question of the issuance of said bonds to the qualified electors of the county at the next general election or at a special election to be called by the board for that purpose, and the words to appear upon the ballot shall be 'Bonds—Yes,' and 'Bonds—No,' or words of similar import, together with a general statement of the amount and purpose of the bonds to be issued. Several separate propositions may be submitted at the same election. * * *" The section then provides for the calling of the election, who shall be qualified electors, and provides for publishing notice of the election—"such notice must contain the time and place of holding the election, * * * the amount and denomination of the bonds, the rate of interest to be paid," etc. Provision is then made as to the form of the bond, how and when to be paid and the like. "And the board of supervisors, before or at the time of issuing said bonds by ordinance shall provide for the levy of an annual tax sufficient to effect the object of this provision. Such tax when collected shall be paid to the treasury of the county, and used solely to pay the interest and principal of said bonds as they respectively become due. The revenue derived from the sale of said bonds shall be applied to the purpose specified in the order of the board, and no other. Should there be any surplus it shall be applied toward the payment of said bonds. The board of supervisors of any county can contract a bonded indebtedness for county purposes only as in this title provided."

The position taken by the plaintiffs at the trial and here is that the face of the ballot expressed the will of the voters, regardless of the notice given to them by the order and proclamation of the board; that the $225,000 was to constitute the bridge fund, and all of it could be lawfully used for the construction of one bridge if necessary; that the ballot sufficiently complied with the statute in making a "general statement of the amount and purpose of the bonds to be issued." If this position be correct, it would follow that the board might not only expend all the bridge bond money on a single bridge, but it might also expend all the road and highway money upon a single road, and this, too, in direct conflict with the order of the board and the proclamation and notice given to the electors. We cannot agree to this construction of the statute. It is not necessary to consider whether it would have been sufficient compliance with the statute had the order and the notice or proclamation to the electors simply stated the purpose as it was stated in the ballot—i. e., "the sum of $225,000.00 to be expended in building and constructing bridges in said Sacramento county"—for that is not what the board did. See McMahon v. Board of Supervisors, 46 Cal. 214. The electors were notified that they would be called upon to vote "Yes" or "No" upon the proposition to bond the county for that amount to be used as it was ordered, by the board it should be used to construct 30 different and specifically named bridges, the amount to be expended on each bridge being specifically mentioned, and the electors did not authorize, and certainly did not intend to authorize, the bonding of the county to such an extent leaving it discretionary with the board to expend the entire amount on one bridge and wherever the board might elect. The statute seems to be plain enough. It says: "Such indebtedness shall be incurred in the following manner, to wit: The board of supervisors thereof shall by order specify the purpose for which the indebtedness is to be incurred." And it then directs that in submitting the purpose set forth in the order to be voted upon by the electors there shall appear upon the ballot: "Bonds—Yes and Bonds—No, or words of similar import, together with a general statement of the amount and purpose of the bonds to be issued." The brief statement of the purpose upon the ballot identifies the proposition more fully set forth in the order of which the electors are fully advised by publication of the order. To make the meaning of the Legislature clear, the act provides that "the revenue derived from the sale of said bonds shall be applied to the purpose specified in the order of the board of supervisors, and no other." The language is, "the purpose specified in the order of the board," not in the ballot the form of which they prescribed as directed by the statute. In dealing with any surplus which might arise in expending the money for any of the specified purposes, the law expressly provides that "it shall be applied toward the payment of said bonds." Finally, the board is informed that it can "contract a bonded indebtedness for county purposes only as in this title provided." In its order the board declared that it was necessary to incur a bonded indebtedness "for the purposes hereinafter stated," and that "said amounts above specified and said purposes so stated are more particularly designated and described as follows." Then follow the specifically enumerated specified purposes submitted to the electors for their vote "Yes" or "No." Here was $600,000 which the voters were told was to be expended in constructing 7 different roads in the county and $225,000 to be expended in constructing 30 different bridges, and we are asked to hold that these large amounts, ordered by the board for specific purposes, could be divided up and shifted about at the discretion or possible caprice of the board and for purposes in direct violation of its order and the statute. The order of the board was jurisdictional, without which the election and the bonds would have had no validity. The published order of the board formed an essential part of the propositions submitted to the vote of the electors, and it was the order which was ratified by them. Respondents' contention would lead to results still wider than we have suggested, for by it the board could expend all this money on roads and bridges, no one of which was enumerated in the order, and this must be so if it be true that the statement made on the ballot of the purpose is the measure of the board's power.

It is claimed by plaintiffs that "the board of supervisors cannot order a bonded indebtedness for a number of purposes, and then submit the question to the voters as a single purpose. It naturally follows, therefore, that it was not the intention of the board to have the estimated cost of construction and repairs of each separate bridge considered as a distinct purpose, for, if it had, each purpose would have had to have been submitted separately to the voters. A bonded indebtedness therefore of $225,000 was created for the construction and repair of bridges in the county, and that constituted but a single purpose." The force of the argument rests upon the contention that the purpose declared upon the ballot is controlling, and that the provisions of the order of August 6, 1907, are of no consequence. But this order has all the force of an ordinance, although not so called, and, as it was "passed in pursuance of the statute, has the force and effect of a law of the state and is to be construed as if its terms had been incorporated in the statute itself." Murphy v. San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444; City of San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699. This order or ordinance was published to give notice to the voters of its purpose and what it was proposed to do with the money derived from the bonds. It does not seem reasonable that the board of supervisors intended, or that the voters intended, that the power should be reserved to the board to expend the money at their discretion. The more reasonable construction to be given the order and the statute is that the purposes specified in the order should control. It was not necessary that the ballot should contain a statement of all these purposes in order to comply with the statute, inasmuch as they were particularized in the order, for the statute only requires that the ballot shall contain "a general statement of the amount and purpose of the bonds to be issued," but, where the order defines the purposes specifically, it should be as binding upon the board as though these specific purposes had been expressed on the ballot. Nor does the fact that the bonds for bridge purposes constituted one fund—i. e., that there was not created a separate bonded indebtedness for each bridge to be constructed—affect the question. The order still remains as the measure of the board's power to expend the money. The auditor rightly set apart this fund agreeably to the order, and in our opinion he has no power to issue a warrant to be paid out of this fund for any one bridge in excess of the amount thus set apart.

It is further contended by plaintiffs that the provision of the statute relating to any surplus remaining of the fund refers only to such surplus as shall be left over after all the bridges are completed. But, as plaintiffs contend that the board is in no wise controlled by the purposes mentioned in the order, it would not be likely to happen that there would ever be a surplus, for, under the construction urged, the board could use the bridge bond fund for constructing bridges anywhere in the county at any time and so long as there was money left to do so. The statute says: "Should there be any surplus it shall be applied toward the payment of said bonds." Consistently we must hold that the surplus here referred to is money unexpended in the construction of any bridge, which the board has specifically declared was to be constructed or repaired out of this bridge bond fund.

But plaintiffs further contend that, as this fund was a single fund to be used at the discretion of the board, the latter had the right to contract to pay any cost in the construction of any one bridge which might happen to be in excess of the amount mentioned in the order for the construction of that particular bridge. This would be true if plaintiffs' construction of the statute were correct, for they urge that the board had the power to expend the entire fund on one bridge. But, if the board had not such power, it could not confer it in violation of the statute by making a contract. By force of the statute and its order, the power of the board was limited in the expenditure of the money arising from the sale of these bridge bonds to the sum of $5,000 for the "Twelfth Street American river bridge, repairs," and, if the board has incurred liabilities for this purpose in excess of that amount, such excess must be paid, if at all, out of some other fund.

It seems to us that the views herein expressed are consistent with the letter and spirit of the statute, and that the construction contended for by plaintiffs would open the door to possible, if not probable, dangerous abuse of power, and would take from the vote of the people all its significance as well as defeat its purpose.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

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14 Cal. App. 70

LARSEN v. MAGNE-SILICA CO. (Civ. 824.)

(Court of Appeal, Second District, California. Aug. 9, 1910. Rehearing Denied Sept. 7, 1910; Denied by Supreme Court Oct. 8, 1910.)

1. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—DANGEROUS EMPLOYMENT—DUTY TO INSTRUCT.

Where inexperienced men are employed in dangerous mining operations, it is the master's duty to warn the employés of the dangers, and instruct them how to minimize them.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—DANGEROUS OCCUPATION—MINING OPERATIONS—FELLOW SERVANT.

Where plaintiff was an inexperienced employé, and during the temporary absence of defendant's superintendent the work was in charge of J., a skilled employé, whose directions plaintiff was bound to follow, J. was not merely a fellow servant of plaintiff, and for his negligence the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 446; Dec. Dig. § 189.*]

3. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—INSTRUCTIONS—DUTY TO OBEY.

When directed by a master or one in authority to perform work, the servant's duty is to obey, and he is entitled to rely on the superior knowledge of the master and act as directed, unless the danger is so open and apparent that a man of ordinary prudence would discern it, and refuse obedience.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778-788; Dec. Dig. § 245.*]

4. MASTER AND SERVANT (§ 273*)—INJURIES TO SERVANT—ASSUMED RISK—KNOWLEDGE—EVIDENCE.

In determining whether a servant knew the danger and assumed the risk of the injury he suffered, the jury may consider his youth, inexperience, the work to which he was assigned, the character of the danger, and defendant's failure to warn.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 936-938; Dec. Dig. § 273.*]

5. MASTER AND SERVANT (§§ 278, 280*)—INJURIES TO SERVANT—ASSUMED RISK—NEGLIGENCE—FAILURE TO WARN.

In an action for injuries to a servant by the caving of earth while plaintiff was mining a lower strata according to the directions of his superior, evidence *held* to warrant findings that defendant was negligent in failing to warn plaintiff, and that plaintiff did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 972, 981-986; Dec. Dig. §§ 278, 280.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Albert Larsen, by S. Larsen, his guardian ad litem, against the Magne-Silica Company. From a judgment for plaintiff and from the refusal of a new trial, defendant appeals. Affirmed.

Waldo M. York and J. M. York, for appellant. L. H. Roseberry and B. F. Thomas, for respondent.

ALLEN, P. J. The action was one to recover damages on account of personal injuries. Trial was had before a jury, verdict and judgment in favor of plaintiff, and from the judgment and an order denying a new trial defendant appeals.

The contention of appellant that there is no evidence tending to show neglect on the part of defendant or its officers, if determined adversely to appellant, disposes of the questions involved in the motion for a nonsuit, as well as the other specifications of error presented.

We find evidence in the record tending to show that defendant was engaged in operating a mine from which it was seeking to extract infusorial earth. This earth when in place is shown to lie in strata overlying which heavier earth, ordinarily of a depth of five to six feet, is found. The safest and best way to mine for this infusorial earth was to first remove the waste on top. This was the customary way and the safest way. Defendant was undertaking at the time of the injury complained of to mine this earth without removing the waste and without propping or supporting the same, which was a dangerous method of procedure. Plaintiff, a youth of less than 18, without previous experience as a miner, was employed by defendant generally without reference to any particular kind of employment. It is shown that while he was employed by one Starr, the superintendent of the mine, yet in the absence of Starr therefrom one Jacobson, a miner, directed the other employés as to their duties and the manner of their performance. Plaintiff during his employment, which lasted several months, was chiefly engaged in hauling waste and piling rock, and much of the time working upon a ranch owned by the superintendent, and was not employed in connection with the mining operations proper to the extent of a week during his entire employment. It appears that on the Saturday preceding the injury, which occurred on Monday, the superintendent directed plaintiff to assist the other employés who were taking out this rock or infusorial earth from the face of the cliff, and in which operation they were prying out the rock without removing the waste. This work plaintiff continued until the close of the day, and on the Monday following reported for work, and, Starr being absent, Jacobson directed him to continue his previous employment. Plaintiff undertook to remove a portion of this rock strata, as the other employés were seeking to do, by prying out the rock without removing the waste, and in so doing a cave occurred and large quantities of earth and rock fell upon plaintiff and injured him. Neither the defendant nor any one in authority or connected with the operation of the mine ever disclosed to plaintiff the danger connected with the work, nor any steps which should be taken by him to avert danger. It is true that upon one occasion, while plaintiff was engaged in hauling rock, he saw a large quantity of earth fall, but did not see what occasioned it. Before plaintiff undertook to remove the wedge of rock which occasioned the cave producing the injury, he applied to Jacobson for instructions as to whether he should remove the waste first before seeking to take out the wedge, and was told to proceed to take out the wedge. After removing a portion of the wedge, he reported to Jacobson his progress, and Jacobson pointed to another portion of the wedge and said, "Take that out." Doing this seems to have removed the support from the earth above and which resulted in the cave. Plaintiff knew nothing about the character of this earth or its resisting force or strength. It further appears that at least 18 months' experience in a mine of this character would be necessary in order to render one capable of mining in such employment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is insisted by appellant that no one authorized by defendant ever directed plaintiff to do this particular work, and that, if he obeyed the instructions of Jacobson, it was in obedience to suggestions from a fellow-employé, for which defendant is not responsible. In work of this character where inexperienced men are employed, it is incumbent upon the employer, if the work be of a dangerous character, to apprise employés of the danger and instruct them in the manner of the performance of their duties, so as to minimize the danger incident thereto. Jacobson is shown to have exercised general duties as a superintendent in the absence of Starr, the superintendent proper. While he did not hire or discharge men, he directed their movements and work. In this he was discharging a duty of his principal. It is further insisted that plaintiff had knowledge of the dangerous character of the work and assumed the risk. In Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138, in speaking of the duty which the master owed with reference to dangerous machinery, it is said: "When one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment and the necessity for care." This rule as to machinery should and does apply to any employment of a dangerous character. When directed by a master or one in authority to perform work, the servant's duty is to obey, "and he has a right to rely upon the superior knowledge of the master and act as directed, unless the danger in doing so is so open or apparent that a man of ordinary prudence would discern the danger and refuse obedience. His position was one of subordination, and he had a right to rely upon the superior knowledge of the master, and to assume that the master would not put him in a place of peril." Forsman v. Seattle Electric Co. (Wash.) 109 Pac. 121. As to whether or not plaintiff had knowledge and appreciation of the danger were matters to be determined by the jury from the facts in the case. In considering these facts the jury were warranted in taking into consideration the youth of plaintiff, his inexperience, and the work to which he was assigned, the particular character of the danger attending the work, and the failure of defendant to give him any warning concerning it. Jenson v. Will & Finck Co., 150 Cal. 398, 89 Pac. 113. In Quinn v. Electric Laundry Co., 155 Cal. 508, 101 Pac. 797, an instruction is approved to the effect that: "A servant's implied assumption of risks, which accompanies and is a part of a contract of hiring, is confined to that particular work and class of work for which he is employed; and if the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employés, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work; and, in a case involving the principle here declared, it will not be held, as a matter of law, that the injured party assumed the risk, unless the evidence is clear, explicit, and uncontradicted to that point." The words "to that point," used in the instruction, were held to relate to the assumption of risks on the knowledge or want of knowledge of the injured employé. We have here a case presented wherein, by reason of the youth and inexperience of plaintiff, the master omitted a plain duty in not warning him of the incident danger, and further, upon the authority last cited, under the circumstances of this case, evidence clear and explicit in its character of previous knowledge of danger is absent, and, the jury having determined as it did that plaintiff did not have such knowledge, the same is conclusive of that matter.

We think the evidence in the record entirely sufficient to warrant the jury in determining that the injury to plaintiff was occasioned by the negligence of defendant, and the judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 152

TROY LAUNDRY MACHINERY CO., Limited, v. DRIVERS' INDEPENDENT LAUNDRY CO. (Civ. 776.)

(Court of Appeal, Second District, California. Aug. 22, 1910. Rehearing Denied Sept. 17, 1910; Denied by Supreme Court Oct. 13, 1910.)

1. SALES (§ 38*)—FRAUD—RELIANCE ON REPRESENTATIONS.

As a false representation, to constitute fraud, must have deceived—that is, must have been relied on by the opposite party, and have induced him to act to his prejudice—there could have been no fraud in the sale of a machine because of the seller's representation that it would do the amount and kind of work usually done by the best of such machines, if for three months prior to the contract of sale the purchaser had been using the machine as lessee thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 74, 75; Dec. Dig. § 38.*]

2. SALES (§ 52*)—RELIANCE ON REPRESENTATION—PRESUMPTION.

If the representation of one when selling was calculated to induce the other party to make the contract of purchase, it is presumed he was influenced by it, so that, to take away his right to relief on the ground of fraud, it must be shown that he did not rely on it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 122; Dec. Dig. § 52.*]

3. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTION OF LAW—ENTIRE ABSENCE OF EVIDENCE.

The entire absence of evidence to support a material finding presents a question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3325; Dec. Dig. § 842.*]

4. EVIDENCE (§ 434*)—PAROL EVIDENCE—VARYING CONTRACT—FRAUDULENT REPRESENTATIONS.

Though a contract of sale is in writing, evidence of fraudulent representations inducing the purchaser to make it, not tending to vary the terms of the writing, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2014; Dec. Dig. § 434.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Troy Laundry Machinery Company, Limited, against the Drivers' Independent Laundry Company. Judgment for plaintiff. Defendant appeals. Reversed.

See, also, 109 Pac. 36.

D. Z. Gardiner and Millsap & Sparks, for appellant. Horace S. Wilson and Constan Jensen, for respondent.

JAMES, J. Plaintiff brought this action to recover from defendant the sum of $900 as a balance alleged to be owing and unpaid on account of the purchase price of certain laundry machinery. A written contract, dated December 16, 1907, described the property purchased as "one secondhand No. 3, Troy triplex mangle."

Defendant answered the complaint, admitting the execution of the contract and the performance of all the conditions required to be performed by plaintiff thereunder, and then alleged: "That prior to the signing of the contract set out in the complaint, and in order to and for the purpose of inducing the defendant to sign and execute said contract, the plaintiff represented to defendant and stated to the defendant that the mangle referred to in said contract was all right and would do the amount and kind of work usually done by the best of such machines; that plaintiff was well acquainted with said machine, and knew its character and condition, and the kind, amount, and quality of work that said machine would do; that defendant was unacquainted with the amount, kind, and quality of work that said machine would do, but knew that plaintiff was well acquainted with said facts, and the defendant relied on the aforesaid representations and statements of the plaintiff concerning said machine, and was induced thereby to enter into and execute said contract, and but for said representations and statements would not have done so, and would not have made said conditional or any purchase of said mangle." Allegations following recited that after the mangle was set up and operated it was discovered that it would not do the amount or kind or quality of work usually done by such machines and was in fact useless and worthless; that defendant immediately gave notice that it rescinded the contract, whereupon plaintiff promised to repair the mangle and put it into a condition to do the required work, and did attempt so to do, but failed, and that the machine remained useless and valueless; that defendant immediately gave notice to plaintiff that it insisted upon its rescission of the contract and offered to return the machine to plaintiff. Damages were alleged to have been suffered in the amount of $475, which defendant sought to recover under its counterclaim.

Upon the trial, defendant, after introducing the testimony of several witnesses going mainly to show the authority of the agents of the parties to make the contract sued upon, and while J. E. Reid, the president of defendant company, was being examined as a witness, offered in evidence a writing, dated September 16, 1907, purporting to be a contract whereby the use of "one Troy duplex mangle" and "one electric motor" was let by plaintiff to defendant for a stipulated rental for a period of 90 days. This witness, upon objection by plaintiff's counsel being made, was not allowed to state what conversations were had with plaintiff's agent at the time the contract of September 16th was entered into, and he was then asked whether he had any conversations with plaintiff's agent at the time the contract of December 16th was executed. This line of inquiry was objected to, and the trial judge in ruling remarked: "I will sustain any objection to any conversation prior to the first contract as immaterial. I sustain the objection as to conversations had at the time of entering into the second contract, because they tend to vary the terms of a written contract." The court found that the contract of September 16, 1907, referred to the same machine as that mentioned in the contract of December 16, 1907; that defendant took possession of the property and retained it, and still had possession of it; that the plaintiff did not, prior to the signing of the contract set out in the complaint, or at all, make the false representations alleged in defendant's answer. Judgment for plaintiff followed, from which defendant has appealed.

The defendant complains that the court

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erred in excluding evidence offered in support of the allegations of fraud and to establish its counterclaim. This contention seems to be well founded. The answer of defendant presented, in an appropriate and sufficient way, an issue as to whether or not the consent of defendant to the making of the contract sued on had been obtained by fraud. If it had been made to appear in the record that the mangle described in the contract of September 16, 1907, was the same mangle as that described in the contract of December 16, 1907, and that defendant had used, or had had an opportunity of using, the mangle prior to the making of the last contract, the ruling would have been correct; for in that case defendant would or should have known just what work could be accomplished by the use of the mangle, and it could not then have been deceived by the false representations, if they had been made as alleged. "A false representation, to constitute fraud, must actually deceive; that is, it must be relied upon by the other party, and must induce him to act to his prejudice. If it is not believed, or the party disregards it and makes inquiries for himself, there is no fraud. * * * If the representation was one calculated to induce the other party to make the contract, the presumption is that he was influenced by it; and in order to take away his right to relief on the ground of fraud it must be shown that he did not rely upon it." Clark on Contracts, p. 232.

A careful examination of the testimony, as shown by the record submitted here in the bill of exceptions, fails to disclose any evidence upon which to base the finding of the court that the mangles described in the two contracts were one and the same machine. The contrary seems established by reason of the difference in the machines as described in the respective contracts; in one it is styled a duplex machine, while in the other a triplex. The entire absence of evidence in support of a finding material in the maintenance of a judgment presents a question of law. Identity not appearing, defendant was not estopped from asserting that it had been misled to its prejudice by the representations alleged. The effect of the evidence thus tendered would not have been to vary the terms of the written contract. Maxson v. Llewelyn, 122 Cal. 199, 54 Pac. 732; Civ. Code, §§ 1565, 1572.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 134

PEOPLE v. ROLLINS. (Cr. 239.)

(Court of Appeal, First District, California. Aug. 19, 1910. Rehearing Denied Sept. 16, 1910; Denied by Supreme Court Oct. 13, 1910.)

1. Criminal Law (§ 1130*)—Appeal—Briefs.

To make a number of points with reference to rulings on evidence without sustaining them by argument or citation of authority is insufficient briefing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2966; Dec. Dig. § 1130.*]

2. Criminal Law (§ 407*)—Evidence—Admissions.

While on a prosecution for obtaining money through false representations, including one that defendant owned mining properties in Alaska, letters written from there, in answer to inquiries, stating that he owned no such properties, were incompetent to establish the truth of their statements, yet having been read by witness to defendant, in a conversation between them, on defendant's insisting that he owned said properties, and witness having, after so reading them, repeatedly asked defendant if he still maintained that he owned the properties, and his answers having been evasive, and he having finally said that he was unable to say whether or not he owned any properties there, the letters are competent to prove an admission against interest by defendant by showing his conduct with reference to them when they were read to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898–900, 968; Dec. Dig. § 407.*]

3. Criminal Law (§ 1168*)—Order of Admission of Evidence.

While the declarations of a conspirator are inadmissible against his co-conspirators without the conspiracy being proven, a reversal of the order of proof is of no moment, in the absence of a showing of injury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3136; Dec. Dig. § 1168.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

J. R. Rollins was convicted of grand larceny, and appeals. Affirmed.

Frank J. Gordon and J. J. Von Hovenberg, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was found guilty of the crime of grand larceny as charged. He moved for a new trial, and, this motion being denied, he was sentenced to imprisonment in the state prison for the term of 10 years. This appeal is from the judgment.

Briefly the facts of the case are as follows: Three men, Williams, Ameral, and Wilson, with the defendant Rollins, doing business under the name of "The Hypatia Mining and Development Company," entered into an arrangement for cheating and defrauding a certain class of laborers. Pursuant to this arrangement, they caused an advertisement to appear in a newspaper, in answer to which 19 or 20 men called at the office of the defendant, and were there collectively told by Williams that the Hypatia Mining & Development Company was organizing a party of 25 to go to Alaska to work on mining claims owned by defendant Rollins and to locate mining claims on property which had been prospected by said Rollins; that said defendant had tried on other occasions to get men to go there and do this mining work, but that, after arriving there, other companies by offering better pay had enticed them away; that consequently on this occasion, to avert a similar experience, each man desiring to avail himself of the Rollins proposition would be required to deposit with the defendant and his associates the sum of $200 as a guaranty that the contract would be performed upon his part; that of this sum $40 or $50 could be paid down, and the balance paid in installments. The deposit was to be returned at the completion of the contract, which covered a period of three years. For every dollar deposited they were each to be given one share of stock on the company's books, which, while not entitling them to the possession of the stock, still gave them the right to any dividends paid upon it. In addition each man was to receive his board and lodging while in Alaska and wages at the rate of $4.50 per day or $6.50 per day, according to the kind of work engaged upon. Williams was to visit Alaska at once and ascertain if the facts were as represented by Rollins. If he found that they were, the expenses of his trip were to be paid out of the money deposited by the men. If the outlook was not satisfactory, Williams was to pay his own expenses.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Rollins was present at this meeting, and he advised MacLeod, the complaining witness, to accept the proposition. Accordingly the next day MacLeod paid Williams $50 on account of the deposit above mentioned, and shortly thereafter, upon making further inquiries in connection with his employment, was informed by Rollins that Williams had collected all the money that he could, and instead of going to Alaska had gone to Los Angeles, and had there squandered it. Rollins promised MacLeod, however, that he would reimburse him the amount of money advanced to Williams, and to that end referred him to Wilson. Wilson told him that the company would make good the loss, but that in order to do so a new contract similar to the first one must be made with the company, including the deposit of the $200 guaranty; that in the present case, however, a credit of $50 would be allowed on account of the payment made to Williams, but that $50 more must be paid at once. This payment was made. The truth of the matter was that Rollins had no mining interests in Alaska or elsewhere, the Hypatia Mining & Development Company was a fiction, and the whole scheme was a bare-faced swindle.

Defendant's brief is only a little better than would be a statement that he relies upon each objection made during the trial and found in the transcript. For example, on one page of his brief he makes nine points with reference to rulings on evidence, and none of these is sustained by argument or citation of authority. Notwithstanding this often-condemned method of briefing a case (People v. Chutnacut, 141 Cal. 685, 75 Pac. 340; People v. McLean, 135 Cal. 309, 67 Pac. 770; People v. Cebulla, 137 Cal. 318, 70 Pac. 181; People v. Bordet, 110 Pac. 155), we have examined each of the points made, and we are giving them all the consideration they deserve when we say that they were made as to evidence tending to prove a conspiracy, or to material acts and declarations of co-conspirators during the life of the conspiracy and in relation to it, and the evidence was clearly admissible.

Defendant also claims that the court committed error in permitting three certain letters to be read during the examination of the witness Petersen. These letters were from the land office departments of Canada and the United States in reply to inquiries made by the police department of Oakland, and stated in effect that Rollins owned no mining properties in the places in Alaska claimed by him. They were read to the defendant by the witness Petersen in a conversation between them upon the defendant insisting that he owned the said mining properties, and, after so reading them, Petersen repeatedly asked the defendant if he still maintained that he owned such properties. His answers were all evasive, and he finally said that he was unable to state whether he owned any mining claims there or not. These letters were competent evidence—not to establish the truth of their contents, but to prove an admission against interest on defendant's part by showing his conduct with reference to them when they were read to him. His action under the circumstances of this case amounted to an implied acquiescence in the truth of the statements contained in the letters, and certainly for this purpose they were admissible. People v. McCrea, 32 Cal. 98; People v. Collins, 48 Cal. 277; People v. Estrado, 49 Cal. 171; People v. Palmer, 53 Cal. 615; People v. Amaya, 134 Cal. 532, 66 Pac. 794. It may not be amiss to observe here that the defendant would have been entitled to an instruction to the jury, if he had asked for it, to the effect that these letters were not admitted as substantive evidence of the truth of the facts stated in them, but to show the attitude of the defendant with reference to them when they were read to him. See cases last cited. He did not ask for such an instruction.

Defendant requested the court to instruct the jury to acquit him upon the ground that the evidence was insufficient to prove the charge. The evidence was abundantly sufficient to go to the jury, and the proposed instruction was properly refused.

Defendant also complains that the court committed error in permitting MacLeod over objection to testify as to the conversations with accomplices of the defendant before proof of the conspiracy. It is true that the declaration of a conspirator cannot be given in evidence against his fellow conspirators without first proving the conspiracy. But the rule goes to the order of proof, and unless injury is shown—which is not the case here—a departure from the rule is a matter of no moment. People v. Jones, 31 Cal. 567; People v. Jones, 123 Cal. 65, 55 Pac. 698; People v. Bianchino, 5 Cal. App. 633, 91 Pac. 112; People v. Donnolly, 143 Cal. 398, 77 Pac. 177. In the case at bar the evidence was sufficient to justify the jury in the implied finding to the effect that there was a conspiracy.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

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14 Cal. App. 60

McCLEARY et al. v. BROADDUS et al.

(Civ. 742.)

(Court of Appeal, Third District, California. Aug. 9, 1910. Rehearing Denied by Supreme Court Oct. 7, 1910.)

1. MINES AND MINERALS (§ 14*) — MINING CLAIMS—SOURCE OF TITLE.

Discovery and appropriation are the source of title to mining claims; development by working being only a condition of continued ownership until a patent is obtained.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 19; Dec. Dig. § 14.*]

2. MINES AND MINERALS (§ 14*)—"APPROPRIATION."

"Appropriation" of a mining claim is accomplished by the posting of notice at or near the point where the ledge is exposed, followed by the recording of notice and the marking of boundaries.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 19; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 1, pp. 466–477; vol. 8, p. 7580.]

3. MINES AND MINERALS (§ 14*)—LOCATION—ORDER OF STEPS REQUISITE.

When every act necessary to complete a mining location has been performed before an adverse claim has accrued, the order in which the acts have been performed is immaterial.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 19; Dec. Dig. § 14.*]

4. MINES AND MINERALS (§ 20*) — MINING CLAIMS—LOCATION.

Under Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), making it essential to a valid mining location that the location be distinctly marked on the ground, so that its boundaries can be readily traced, the ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or of such a character that the boundaries can be readily traced.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40–44; Dec. Dig. § 20.*]

5. MINES AND MINERALS (§ 38*)—LOCATION —MARKING BOUNDARIES—EVIDENCE.

Evidence *held* to show that plaintiff's grantor made discovery on the land in controversy on August 1, 1905, and on the 4th posted a location notice, and on the 17th put up monuments from which the boundaries of the claim could be readily traced.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 102–107; Dec. Dig. § 38.*]

6. MINES AND MINERALS (§ 19*)—LOCATION —POSTING NOTICE—TIME AND PLACE.

In the absence of a mining custom or regulation, there is nothing in Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), regulating mining locations, requiring the posting of notice on the day of discovery, or prescribing where it shall be posted on the claim, or at all; the only necessity being that the location be so marked on the ground that its boundaries may be readily traced.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37–39; Dec. Dig. § 19.*]

7. MINES AND MINERALS (§ 19*)—LOCATION NOTICE—MARKING BOUNDARIES—TIME.

Ordinarily a notice of the location of a mining claim which does not sufficiently mark the boundaries of the claim is sufficient to hold the claim for a reasonable time in which to mark the boundaries, in the absence of an adverse prior discovery and a prior marking of boundaries.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37–39; Dec. Dig. § 19.*]

8. MINES AND MINERALS (§ 17*)—LOCATION —DISCOVERY.

The discovery is the source of title to a mining claim, and vests in the discoverer a prior right to complete the location within a reasonable time.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24–28; Dec. Dig. § 17.*]

9. MINES AND MINERALS (§§ 19, 22*)—LOCATION—NOTICE—POSTING AND RECORDING.

The mining law of the United States does not require a notice of location to be posted or recorded in order to vest the claimant with a prior right to complete his location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37, 45; Dec. Dig. §§ 19, 22.*]

10. MINES AND MINERALS (§ 38*) — ASSESSMENT WORK—PERFORMANCE—EVIDENCE.

Evidence *held* to justify a finding of performance of the requisite assessment work on certain mining claims in controversy for the years 1906 and 1907.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 106; Dec. Dig. § 38.*]

11. MINES AND MINERALS (§ 38*)—QUIETING TITLE—PERSONS ENTITLED TO SUE—OWNER OF UNDIVIDED INTEREST.

Under Code Civ. Proc. § 738, authorizing the owner of an interest in real property to sue to quiet title against any one claiming adversely to him, the owner of an undivided interest in a mining claim is not required to join the owner of any other interest in a suit against third persons to quiet title.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 88; Dec. Dig. § 38.*]

Appeal from Superior Court, Modoc County; John E. Raker, Judge.

Action by C. E. McCleary and others against W. D. Broaddus and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

A. F. Shartel and James Wylie, for appellants. F. M. Jamison and N. A. Cornish, for respondents.

BURNETT, J. The action was brought to quiet title to a certain mining claim in Modoc county, known as the "Mountain Sheep Mining Claim." The defendants contend that the land is included within their locations, known as the Evening Star, White Quartz, and Klondyke mining claims, and the determination of the case involves the question of prior location and appropriation as to the respective claimants, and whether up to the time of the trial plaintiffs had done everything required of them by law to maintain the validity of their claim. In reaching a conclusion favorable to plaintiffs, the trial court found that their grantor, C. T. Fisher, "made a discovery of a mineral-bearing ledge in place containing gold on the ground embraced within the exterior boundaries of the Mountain Sheep mining claim on the 1st day of August, 1905, and that thereafter, on the 4th day of August, 1905, and the 17th day of August, 1905, the said C. T. Fisher proceeded to and did mark the exterior boundaries of the said Mountain Sheep mining claim upon the ground so that its boundaries could be readily traced upon the ground, and that the marking of the exterior boundaries of the said Mountain Sheep mining claim by the said C. T. Fisher, following the discovery by him as aforesaid, on the 1st day of August, 1905, was done within a reasonable time after the discovery was made by him as aforesaid; that the discovery of the ledge of mineral-bearing quartz in place upon said Mountain Sheep mining claim, made by the said C. T. Fisher and his location of said Mountain Sheep mining claim, and marking the exterior boundaries thereof so that the boundaries of said last-named claim could be readily traced upon the ground, as aforesaid, was prior in time and prior in right to the said discoveries of the mineral-bearing ledges and each of them made by the said defendants upon the said Evening Star, White Quartz, and Klondyke mining claims, and each of them and prior to the marking of the boundaries of the Evening Star, White Quartz, and Klondyke mining claims and each of them." It is claimed that these findings are not justified by the evidence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The parties are substantially agreed, except possibly in one particular, as to what steps are necessary to make and maintain a valid mining location. Indeed, the proceeding has been frequently the subject of adjudication, and concerning it there would appear to be little room for controversy. A general and comprehensive statement of what is required is found in the decision of the United States Supreme Court in Erhardt v. Boaro, 113 U. S. 535, 5 Sup. Ct. 564, 28 L. Ed. 1113, wherein it is said: "In all legislation, whether of Congress or of the state or territory and by all mining regulations and rules, discovery and appropriation are recognized as the source of title to mining claims, and development by working as the condition of continued ownership until a patent is obtained." The only uncertainty involved in the foregoing statement is as to the exact meaning of appropriation. Ordinarily this is effected in the following manner, as pointed out by the Supreme Court in Dwinnell v. Dyer, 145 Cal. 21, 78 Pac. 253, 7 L. R. A. (N. S.) 763: "The posting of notice at or near the point where the ledge is exposed; next the recording of notice; next the marking of boundaries." But, in the language of the learned Chief Justice: "It is indeed universally held that, when every act necessary to complete a location has been done before an adverse claim has accrued, the order in which such acts have been performed is immaterial."

Section 2324 (U. S. Comp. St. 1901, p. 1426) of the statutes of the United States makes it essential that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." In commenting upon this requirement the Supreme Court in Donahue v. Meister, 88 Cal. 131, 25 Pac. 1099, 22 Am. St. Rep. 283, declared that it is the "main act of original location." In Eaton v. Norris, 131 Cal. 563, 63 Pac. 856, it is said that "the ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or, to use the language of the statute, of such a character that the boundaries can be readily traced." As to the purpose of the posted notices, it is stated that they may be an aid in determining the situs of the monuments (Lindley on Mines, § 373), and therefore "constitute a part of the marking as does every other object placed on the ground for the purpose of marking it or otherwise, if it in fact does help to mark it."

Did the said Fisher, in compliance with these requirements of the law, make a valid location of the claim in question? There is evidence in the record that he made the discovery on the 1st day of August, 1905. He testified as follows: "Q. What was your object and purpose in being there the first day of August? A. I was prospecting. Q. I will ask you to state what discovery you made of mineral at that time if any? A. I found gold out of the rock, or supposed it to be gold, about the center of the claim." He further stated that "there was a quartz lead there as near as I could trace it. It would be over half the length of the claim." It maybe, as said by appellants, that "this testimony of Fisher's is as devoid of truth as cunning and malice can make it"; but it is needless to add that such consideration was for the trial court. The testimony is not inherently improbable, and, under the rule, we must accept it as establishing the proper discovery. Again, he testified that on the 4th of August, 1905, one Lester Bonner wrote a notice of location, and Fisher signed it and posted it on a tree on the northeast corner of the claim, and built a monument there of stone and pieces of decayed wood about four feet high. He went back the next day and "put up the northwest and center monuments, and then prospected on the ground for quite a while. On August 17th I put up the northeast side center, the southeast corner, the south or southeast end center, and the southwest corner, and the southwest side center monuments of stone about three feet high so that the lines of the boundaries could be readily traced from those monuments." As to what was done on the 4th of August and subsequently Fisher is corroborated by other witnesses. There is evidence, then, that everything was done by Fisher which was necessary to effect a valid location. There is some criticism of the fact that his notice was not posted until the said 4th of August, and that it was placed some distance from the point of discovery.

As to this, it may be said that there is no evidence of the existence of any mining custom or regulation in the district relating to the subject, and there is nothing in the statute requiring the posting of notice on the day of discovery or prescribing where it shall be posted on the claim or at all. As we have already seen, the practice is as suggested by appellants, but the essential things are the discovery and the "marking of the location upon the ground so that the boundaries may be readily traced." And it is conceded that the discoverer has a reasonable time in which to so mark the location.

The claim of appellants, on the other hand, rests upon the discovery and the posting of a notice on the second day of August and the marking of the boundaries on a date subsequent to that of respondents. The location notice posted by appellants the second day of August and recorded on the first day of September was in the following form:

"Location Notice.

"Notice is hereby given, that we, undersigned citizens, having complied with the laws of the United States and local laws, have located and claim 1,500 feet in a northwesterly and southeasterly direction, and 300 feet on each side of this location monument. This monument is the beginning point of this claim. This claim shall be known as the White Quartz. Located the 22nd day of August, 1905."

It is admitted by appellants that their location notices did not sufficiently mark the boundaries of the claim, but their contention is "that location notices are sufficient to hold mining claims for a reasonable time in which to mark the boundaries." Ordinarily that is true, because the notice is evidence of an original discovery, or else the mining customs or rules require the posting of such notice. But here we have a prior discovery on the part of respondents and a prior marking of the boundaries. The discovery is manifestly the source of the title, and vests the discoverer with the prior right to complete his location. He could only lose this prior right to perfect his claim by a failure within a reasonable time to mark his location so that the boundaries could be traced upon the ground. But respondents not only proceeded within a reasonable time to perform this ultimate act, but before appellants made any effort to mark said boundaries.

The mistake of appellants is in the contention that the prior discovery must be accompanied by a prior posting of notice in order to vest the claimant with the prior right to complete his location. "But the mining law of the United States," as held in Anderson v. Caughey, 3 Cal. App. 26, 84 Pac. 224, "does not require the notice of location to be posted or recorded (Carter v. Bacigalupi, 83 Cal. 187 [23 Pac. 361]; Dwinnell v. Dyer, 145 Cal. 12 [78 Pac. 247, 7 L. R. A. (N. S.) 763]); and it is only where the local customs and rules of the miners of the district require these steps that they are necessary."

It is the contention also of appellants that Fisher and his successors in interest fell short of satisfying the condition of continued ownership by reason of failure to do the improvement work required by the statute. There is testimony, though, to support the finding of the court in that respect. C. E. McCleary testified that about $2,000 worth of work was done in 1906 and $100 worth in 1907. William A. Schauers also testified that something over $100 worth was done in 1907. This places the finding of the court beyond our reach. Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93.

We think there is no merit in the contention that the demurrer to the complaint should have been sustained on the ground of the nonjoinder of the owner of the other one-fourth of the mine; the plaintiffs claiming to own only three-fourths. Section 738 of the Code of Civil Procedure authorizes the owner of any interest in real property to bring an action to quiet his title against any one claiming adversely to him. He is not required to join the owner of any other interest in the suit. The rule is that tenants in common may but need not join as plaintiffs. 17 Ency. of Plead. & Prac. p. 319.

We have endeavored to consider fully, but without unnecessary elaboration, all the points made in the interesting brief of appellants, but we can see no reason to interfere with the conclusion of the learned trial judge, and the judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(158 Cal. 435)

BARRY v. ALL PERSONS CLAIMING ANY INTEREST OR LIEN UPON THE REAL PROPERTY HEREIN DESCRIBED OR ANY PART THEREOF. (S. F. 5,306.)

(Supreme Court of California. Sept. 30, 1910. Rehearing Denied Oct. 27, 1910.)

1. Estates (§ 1*)—Future Estates.

Under the direct provisions of Civ. Code, §§ 767, 773, an estate may be limited so as to commence in the future.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. Costs (§ 260*)—Frivolous Appeals.

In view of a previous decision of the Supreme Court, specially pointing out that under the direct provisions of Civ. Code, § 767, an estate may be created to commence in futuro, an appeal taken on the sole ground that a deed creating such an estate is not valid is frivolous, requiring a penalty against appellant of $100 for prosecuting a frivolous appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983–996; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Edward Joseph Barry against all persons claiming any interest or lien upon the real property herein described or any part thereof. From a judgment for plaintiff, defendants appeal. Affirmed.

F. W. Sawyer, for appellants. Perry & Dailey, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. This is an action to quiet title under the McEnerney act. Walter A. and J. W. Barry appeared as defendants and answered. Judgment passed for plaintiff. In their answer they attack the validity of the deed under which plaintiff claimed title, upon the ground that its execution had been procured through undue influence, and that it was given without consideration. No evidence to sustain these contentions was offered at the trial, and it appeared, further, that this was not the only nor yet the principal source of plaintiff's title. Upon this appeal the appellants make the point, for the first time, that the deed to which reference has been made is void as an attempt to create an estate to commence in futuro. This is the sole proposition urged, and the only case from this state offered in support of it is that of Hawes v. Stebbins, 49 Cal. 369. Hawes v. Stebbins, as the slightest inspection of the case will disclose, grew out of facts and conditions existing prior to the adoption of the code provisions changing the rule, and its decision was governed by the well-recognized common-law rule resting for its origin in delivery of seisin. That rule has long since been abrogated in this state. Indeed, it was abrogated at the time Hawes v. Stebbins was decided, and reference in the opinion in that case is made to the fact in the following language: "The remedy, if one be needed, should be provided by statute, for it would then be prospective in its operation, and it has, in fact, been furnished by section 767 of the Civil Code." Section 767 of the Civil Code provides in terms that "a future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time." See, also, section 773, Civ. Code. In Blakeman v. Miller, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120, it is said: "The technical rule against the creation of future estates applied only to legal estates, and even as to them is now abolished." It is thus manifest that this appeal is frivolous, that the untenableness of appellants' position was demonstrated before their eyes in the one and only case from this state which they cite as authority. The conviction is irresistible that the appeal was taken only for the purpose of vexing respondent and clouding his title.

The judgment herein not being a money judgment, there is no accumulated interest to compensate for the delay. It is therefore adjudged that the judgment appealed from be affirmed, with a penalty against appellants in favor of plaintiff of $100 for taking and prosecuting a frivolous appeal.

We concur: LORIGAN, J.; MELVIN, J.

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158 Cal. 437

ATCHISON, T. & S. F. RY. CO. v. LOS ANGELES COUNTY. (L. A. 2,431.)

(Supreme Court of California. Sept. 30, 1910.)

1. TAXATION (§ 317*)—RAILROADS—LOCAL ASSESSMENTS — "ROADWAY" — "RIGHT OF WAY."

Railroad property within a city, consisting of parcels contiguous to the 30-foot continuous right of way and within a part of the 9-rod right of way permitted to railroads by Civ. Code, § 465, subd. 4, and used for freight and passenger depots, for local business, and for spur tracks necessary for the depots, and for a fruit packing house with a spur track for convenient use, and for a park and for tracks used for the storage of tools, is not a part of the right of way within Const. art. 13, § 10, providing that the franchise roadway, roadbed, and rails of railroads operated in more than one county shall be assessed by the State Board of Equalization, and is properly assessed by the city assessor; the word "roadway" being synonymous with the phrase "right of way," which includes the continuous strip of land permitted by law on which to construct the roadbed and lay the tracks.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*

For other definitions, see Words and Phrases, vol. 7, pp. 6230–6234; vol. 8, pp. 7790–7791; vol. 7, p. 6257.]

2. TAXATION (§ 317*)—RAILROADS—LOCAL ASSESSMENTS.

The assessment by the State Board of Equalization, authorized by Const. art. 13, § 10, providing that the franchise, roadway, roadbed, and rails and the rolling stock of railroads, operating in more than one county, shall be assessed by the State Board of Equalization, is an exception to the general rule requiring all property to be assessed locally, and all railroad property must be assessed locally unless it comes within the category of franchise, roadbed, rails, or rolling stock.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

3. TAXATION (§ 317*)—RAILROADS—"RAILS."

The word "rails" in Const. art. 13, § 10, providing that the franchise, roadway, roadbed, rails, and rolling stock of railroads operating in more than one county shall be assessed by the State Board of Equalization, does not include spur tracks and switches, though on the actual roadway.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

4. TAXATION (§ 317*) — RAILROADS — ASSESSMENTS.

A city assessor assessing railroad property cannot by any act estop the city from claiming that the property is properly assessed by the local assessor, notwithstanding Const. art. 13, § 10, relating to the assessment of enumerated railroad property by the State Board of Equalization.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

5. TAXATION (§ 317*) — RAILROADS — ASSESSMENTS.

The description by an assessor of a city assessing spur tracks of a railroad as on the "nine-rod right of way" does not estop the city from asserting that the property is properly assessed by the local assessor, notwithstanding Const. art. 13, § 10, even if the assessor could estop the city.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Atchison, Topeka & Sante Fé Railway Company against the County of Los Angeles. From a judgment for defendant, plaintiff appeals. Affirmed.

E. W. Camp, U. T. Clotfelter, and A. H. Van Cott, for appellant. J. D. Fredericks, Dist. Atty. and Hartley Shaw, Asst. Dist. Atty., for respondent.

MELVIN, J. The action was to recover from the county of Los Angeles taxes paid by plaintiff under protest. Appellant's contention is that the taxes were illegally levied, assessed, and collected; its argument in this regard being that all the property locally assessed is within the purview of section 10, art. 13, Const., a part of "the franchise, roadway, roadbed, and rails" of a railroad operated in more than one county in the state, and was therefore assessable by the State Board of Equalization. Further that all of this property was situated within or upon and was a part of the nine-rod right of way permitted to railroads. Section 465, subd. 4, Civ. Code.

The complaint charged in separate counts. The first touched the assessment of certain pieces of real estate claimed to be a part of the nine-rod right of way. Generally speaking, the contention is not that the railroad owned a continuous right of way 9 rods wide, the fact being that its roadway was but 30 feet wide, but that the lands were contiguous to the 30-foot strip and within the limits of 9 rods, and should thus be held to be within the 9-rod right of way contemplated by the statute. As to these parcels of land, the court found that upon one the plaintiff maintained a freight depot for the accommodation of its local business in the city of Pasadena, together with certain spur tracks necessary for the depot; that upon the second there stood a fruit packing house having a spur track for its convenient use, upon the third the plaintiff maintained a passenger depot for the accommodation of its local business in the city of Pasadena, and a small park consisting of grass, flower beds, and shrubs; that upon the fourth plaintiff maintained a freight depot for the purpose of handling freight to and from the city of Pasadena, upon the fifth a passenger depot for the accommodation of local travel in the city of Pasadena; and that the sixth parcel contained no tracks or other improvements and was used solely for the storage of tools for use upon the railroad. A second cause of action bore specific relation to side tracks, switches, spurs, and passing tracks upon the nine-rod right of way, while the third cause of action dealt with side tracks or spur tracks not within the nine-rod right of way. As to all these the court found in effect that they were not a part of the right of way, roadbed, or rails of the main line, but were used for local purposes, and so upheld the assessment of the county assessor.

Plaintiff's contention to the effect that because the law permits it a nine-rod right of way all of its lands within such boundary must be considered as part of its right of way is erroneous. Plaintiff's right of way in this instance happened to be a continuous strip but 30 feet wide with here and there added lands contiguous to this strip. These added lands did not form part of the "right of way." As said in San Francisco & San Joaquin Valley R. R. Co. v. City of Stockton, 149 Cal. 83, 84 Pac. 771, "roadway" is synonymous with "right of way." "The only remaining class of property named in the constitutional provision is 'roadway.' * * * This court has said that it is synonymous with 'right of way' and includes 'whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track' (S. F. v. C. P. R. R., supra [63 Cal. 467, 49 Am. Rep. 98]), which is but another way of saying that it is the continuous strip of land, not exceeding in width the nine rods permitted by law (Civ. Code, § 465, subd. 4), which the company acquires and uses for the construction and maintenance of its roadbed and railroad track. Said strip is, of course, ordinarily wider than the actual roadbed, and portions thereof are often used at points along the line for other than roadbed purposes, but, as long as all improvements thereon other than roadbed and rails are locally assessed, the property remaining for assessment by the state board, although it may have originally cost more in one place than in another, is, considering its use for railroad purposes, substantially of the same value the whole length of the road."

The cases which appellant cites in support of its contention arose over questions between the companies and landowners in relation to the width of the right of way which the companies had acquired by condemnation or grant, and it was held under the circumstances in each case that, no limitation upon the width of the right of way appearing, it would be presumed that it extended to the full width permitted by statute. These cases are clearly inapplicable to a question of the relative and respective powers of the State Board of Equalization and of county assessors to assess railroad property. The question has recently received elaborate consideration from this court in the case last above cited. It is in that case pointed out that the question as to which is the proper body or person to assess depends entirely upon the language of the Constitution, that the assessment by the board of equalization is an exception to the general rule requiring all property to be assessed locally, and that it matters not, therefore, how convenient, how useful, or, indeed, how necessary, to the functions of an operating railroad any particular property may be, it is to be locally assessed unless it comes within the category of franchise, roadway, roadbed, rails, or rolling stock. Within the general term "rails" will not be included spur tracks and switches, even upon the actual roadway. "Under this construction of our constitutional provision, we have two general classes of railroad property for purposes of assessment, made entirely regardless of the question as to the necessity of the use of the property for the purposes of the railroad. One contains only such property as may fairly be said to be substantially the same both in quantity and value, the whole length of the road, while in the other is all such property as may fairly be considered purely local." The fact that the assessor in his description of the property in some instances assessed the sidetracks as being on the "nine-rod right of way" cannot, of course, be regarded as any admission or estoppel against the city. The assessor would have no power to make such an admission or to raise such an estoppel in the first place, and, in the second place, the language is language of description merely, and would not be held to create an estoppel even if an estoppel might thus be raised.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

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158 Cal. 433

KRELING et al. v. McMULLEN et al.

(S. F. 5,122.)

(Supreme Court of California. Sept. 30, 1910.)

1. Appeal and Error (§ 934*) — Default Judgment—Presumptions.

The court on appeal from a default judgment will make all reasonable presumptions in favor of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3778; Dec. Dig. § 934.*]

2. Pledges (§ 58*)—Foreclosure.

Though a note and chattel mortgage securing it are but collateral security for the performance of the conditions of a lease by the mortgagee to the mortgagor, the holder of the principal obligation may foreclose the pledge without action on the principal obligation.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 186; Dec. Dig. § 58.*]

3. Appeal and Error (§ 934*) — Presumptions—Default Judgment.

A default judgment foreclosing a chattel mortgage securing a note will not be disturbed on appeal on the ground that the complaint alleging an assignment of the note and mortgage to plaintiff shows that the note and mortgage were given as collateral security for the performance of the terms of a lease from mortgagee to mortgagor, and that the pledgee could not sell any evidence of debt so pledged, where the complaint contains no allegation negativing the presumption that the action is brought by the owner of the principal obligation, but defendant, desiring to show that plaintiff is not the owner of the principal obligation, must do so by answer.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 934.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Ernestine Kreling and another against Victor McMullen and another. From a default judgment for plaintiffs, defendants appeal. Affirmed.

Joseph W. Patton, for appellants. De Laveaga & Magee, for respondents.

MELVIN, J. The complaint alleged the making of a promissory note to the firm of Smith & Stevens payable in monthly installments; that the note was secured by a chattel mortgage upon certain property consisting of furniture, carpets, pictures, and other household effects; that the firm of Smith & Stevens duly sold and assigned the said note with the said mortgage to plaintiffs; and that plaintiffs thereupon became and ever since have been the owners and holders thereof. A copy of the mortgage is attached to the complaint and made a part of it. A breach of the contract entitling plaintiffs to foreclose is alleged, and the prayer is for foreclosure under the terms of the mortgage. The mortgagor, Victor McMullen, defaulted. She now appeals from the judgment, contending that the complaint establishes that the note and mortgage were given as collateral security for the performance of all the terms and conditions of a certain indenture of lease made between Smith & Stevens, lessors, and herself, lessee; that the pledgee cannot sell any evidence of debt of this kind so pledged to him; and that his only recourse in law is to collect it when due (Civ. Code, § 3006); that the complaint here establishes an attempt upon the part of the pledgee to do this forbidden thing; that it also establishes the asserted fact that the note and mortgage were given in pledge as collateral security; that the plaintiffs were not the owners or holders of the principal obligation; and that, finally, these purchasers cannot be regarded as innocent, since the mortgage which they took for the promissory note upon its face discloses that it was given as collateral security for another independent principal obligation.

The propositions of law which appellant thus enunciates are unquestionably sound, but they cannot avail her in view of the fact that this is an appeal from the judgment after default, and that it is the duty of the court under such circumstances to indulge in all reasonable presumptions and intendments in favor of the judgment. The cases upon this are so numerous and so uniform that it should be sufficient to cite Caruthers v. Hensley, 90 Cal. 560, 27 Pac. 411, and Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888. The action was in due form for the foreclosure of a chattel mortgage. If, as appellant contends, the promissory note and the chattel mortgage here in suit were but collateral security, nevertheless it was the right of the holder of the principal obligation to foreclose the pledge, and this he could do without action upon the principal obligation. Merced Bank v. Casaccia, 103 Cal. 644, 37 Pac. 648; Fernandez v. Tormey, 121 Cal. 520, 53 Pac. 1119; Farmers' Bank v. Copsey, 134 Cal. 289, 66 Pac. 324. Therefore this action could have been appropriately brought by the owner of the principal obligation in its present form and under the principle of law which will support such judgments by all reasonable intendments it will be presumed, if necessary, that it was brought by the holder of the principal obligation. Distinctly, while the complaint might have been subject to demurrer for uncertainty upon this proposition, it contains no allegation which negatives, and therefore forbids the indulgence in this presumption. In the state of the pleadings had defendant desired to show that plaintiffs were not the owners of the principal obligation she would have been compelled to do so as matter of defense by answer. This she did not do.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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158 Cal. 425

NORTON et al. v. BASSETT et al. (L. A. 2,406.)

(Supreme Court of California. Sept. 29, 1910.)

1. PLEADING (§ 236*) — COMPLAINT — AMENDMENT—JUDICIAL DISCRETION.

Plaintiff's right to amend his complaint is subject to an exercise of discretion by the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

2. PLEADING (§ 236*) — COMPLAINT — AMENDMENT—ABUSE OF DISCRETION—TEST.

Generally the test whether a trial court has abused its discretion in refusing to permit plaintiff to amend is whether the amendment is a permissible amendment, which will perfect a cause of action otherwise imperfectly pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

3. PLEADING (§ 245*) — COMPLAINT — AMENDMENT—REFUSAL—DISCRETION NOT ABUSED.

Permission to amend by showing plaintiffs' possession of land was properly refused, where the action had been pending nearly six years, and had been tried on another theory, and where the trial court was satisfied that plaintiffs could not show possession.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 653–675; Dec. Dig. § 245.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by C. E. Norton and another, partners as Norton & Kennedy, against Charles N. Bassett and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Tanner, Taft & Odell and W. R. Bacon, for appellants. Flint Barker, Barker & Bowen, and Gray, Barker & Bowen, for respondents.

MELVIN, J. On a former appeal in this case (Norton v. Bassett, 154 Cal. 411, 97 Pac. 894) it was held that the statute of limitations barred the prosecution of this action by the beneficiaries out of possession. The facts will be found fully stated in the opinion handed down in that case. After this decision, plaintiffs undertook in the trial court to change their complaint so as to obviate the difficulty and remove the bar of the statute by amendments to the following effect: "That said plaintiffs have been in possession of said lands from the time the same were purchased as aforesaid up to the date of bringing this suit. * * * That said Charles N. Bassett, defendant, and said F. M. Kelsey, administrator, and said B. A. Nebeker, guardian, as aforesaid, each had actual notice of said interest and claim of plaintiffs in and to the premises mentioned in this complaint, and to the moneys arising from the profits thereof and the sale of lots, and had actual notice of the possession by said plaintiffs of said premises, and having notice it was expressly agreed that the plaintiffs should continue to act as the selling agents for said premises, and from sales of lots the proceeds should be paid over to said F. M. Kelsey, administrator, during the time that he was administering said estate, and to the guardian, B. A. Nebeker, during the time that the said Charles N. Bassett was a minor, to be applied as originally agreed between the said O. T. Bassett and plaintiffs and said Si Roll and at all times the said administrator and the said guardian and the said Charles N. Bassett admitted and recognized the claims and possession of said plaintiffs until the time when the said Charles N. Bassett arrived at the age of 21 years." Upon objection of defendants the superior court, with the record of the trial before it, refused plaintiffs leave to amend in these particulars, and entered judgment against them and in favor of defendants.

Upon this appeal plaintiffs insist that they were entitled of right absolute to amend, and, if such was not their absolute right, it was an abuse of the discretion of the court to refuse its permission to them to do so. In the matter of amending pleadings, this court has always counseled and sanctioned great liberality. No discussion upon so plain a proposition is necessary. Thus in People v. Mt. Shasta Co., 107 Cal. 258, 40 Pac. 391, it is said: "The court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and, when it is refused, the court must be able to say that the complaint cannot be so amended as to state a good cause of action." See, also, Crosby v. Clark, 132 Cal. 8, 63 Pac. 1022. But, while such is the undoubted rule, there is always in the granting or refusing to grant leave to amend the exercise of the discretion of the trial court. Brittan v. Oakland Bank of Savings, 124 Cal. 291, 57 Pac. 84, 71 Am. St. Rep. 58; Bank of Woodland v. Heron, 122 Cal. 107, 54 Pac. 537. Speaking generally, it may be said that the test as to whether or not the court has abused its discretion will depend upon whether the amendment is a permissible amendment which will perfect a cause of action otherwise imperfectly pleaded. In this case the court had tried the action, had taken all of the evidence of all of the parties, from which evidence it was satisfied that plaintiffs were not in possession of the land, and could not prove such fact upon a new trial without gross stultification of the evidence which they had formerly given. In its findings upon the former trial the court declared: "It is true that the plaintiffs did not, nor did either of them, during the course of administration of the estate of O. T. Bassett assert or attempt to establish in the said proceeding any right to the possession of the said land or any part thereof." The amendment was offered nearly six years after the action was begun, after it had been prosecuted and tried upon an entirely different theory, and after all the evidence touching possession was before the trial court. Satisfied, as that court was, that this evidence did not and could not be held to establish possession in the plaintiffs, it was not only no abuse of discretion, but it was the duty of the court to refuse to allow amendments which would effectuate only a protraction of the litigation without changing the result. The argument that the title held by O. T. Bassett, deceased, will be regarded as a mere mortgage which has been paid in full, and that this action will therefore be treated as an action to redeem, is untenable. Whatever may have been the relation between the parties, however much the deed to Bassett may have partaken of the characteristics of a mortgage, it was, and was by the court found to be, a deed conveying to him the legal title, and the failure of the plaintiffs to prosecute their cause of action against the involuntary trustee, after the death of Bassett, results in perfecting that legal title.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

No other point seems to call for special attention.

The judgment appealed from is therefore affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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158 Cal. 430

WILSON et al. v. CITY OF ALHAMBRA et al. (L. A. 2,469.)

(Supreme Court of California. Sept. 29, 1910.)

1. MUNICIPAL CORPORATIONS (§ 661*)—HIGHWAYS AND PUBLIC ROADS—POWERS OF THE CITY.

A city may make reasonable regulations in controlling the connection of private ways with public roads, but their powers stop there.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1435; Dec. Dig. § 661.*]

2. MUNICIPAL CORPORATIONS (§ 651*)—ORDINANCE—VALIDITY—STREETS.

An ordinance prohibiting a private person from extending a street, which was 40 feet wide, through his property, unless such extension was made 50 feet wide, was unreasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 651.*]

3. MUNICIPAL CORPORATIONS (§ 651*)—SUIT TO ENJOIN ENFORCEMENT OF ORDINANCE—EVIDENCE—ADMISSIBILITY.

A contention by the city that a street 40 feet wide would be dangerous in case of fire and a nuisance was without merit, for in that case all the other 40-foot streets in the city could be declared nuisances.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 651.*]

4. INJUNCTION (§ 85*)—CITY ORDINANCE.

Where an unreasonable ordinance was enacted prohibiting a private person from extending a public road through his property unless it was made of a certain width, injunction against its enforcement was the proper remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Suit by Warren Wilson and another against the City of Alhambra and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Sloan Pitzer, City Atty., for appellants. Murphy & Poplin, for respondents.

HENSHAW, J. The action is for injunction. The facts are that Dos Robles street in the city of Alhambra is a street 40 feet wide, ending at the property line of plaintiff Wilson, who was the owner of a 6-acre tract of land. Wilson desired to extend Dos Robles street through his property, joining Dos Robles street with Alhambra road, another public way of the city running at right angles with the line of Dos Robles street extended; his purpose being to subdivide his property and sell building lots along the frontage of his proposed Dos Robles street extension. Wilson employed the city engineer of the city of Alhambra to draw plans and specifications for the construction of this street or way through his property, in conformity with all the regulations and requirements of the ordinances of the city of Alhambra. The work contemplated cement sidewalks, cement curbing, and gutters, as well as the construction of the driveway proper. The city engineer drew up the plans and specifications in accordance with the requirements of the city ordinances, and Wilson let his contract for the construction of the work. Being in ignorance of the existence of an ordinance of the city exacting permission for the doing of such work before operations were begun, they proceeded with it without obtaining such permit, and Wilson and the contractor were arrested and proceeded against criminally for the violation of this ordinance. Thereupon Wilson and his contractor made application to the proper authorities of the city of Alhambra for permit to do the work, offering to pay any moneys required, and to file an undertaking in any penal sum exacted. Their request was arbitrarily refused for no other assigned reason than that they had begun the work without first requesting a permit. They then undertook the further prosecution of the work and to make connection with Alhambra road, when the city of Alhambra adopted a new ordinance, No. 281, making it unlawful for any person "to establish, open, make, build, construct, maintain, lay out or adopt any private way, private drive, private street or other private street to be used for street and highway purposes in the city of Alhambra less than fifty feet in width." Wilson and his contractor were arrested for a violation of this ordinance because the street which they projected and were in the process of constructing over Wilson's private property was but 40 feet in width. Dos Robles street, a public street of the city of Alhambra, an extension of which in effect Wilson undertook to build through his property, was itself but 40 feet wide, and so were other public streets of the city. The court adopted the view that the ordinance was unreasonable, was an unwarranted interference with the rights of private property, and granted the injunction restraining the city of Alhambra from enforcing the ordinance against plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The conclusion which the court reached we think was not only eminently just, but the only one permissible under the showing made. The power of the city to legislate and to pass reasonable regulations touching this subject-matter is, of course, not questioned. Nor need we be at pains to consider the distinctions which may be thought to exist between public highways and private ways publicly used. Section 2620 of the Political Code provides that the width of all public highways, except bridges, alleys, and lanes, and trails, shall be at least 40 feet, and the width of all private highways and by-roads, except bridges, shall be at least 20 feet. Whether plaintiff Wilson designed to construct a private way, used of right by the owners to whom he might sell his land, and through their license by others coming upon their lands, or whether, in effect, by use the street would become in time a public highway, are considerations quite immaterial to this determination. Plaintiff was unquestionably entitled to access and to a right of way to and from Alhambra road. The city had the right to control plaintiff by reasonable regulations in the work that he might do to make this right of way available, in other words, in making the connection between his private way and the public road. But further than this its powers did not extend. A man's right of access to a public highway may not be embarrassed, much less prohibited, by an unreasonable ordinance prescribing the width of such approach. And from another aspect the unreasonableness of this ordinance is made apparent, in that it requires plaintiff to construct a road wider than the city's own public street, of which the private way would, at the most, be but an extension. The court did not err in refusing to admit testimony proffered by defendant which it is asserted would show that a 40-foot street with a 24-foot roadway, such as this, "is dangerous to the public in case of fire, accidents, and travel," and could therefore be forbidden or abated as a nuisance. The subject is not one of expert testimony. Common knowledge establishes the contrary, and the contention, if sustained, would be to declare all other 40-foot streets in the city of Alhambra public nuisances, in accordance with section 2 of the ordinance in question. The findings are abundantly supported by the evidence, and the conclusions of law follow legally and logically therefrom. Plaintiff's remedy by injunction was proper. The case is not parallel with Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1, 50 Pac. 10. There permit was refused by the street superintendent, and it was said that the remedy was by mandamus to compel the issuance of the permit in a proper case. Here no question of permit is involved. The city stands upon the sufficiency of its ordinance which forbids construction of the road under any circumstances whatsoever.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

158 Cal. 420

In re MILLER'S ESTATE. (S. F. 5,332.)

(Supreme Court of California. Sept. 29, 1910. Rehearing Denied Oct. 27, 1910.)

1. Wills (§ 11*) — Testamentary Power — Limitations.

Code Civ. Proc. § 1469, is under the title of "Provision for the support of the family," and provides that if the inventory shows that the whole estate does not exceed $1,500, and if there be a widow or minor children, the court shall require all persons interested to show cause why the whole of said estate should not be assigned for the support of the family of deceased, and, if the court finds that its value does not exceed that sum, it shall assign to the widow, if there be such, and, if not, to minor children, the whole of the estate. *Held*, that section 1469 limited the general testamentary power given by Civ. Code, § 1270, permitting every person over 18 years of age of sound mind, etc., to dispose of all his estate by will, so that a decedent could not by will prevent his widow from taking his whole estate if it was worth less than $1,500, if she otherwise came within the provisions of section 1469.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 26–31; Dec. Dig. § 11.*]

2. DESCENT AND DISTRIBUTION (§ 63*)—PROCEEDINGS FOR DISTRIBUTION—ADMISSION OF EVIDENCE.

A widow is entitled to the whole of her deceased husband's estate under Code Civ. Proc. § 1469, only when she is a member of his family at his death so as to be entitled to demand support of him, so that, on a widow's application for the whole of the estate under the statute, evidence was admissible to show that she had abandoned decedent before his death; Civ. Code, § 175, providing that a husband unjustifiably abandoned by his wife is not liable for her support until she offers to return.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 190–193; Dec. Dig. § 63.*]

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

In the matter of the estate of James W. Miller, deceased. From a decree made upon the widow's application to have the estate decreed to her, an appeal was taken. Reversed, and application remanded for new hearing.

T. J. Weldon and W. D. L. Held, for appellant. Mannon & Mannon, for respondent. Arthur J. Thatcher, in pro. per.

HENSHAW, J. James W. Miller died testate. The inventory and appraisement showed the value of his estate to be less than $1,500. His widow applied to the court for an order and decree vesting the whole estate in her under the provisions of section 1469 of the Code of Civil Procedure. Her application was contested by a legatee under the will, appellant herein. The will was offered in evidence upon the hearing. The will contained the following declaration: "As my said wife Jennie W. Miller has refused and neglected to live with me as a wife for several years last past and has totally abandoned me, I give and bequeath to her the sum of five dollars and no more." Certain evidence was offered and certain questions propounded designed to establish the fact indicated in the declaration in the will. To all of this objections were made and sustained. The formal proposition presented for determination is the correctness of the court's ruling in this regard. But, underlying this, the essential questions are, first, does the testamentary power conferred by section 1270 of the Civil Code control the provisions of section 1469 of the Code of Civil Procedure, or is section 1469 of the Code of Civil Procedure a controlling limitation upon the general power of testamentary disposition; second, is a widow by virtue of her widowhood alone entitled to distribution under section 1469 of the Code of Civil Procedure, or must she, to be so entitled, have been of the family of the deceased at the time of his death?

1. Upon the first proposition we entertain no doubt but that section 1469 of the Code of Civil Procedure controls the general power of testamentary disposition conferred by section 1270 of the Civil Code. It was so declared in Estate of Walkerly, 108 Cal. 627, 653, 41 Pac. 772, 778, 49 Am. St. Rep. 97, in the following language: "The Code provisions making disposition of the homesteads and of estates in value less than fifteen hundred dollars are instances of the limitations put by the Legislature upon the free power of testamentary disposition." While in strictness this language in the Walkerly Case is obiter dictum, its construction of the statutes in this regard is clearly just and sound. The law, careful always of the rights of the family, by section 1469 shows a tender regard for it when the bread winner is taken by death, leaving but a small estate for the support of those dependent upon him; and so it has with wisdom and humanity decreed that under such circumstances the husband and father may not will it away from the family, but that it shall go to them expeditiously and without delay in administration.

2. Section 1469 is found in chapter 5, art. 1, Code Civ. Proc., under the specific title of "Provision for the support of the family." The word "family" as thus used has received at the hands of this court exact definition—a definition narrower than that which Woerner gives (1 Woerner, Am. Law of Admin. [2d Ed.] § 88), but none the less a just and reasonable definition under our law. In Re Noah, 73 Cal. 588, 15 Pac. 290, 2 Am. St. Rep. 829, this court quotes with approval the following: "It is an allowance made to the family. * * * I think that the statute was intended to embrace those who were the immediate family of the deceased; those who were by law entitled up to his death to look to him for support and protection. * * * Yet any person to be entitled to an allowance out of the estate must have been in receipt of, or in law entitled to demand of deceased, maintenance before his death. In re Byrne's Estate, Myr. Prob. 1." Section 1469 of the Code of Civil Procedure provides as follows: "If upon the return of the inventory of the estate of the deceased person it shall appear therefrom that the value of the whole estate does not exceed the sum of $1,500, and if there be a widow or minor children of the deceased the court or a judge thereof shall by order require all persons interested to appear on a day fixed to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased. * * * If upon the hearing the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court finds that the value of the estate does not exceed the sum of $1,500, it shall by a decree for that purpose assign to the widow of the deceased, if there be a widow, and, if no widow, then to the minor children of the deceased, if there be minor children, the whole of the estate." It will thus be noted that this section is not only found under the subtitle of "Provision for the support of the family," but itself declares that, where the estate is apparently of less value than $1,500, notice shall be given to show cause "why the whole of said estate should not be assigned for the use and support of the family of the deceased." When provision is made that the estate shall be assigned to the widow, if there be a widow and no minor children, it is manifest from the context and from the title to the chapter that it means that it shall be assigned to the widow, when she thus constitutes the family of the deceased, and to her and the minor children when together they constitute the family of the deceased. Thus it is said in Estate of Neff, 139 Cal. 71, 72 Pac. 632: "Taking all the Code sections together, and considering the regard which the law has for the interests of the family, it was clearly the intention of the Legislature that small estates under $1,500 shall go immediately to the family without further administration." And it is declared in Phelan v. Smith, 100 Cal. 158, 34 Pac. 667, that, where a decree sets apart a homestead for "the use of the family of the deceased" without mentioning the widow and children, it will be construed as using the term "family" in the sense of the statute providing for homesteads, to denote the surviving wife and children.

While the precise question whether a widow who was not at the time of her husband's death a member or part of his family is entitled to distribution under section 1469 of the Code of Civil Procedure has never arisen in this state, nevertheless, under similar statutes pertaining to the homestead and in other states under like statutes making provision for the maintenance or support of the family, the rule of decision has been uniform that the widow, to take, must come within the definition of "family," must have been a member thereof, or at least must, without fault of her own, have been entitled to maintenance and support from the husband during his lifetime. Thus in Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358, it was held that a wife separated from her husband by agreement of separation whereunder each spouse surrendered his or her claims upon the other for support or sustenance ceased to be a member of his family, and was therefore not entitled to family allowance under sections 1465, 1466, and 1468 of the Code of Civil Procedure, nor to a homestead, even for a limited period; the court in this connection saying: "And since I think the setting apart of a homestead by the court from the separate property of the husband, as required by section 1465, 'for the use of the surviving * * * wife * * * and the minor children, or * * * for the use of the minor children,' means the setting of it apart for the temporary use of the family in the sense in which the word 'family' is used in sections 1466 and 1468, it follows that the surviving wife is not entitled to such homestead unless she had been a member of her husband's family immediately before and at the time of his death." And in Re Noah, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, where the wife had voluntarily separated from her husband, and, in consideration of money paid to her had waived all her marital claims, had continued to live apart from her husband without any attempt to set aside the agreement or to assume again their marital relations, or to demand from him further support, it was ruled that she had ceased to be a member of his family, and upon the husband's death was not entitled to a family allowance under sections 1465 and 1466 of the Code of Civil Procedure. In other jurisdictions the rule of decision is so uniform that it is embodied in the following declaration in 18 Cyc. 393: "The special allowance to a widow is usually denied where she was not living in a family relation with her husband at the time of his death unless her separation was involuntary and through no fault of hers or was based upon reasons constituting a sufficient ground for divorce." See, also, Linton v. Crosby, 56 Iowa, 386, 9 N. W. 311, 41 Am. Rep. 107; Booth Mercantile Co. v. Murphy, 14 Idaho, 212, 93 Pac. 777; Hettrick v. Hettrick, 55 Pa. 290; Goss v. Harris, 117 Ga. 345, 43 S. E. 734.

Under the views thus expressed, namely, that the widow is entitled to distribution under 1469 only when she is a member of the family of the deceased—that is to say, when she has been in the receipt of or in law entitled to demand of the deceased a maintenance before his death—it necessarily follows that the determination of the status of the widow in this regard, when her membership in the family is called in question, is always both pertinent and indeed necessary. Section 175 of the Civil Code declares that "a husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct in abandoning him, nor is he liable for her support when she is living separate from him by agreement, unless such support is stipulated in the agreement."

It follows, therefore, that the evidence sought to be introduced by appellant, tending to determine the status of the widow as a member of the deceased's family, was improperly rejected, and for this reason the decree appealed from is reversed and the petition for distribution to the widow remanded for a new hearing, in accordance with the views herein expressed.

We concur: LORIGAN, J.; MELVIN, J.

158 Cal. 428

In re BOSE'S ESTATE.

BOSE v. BOSE. (S. F. 5,401.)

(Supreme Court of California. Sept. 29, 1910.)

1. Husband and Wife (§ 283*)—Right to Support—Abandonment by Wife.

Respondent married decedent after an acquaintanceship of two weeks, but they decided that they could not get along and separated a week after they were married without making any provision as to property rights, and they did not afterwards communicate with each other, though respondent tried to communicate with him by letter. *Held*, that the husband was not liable for respondent's support, she having lived apart from him by agreement; Civ. Code, § 175, providing that a husband unjustifiably abandoned by his wife is not liable for her support until she offers to return.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1063; Dec. Dig. § 283.*]

2. Executors and Administrators (§ 180*)—Allowance to Widow—Entire Estate—"Family."

Under Code Civ. Proc. § 1469, providing that if the inventory of an estate shows that it does not exceed $1,500, and if there be a widow or minor children, the court shall require all persons interested to show cause why the whole estate should not be assigned to the use of decedent's family, and, if the court finds that its value does not exceed $1,500, it shall assign the whole estate to the widow, if there be such, and, if not, to the minor children, a widow who is living apart from her husband at his death so as not to be entitled to support from him, is not a member of his family, so as to be entitled to the whole of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 673; Dec. Dig. § 180.*

For other definitions, see Words and Phrases, vol. 3, pp. 2673–2691; vol. 8, p. 7661.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Friedrich Bose, also known as Johann Friedrich Bose, deceased. From a decree distributing the estate to decedent's widow, Bertha Bose appeals. Reversed, with directions to deny petition for distribution.

Bishop, Hoefler, Cook & Harwood, for appellant. Edwin J. Hanson, Cullinan & Hickey, and John J. O'Toole, for respondent.

HENSHAW, J. The deceased died intestate. The court, having found that the estate was of less value than $1,500, entered its decree assigning all of the estate to the widow, there being no minor children. The appellant is the mother of deceased, and under the law of succession would be entitled to share in the estate equally with the widow. Section 1386, Civ. Code. She appeals upon the ground that section 1469 of the Code of Civil Procedure, under which distribution was had to the widow, is designed exclusively to make provision for the maintenance and support of the family of the deceased, and that it was affirmatively shown that the widow in this instance was not a member of the family, she having voluntarily separated from the deceased two years before his death and within one week after her marriage to him. Section 1469 of the Code of Civil Procedure touching this matter has received interpretation and construction in the Estate of James W. Miller, Deceased (S. F. 5,332, this day filed) 111 Pac. 255. By the testimony of the widow herself it is shown that she married decedent on September 12, 1906, after an acquaintanceship of two weeks; that it was "a case of love at first sight on his side"; that they "could not get along very well; just decided that they could not get along"; that they separated one week after the marriage; nothing was said about property rights and that she "just went her way" and never heard from him again; never received anything from him. Although she afterward endeavored to communicate with him by letter, the letters did not reach him, and she made no other effort to locate him. If this does not establish an abandonment of the husband by the wife, it at least presents a case where the husband was not liable for the wife's support, she living separate from him by agreement, and no support having been stipulated in the agreement. Civ. Code, § 175. It is beyond question that the widow under such circumstances did not constitute a part nor was she a member of the husband's family.

Wherefore it was error to distribute to her the estate of deceased. The decree doing so is therefore reversed, with directions to the trial court to deny the widow's petition.

We concur: LORIGAN, J.; MELVIN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(158 Cal. 377)

MERRITT et al. v. BARTA et al.

(S. F. 4,066.)

(Supreme Court of California. Sept. 19, 1910.)

1. EVIDENCE (§ 23*)—JUDICIAL NOTICE—PUBLIC ACTS.

The "Map of Outside Lands," covering lands in the city of San Francisco, having been made under authority of statute (Act March 27, 1868 [St. 1867–68, c. 331]), and thereafter expressly ratified and recognized as an official map by Act March 14, 1870 (St. 1869–70, c. 249), will be taken judicial notice of by the courts as a public document prepared and promulgated by the state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 29; Dec. Dig. § 23.*]

2. MUNICIPAL CORPORATIONS (§ 650*) — STREETS—EFFECT OF OFFICIAL MAP.

The "Map of Outside Lands," made under Act March 27, 1868 (St. 1867–68, c. 331), and thereafter expressly ratified by Act March 14, 1870 (St. 1869–70, c. 249), *held*, under the facts, not to reserve or set apart as a public street the trapezium shaped lot in the city of San Francisco, constituting a part of the "Outside Lands," and bounded by I street, Forty-Ninth avenue, J street, and the "Great Highway," which fronts on the Pacific Ocean.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1424; Dec. Dig. § 650.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Emma L. Merritt and another, executors of the will of Adolph Sutro, deceased, against C. J. Barta and others. From the judgment, and from an order denying a new trial, defendants appeal. Affirmed.

James F. Tevlin (P. F. Dunn, of counsel), for appellant Hotaling Estate Company. Percy V. Long, City Atty., and Adolphus E. Graupner, Asst. City Atty., for appellant City. Bradley & McKinstry, J. C. McKinstry, and Campbell, Metson & Campbell, for respondents.

SHAW, J. The complaint states a cause of action to recover possession of land alleged to belong to the estate of Adolph Sutro, deceased, and to quiet title thereto. The defendants answered, denying the title of the plaintiffs' testator. They also filed a cross-complaint, averring the execution by Adolph Sutro in his lifetime of a contract to sell the land to one Drummond, to whose rights defendants have succeeded, and asking specific performance thereof. Issue was joined on the cross-complaint, and the court proceeded first to the trial of these issues without a jury, and, after hearing the evidence of the defendants in support thereof, granted a nonsuit thereon in favor of the plaintiffs and a judgment of nonsuit was entered accordingly. Thereafter the issues formed by the complaint and the answer of the defendants thereto were tried by a jury, and the appeals are taken from the judgment thereon given against the defendants and from an order denying their motion for a new trial of those issues. The proceedings on the cross-complaint, the evidence taken in support thereof, and the judgment thereon are not presented for review. Under these circumstances, the cross-complaint and the proceedings thereon are entirely excluded from our consideration. The case must be decided precisely as it would be if no cross-complaint had been filed.

The alleged contract of Sutro and the defendants was not pleaded as an estoppel against the defendants; and hence, although it was set up in the cross-complaint, it is not before us for consideration, and we cannot determine whether or not the defendants would have been thereby estopped to deny the plaintiffs' title. The land in controversy is a small lot in the form of a trapezium situated in the city of San Francisco, and alleged to be bounded north by I street, east by Forty-Ninth avenue, south by J street, and west by the street known as the "Great Highway," fronting on the Pacific Ocean. It constitutes a part of what are known as "Outside Lands." Under the act of April 15, 1851 (St. 1851, p. 357, c. 84), the southern boundary of the city was a line parallel with Clay street located 2½ miles south of the center of Portsmouth square, and the western boundary was parallel with Kearny street and 2 miles west of the center of Portsmouth square. These "Outside Lands" were the lands situated west and south of the above-mentioned boundaries. Soon after its organization, the city of San Francisco laid claim to these and other lands as successor to the Mexican pueblo, and began proceedings for the confirmation of its title by the United States. Prior to this proceeding, and also while it was pending, many parcels of the land were sold by the city and pueblo to private persons who took possession under the purchases. When the lands were confirmed to the city by the final decree of the United States Circuit Court in 1865, that court, for the protection of the persons holding these parcels of land, inserted in the decree a clause declaring that the title of the city should be held in trust for the benefit of the lot holders under grant from the pueblo, town, or city of San Francisco. Cal. A. of S. v. San Francisco, 107 Cal. 338, 40 Pac. 427. For the further confirmation of title to the city and the lot holders, Congress passed the act of March 8, 1866, granting the lands known as the "Pueblo Lands" to the city upon the trust that as to any parcel in the bona fide actual possession of any person at the time of the passage of the act the city should convey the same to such person or his successors, "except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses," and that, as to any residue of the land, it should be held "in trust for the use and benefit of the inhabitants of the city." See Baker v. Brickell, 87 Cal. 333, 25 Pac. 489, 1067; Cal. A. of S. v. San Francisco, supra; Home for Inebriates v. San Francisco, 119 Cal. 534, 51 Pac. 950.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On January 14, 1868, a city ordinance known as "Order No. 800" was passed. At that time the city limits had been extended so as to include these "Outside Lands." This ordinance provided that a plan should be adopted for the subdivision of these lands into lots and blocks showing the streets, public highway, parks, and other portions set apart for public use, and that, when adopted, a map thereof should be made, and that the said parts so set apart and designated on said map as streets, highways, parks, etc., "shall be deemed absolutely dedicated as such." The ordinance was adopted as a statute by the Legislature by the act of March 27, 1868, and all proceedings under it then or thereafter had were thereby expressly declared to be ratified and affirmed. St. 1867-68, p. 379, c. 331. Section 9 of this statute provided that the land lying south of a line drawn east from Seal Rock and "west of a line easterly not less than two hundred feet from ordinary high water mark is hereby reserved and set apart for public use as a public highway." The map made in pursuance of this statute is known as the "Map of Outside Lands."

It is claimed by the appellants that, by virtue of the survey made under this statute and the aforesaid map thereof, the lands here involved were included in one of the streets of the city, designated thereon as "FORTY NINTH AVENUE," that they were thereby set apart and reserved for public use, and that they still remain of that character. It was shown by the plaintiffs that on October 18, 1877, a deed of conveyance was executed by the city to one Paul Rousset, purporting to convey to him the tract in controversy, and that Rousset had afterwards conveyed the same to the plaintiffs' testator, Adolph Sutro. If this deed to Rousset was valid and effectual to transfer the title to the lot, the defendants are without right thereto, and the plaintiffs properly prevailed in the suit. If, at the time that deed was made in 1877, the lot still remained a part of a public street of the city, dedicated by virtue of the act of the Legislature as Forty-Ninth avenue, the city had no power to alienate it and the plaintiffs' title would fail. The defendant C. J. Barta being in possession, he would in that case have the right to a judgment in his favor allowing him to retain the possession as against the plaintiffs, although not against the city. The question is thus presented whether or not this land was in fact reserved for public use as a street by the survey and map of "Outside Lands," and, if so, whether or not it remained dedicated to public use at the time of the execution of the city deed in 1877.

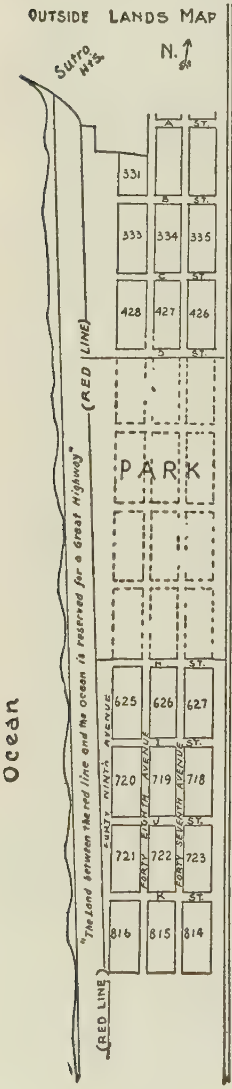
At the time of the first hearing and decision of this case in this court, we did not have access to the "Map of Outside Lands," or to any copy thereof. The transcript gives a mere diagram which does not purport to be a copy of that part of the map, or of any map, and it delineates only the part of Forty-Ninth avenue which includes the lot in controversy. The Map of Outside Lands was made under the authority of the statute of 1868 aforesaid, and it was expressly ratified and recognized as an official map by the act of March 14, 1870 (St. 1869-70, p. 353, c. 249), providing for the execution of deeds to persons who had had previous possession of the lots delineated thereon, being the act under which the deed to Rousset was made. The court will therefore take judicial notice of the map as a public document prepared and promulgated by the state. Diggins v. Hartshorne, 108 Cal. 158, 41 Pac. 283.

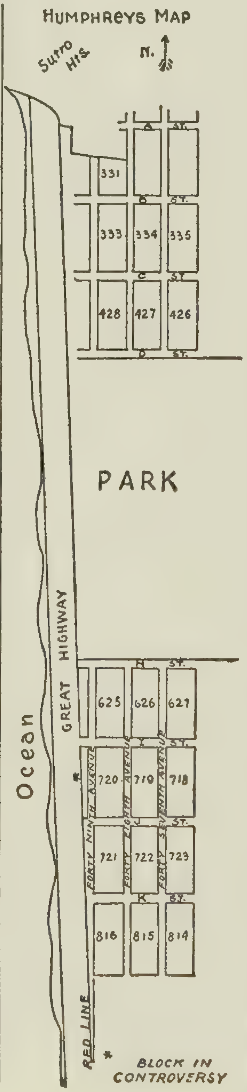
After the first decision of this case, a rehearing was granted. Upon further consideration upon that hearing, a resubmission was ordered and the parties were requested to file additional briefs upon the question whether or not the effect of the Map of Outside Lands and the survey and proceedings leading up to it was to dedicate the block in question as a part of Forty-Ninth avenue. The brief thereupon filed on behalf of the appellant contains extracts from the proceedings of the board of supervisors and from the report of the committee accompanying the Map of Outside Lands. It is claimed that these tend to show such dedication. Other extracts are given in the brief for the respondent to show the contrary. We have examined these extracts and also a copy of the Map of Outside Lands. We are satisfied that the land comprising the lot herein claimed by the plaintiffs was not reserved or set apart for public use by that map, either as a part of Forty-Ninth avenue, or as a part of the Great Highway. The map shows 48 streets running north and south, designated as avenues, numbered from 1 on the east to 48 on the west, and intersected by streets running east and west designated by the letters of the alphabet. The avenues appear to be of the uniform width of 70 feet. The intervening blocks are all numbered. Immediately west of Forty-Eighth avenue a tier of blocks is laid off and numbered, corresponding with the others in all respects. Along the space immediately west of this tier of blocks, in the same relative position as the names of the other avenues, and in capital letters of the same style and size, are written the words "FORTY NINTH AVENUE," occupying, as do the others, a space equal to the width of an avenue. There is, however, no line for the western boundary of Forty-Ninth avenue. The triangular space between the west line of the blocks and the line marked as the east line of the Great Highway is blank, except for the words denoting Forty-Ninth avenue. From a line extended due east from Seal Rock, running southerly from said line and parallel with the ocean front, at a distance indicated by the scale as 200 feet east of high-water mark, a red line is drawn, and along this 200-foot strip is written a statement that the land between the red line and the ocean is reserved as a "Great Highway." This line is not parallel with the lines of the above-mentioned avenues and blocks to the east thereof. The east and west street next south of the park is marked "H" street and the next streets, southerly, as "I" and "J" streets, respectively. The west line of the said westerly tier of blocks intersects the red line at a point between O and P streets, five blocks south of J street. From that point north, the west line of these blocks diverges easterly from the line of the Great Highway, so that at a point opposite Seal Rock the west line of the blocks is something more than three hundred feet east of the red line drawn as the easterly boundary of the Great Highway. This wedge shaped tract is not laid off into blocks and no streets are delineated as crossing it. It is not marked in any way, except by the words, "FORTY NINTH AVENUE," very close to the line of the blocks, as aforesaid. If this strip or wedge was intended to be set apart as a street, the curious and absurd result would be two streets adjoining each other, running in the same direction; that is, the Great Highway, 200 feet wide, and a wedge-shaped street, immediately adjoining it on the east, some 300 feet wide at the north end and tapering to a point 1½ miles to the south where its eastern line would enter the Great Highway. An inspection of the map convinces us that there was no such intention, and that, on the contrary, the irregular shaped tract was purposely left unsurveyed, or at least without subdivision into blocks, and that the purpose of entering therein the words "FORTY NINTH AVENUE" was to indicate that an avenue of the same width as the others was to be subsequently laid off, immediately west of the western tier of blocks, when the irregular tract should be thereafter actually subdivided.

Assuming that we may judicially notice and consider the record of the proceedings of the board and the report of the committee which the board adopted, which are not in the transcript, we find nothing in them to establish an intention to dedicate the wedge-shaped strip lying between the last tier of blocks and the Great Highway as a public street. There are some expressions therein which indicate an opposite intention. The report of the committee recommended "that, when the land will admit of a right-angled survey of blocks," the blocks should be laid out 600 feet northerly and southerly and 240 feet easterly and westerly, and that the east and west streets should be 80 feet wide and the north and south streets 70 feet wide. Nothing is said concerning the wedge-shaped strip lying next to the Great Highway, or concerning any street of irregular width. This is clearly inconsistent with the idea that there was to be an irregular street over 300 feet wide at the north end and tapering to a point at the south end. It is claimed that the insertion of the words "FORTY NINTH AVENUE," along the extreme eastern verge of this tract, necessarily shows that the entire strip should be an irregular street. This is contrary to the declaration, adopted in the report, that the north and south streets were to be 70 feet wide. There is no explanation of the laying out of such an irregular street as this would make, nor of the remarkable fact that it aligns the Great Highway. These declarations, in connection with the map, make it much more reasonable to conclude that the strip was left unplatted and that the words "FORTY NINTH AVENUE" which occupy the exact space of a street 70 feet wide, were put along the eastern edge of the strip, next to the western tier of blocks, to show that there was to be an avenue of that number, and of the same width as the others, abutting the western line of that tier of blocks.

Another consideration fortifies this conclusion. If the map does not show that the strip was purposely left as land not subdivided, it is at least ambiguous upon the question of its character. The act of March 27, 1868, adopting "Order No. 800," was not self-executing. It contemplated and required the subsequent adoption of a plan of subdivision of these Outside Lands and a survey and subdivision thereof according to such plan. The board was made the agent of the state to accomplish these things. No time was fixed within which it must be done. There was no declaration that the first attempt at subdivision was to be final and conclusive in all respects, or that errors in the map could not be corrected, or that the whole of the lands should be included in the first survey and map, or that, if a part of it was not subdivided by the first survey and map, the work could not be completed by a subsequent survey and map, covering the uncompleted tracts. If this part of the tract was not subdivided by the survey and map resulting in the Map of Outside Lands, the board retained power to complete it, and, if the map made was ambiguous, the board had power to clear up the uncertainty by a new or amended map. In 1870 another map, known as the "Humphrey's Map," was made by the board, which, if the "Outside Lands Map" is to be taken as ambiguous or incomplete, was, in effect, a correction or completion thereof in respect of this strip. It is also in the nature of an interpretation by conduct, and it indicates that it was then understood that the previous survey and map were not complete.

This Humphrey's map shows a line drawn as the west line of Forty-Ninth avenue, making it seventy feet wide, in conformity with the other avenues, and from this western line of that avenue all the east and west streets are marked thereon as extending into this wedge-shaped strip toward the Great Highway, thus indicating a subdivision of the strip into blocks of the same length north and south as the other blocks. The part of the strip which is here involved is exhibited thereon as a block bounded by the streets as heretofore stated. Evidently one of the purposes intended to be served by the making of this Humphrey's map was to extend the subdivision into this strip and to show the width of Forty-Ninth avenue. The following diagrams show the wedge-shaped strip and adjoining blocks as delineated on the Map of Outside Lands and the Humphrey's map, respectively, and illustrate what has been said on the subject:


OUTSIDE LANDS MAP
Sutro Hts
N.
A
ST.
331
B
ST.
333
334
335
C
ST.
428
427
426
D
ST.
(RED LINE)
PARK
"The Land between the red line and the ocean is reserved for a Great Highway"
H
ST.
625
626
627
I
ST.
720
719
718
J
ST.
721
722
723
K
ST.
816
815
814
FORTY NINTH AVENUE
FORTY EIGHTH AVENUE
FORTY SEVENTH AVENUE
(RED LINE)
Ocean


HUMPHREYS MAP
Sutro Hts
N.
A
ST.
331
B
ST.
333
334
335
C
ST.
428
427
426
D
ST.
PARK
GREAT HIGHWAY
H
ST.
625
626
627
I
ST.
*
720
719
718
J
ST.
721
722
723
K
ST.
816
815
814
FORTY NINTH AVENUE
FORTY EIGHTH AVENUE
FORTY SEVENTH AVENUE
RED LINE
Ocean
* BLOCK IN CONTROVERSY

The act of March 14, 1870, under which the Rousset deed was made, provided for a petition and a hearing upon the question whether or not the lands for which a deed was sought had been set apart for public use by the survey and map made in pursuance of "Order No. 800" embodied in the statute of March 27, 1868, aforesaid, and for an adjudication that it was not so dedicated, before a deed could be made for the land. If it were so adjudicated, and the other conditions prescribed had been complied with and found to exist, the board of supervisors were directed to order the execution of a deed, and thereupon the mayor was directed to execute a deed in the name of the city to the applicant for the land awarded to him. The execution of the deed to Rousset, and the recitals contained therein, imply that the board of supervisors determined that the land had not been dedicated to public use, but was the property of Rousset, under the provisions of the act of 1868 aforesaid. And as the lot was not reserved for public use, but was mere proprietary land of the city, the deed would be conclusive upon the city as a transfer of its title, under the provisions of the act of March 14, 1870, even if the applicant was not in possession at the passage of the act of Congress of March 8, 1866.

It follows that the title of the plaintiffs is shown to be valid, and that, as the defendants have nothing but the naked possession, they must yield to the holder of the legal title. Having reached this conclusion upon these grounds, the question to which the original briefs are chiefly directed, whether the Humphrey's map is valid, whether it operated to vacate dedications to public use which appeared to have been made by the Outside Lands map, and whether the Humphrey's map was authorized, or has been recognized or ratified by the Legislature, are all immaterial to the decision of the case and need not be considered.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; LORIGAN, J.

BEATTY, C. J. (concurring). I concur in the judgment and in the opinion of Justice SHAW, and desire only to suggest a consideration, not therein adverted to, which, in my opinion, fortifies the conclusion that the broad space between the Great Highway and the east line of Forty-Ninth avenue never was irrevocably or absolutely dedicated as a street of San Francisco, and there is no claim that it was ever dedicated or reserved for any other public purpose. It was not within the power of the supervisors to make a dedication of any part of the Outside Lands in violation of the trust upon which they were committed to their disposal. The grant of those lands to the city was upon a trust for the benefit of those in bona fide possession on March 8, 1866, and the city was administering that trust under the authority and subject to the restrictions of the act of March 27, 1868, confirming Order 800, which contained these qualifying words (St. 1867-68, p. 383, c. 331): "No person in actual possession of any of the lands mentioned in the first section of said order on the said eighth day of March, eighteen hundred and sixty-six, and on which five years taxes shall have been paid, as provided in such order, shall be dispossessed of any of said lands under any order heretofore or hereafter made by said board of supervisors for the reservation of any of said lands for public uses, except for streets, until compensation shall have been actually made to such person, as provided in said order number eight hundred; and until such compensation shall have been made such person shall be allowed to continue in possession of such lands so possessed by them." Not only is the ratification of the order subject to this express qualification, but the ratification itself extends only to what is done in conformity to the order, and both the order and the confirmatory statute are so far subject to the trust which they assume to execute that the plan to be adopted for the subdivision of the Outside Lands into lots and blocks in pursuance of the first section of Order 800 was subject to the inherent condition that it must be reasonable and equitable in its relation to the beneficiaries of the trust, and that, when adopted, it should be impartially followed out in its application to the holdings of those in possession of the lands. Such a plan was adopted. It provided for reservations of large tracts for park and cemetery and for smaller reservations for other purposes, for all of which the persons dispossessed were to be compensated. It provided also for the Great Highway and for the subdivision of the unreserved portion of the Outside Lands into blocks divided by north and south streets 70 feet wide, and east and west streets 80 feet wide. The blocks were to be rectangular and 240 by 600 feet in dimensions where they could be so surveyed, but in irregular spaces like that between the diverging lines of Forty-Ninth avenue and the Great Highway there is the clearest implication that fractional blocks should still be laid out as large as the regular execution of the plan would leave them, or, in other words, that a bona fide occupant of such irregular spaces should not be wholly dispossessed of his holding without compensation merely because, after laying off the streets in regular and impartial execution of a fair and equitable plan, he would have left a block smaller than the full block. The plan required him to give up so much of his land as fell within the streets running at right angles and 70 and 80 feet wide. It did not require him to give up more, and his rights as a beneficiary of the trust forbade such an arbitrary departure from the plan as would compel him to do so.

As this case is presented on the record, we must assume that the lands between high tide and the east line of Forty-Ninth avenue and including the demanded premises were in the bona fide occupation of Rousset or his grantors on March 8, 1866. If so, the board of supervisors violated their trust in approving a map which attempted to dedicate as a street more of his land than the plan of subdivision called for, and, whether this was done purposely or by mistake, it was not only their right, but their duty, to rectify the wrong. This they appear to have done by the subsequent adoption of the Humphrey's map, and the conveyance of the lot; and this fact—that they only did in the end what it was their paramount duty to do in the beginning—that they merely transferred to the person rightfully entitled that to which the city never had a valid claim, distinguishes this case from Hoadly v. San Francisco, 50 Cal. 265, and all other cases depending on the principle that property dedicated to a public use is inalienable.

I concur: ANGELLOTTI, J.

I concur in the foregoing views of the Chief Justice: SHAW, J.

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14 Cal. App. 128

PEOPLE v. EDWARDS. (Cr. 160.)

(Court of Appeal, Second District, California. Aug. 19, 1910.)

CRIMINAL LAW (§§ 543, 1153*)—EVIDENCE—TESTIMONY ON PRELIMINARY HEARING—ABSENCE OF WITNESS FROM STATE.

Under Pen. Code, § 686, authorizing the reading on the trial of testimony of a witness at the preliminary examination, on its being satisfactorily shown to the court that he cannot with due diligence be found in the state, the question of such satisfactory showing is addressed to the trial court, so that its determination in favor thereof cannot be disturbed, where there was some substantial evidence to support the conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1236, 3066; Dec. Dig. §§ 543, 1153.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

B. F. Edwards was convicted of obtaining property by fraudulent pretenses, and appeals. Affirmed.

Beardsley & Gould and Stephen Sullivan, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of obtaining personal property of the value of $675 from one J. D. Ryan by means of false and fraudulent representations and pretenses. His appeal is from a judgment of imprisonment and an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But one point is urged as ground for reversal. At the trial the prosecution was permitted, over the objection of defendant, to read in evidence, from a reporter's transcript, the testimony of R. L. Hamilton given at the preliminary examination of defendant. Hamilton, as a witness before the committing magistrate, had given material testimony corroborative of the charge made by the complainant Ryan. The district attorney represented to the court at the trial that he was unable to procure the attendance of Hamilton as a witness, for the reason that the latter could not be found. To establish the necessary foundation entitling him to read in evidence the testimony of Hamilton taken at the preliminary examination, the prosecutor called three witnesses. Mrs. Hamilton, wife of the desired witness, testified that on the Wednesday preceding the day of the trial (that being Tuesday) her husband had left for Mexico; that he told her he was going to Mexico, to which country he had contemplated going for about two weeks prior thereto; that she did not know positively where he then was, but was satisfied that he was in Mexico. It appeared, further, by the testimony of Arthur H. Aiken and Robert Mahel, process servers attached to the office of the district attorney, that a subpœna had been issued 25 days before the date of the trial for service upon Hamilton, but that no search had been made until a few days immediately before the trial to discover the whereabouts of the missing witness. It was found then that Hamilton had left his customary place of abode and had informed his wife that he was going to Mexico. Upon this evidence the trial court became satisfied that due diligence had been used in the effort to procure the attendance of the witness, and that he could not be found within the state.

It is provided by section 686 of the Penal Code that the testimony of a witness heard at the preliminary examination of a person charged with crime, and taken down by question and answer in the presence of the defendant, who has an opportunity to cross-examine the witness, may at the trial be read in evidence "upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." In the late case of People v. Lewandowski, 143 Cal. 574, 77 Pac. 467, where a contention similar to that urged here was made, the Supreme Court said: "The question, however, as to whether it is satisfactorily shown that such witness cannot with due diligence be found within the state, is a question of fact that is addressed to the trial court, to be determined by it from evidence introduced before it (People v. Plyler, 126 Cal. 379 [58 Pac. 904]), and with the determination of that question of fact by the trial court this court will not interfere, unless the evidence thereon is such as to satisfy the court that the trial court abused the discretion confided to it in holding that due diligence had been used, and that the witness could not be found. People v. Witty, 138 Cal. 576 [72 Pac. 177]; People v. Reilly, 106 Cal. 648 [40 Pac. 13]."

There was evidence tending to show that the witness Hamilton was, in fact, out of the state of California. There was the further evidence that some search had been made for him in the endeavor to secure service of a subpœna. The court determined that a sufficient foundation had been laid to entitle the testimony of the witness taken at the preliminary examination, as shown by the reporter's transcript, to be read in evidence. If there was any substantial evidence to support that conclusion, the ruling cannot be disturbed. Such evidence was before the court.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

14 Cal. App. 99

PEOPLE v. McGEE. (Cr. 243.)

(Court of Appeal, First District, California. Aug. 17, 1910. Rehearing Denied Sept. 16, 1910.)

1. Assault and Battery (§ 91*)—Assault with Deadly Weapon—Evidence.

Evidence *held* sufficient for conviction of an assault with a deadly weapon.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.*]

2. Criminal Law (§ 759*)—Instructions as to Matter of Fact.

A requested instruction that a failure to prove motive is a circumstance in favor of defendant's innocence is one with respect to a matter of fact, as to which Const. art. 6, § 19, declares judges shall not charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1737; Dec. Dig. § 759.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Patrick McGee was convicted of assault with a deadly weapon, and appeals. Affirmed.

Carl Lindsay, for appellant. U. S. Webb, Atty. Gen., C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of assault with a deadly weapon. He was found guilty as charged, and sentenced to imprisonment for the term of 18 months. He appeals from the judgment, and also from the orders denying his motions for a new trial and in arrest of judgment. His principal ground of appeal is that the evidence is insufficient to support the verdict.

Briefly the evidence shows as follows: On December 20, 1908, at 2 o'clock in the morning, John P. Fennell, the complaining witness, John J. Sullivan, and Florence O'Neill were walking along Kearny street, in San Francisco, toward Market street, when the defendant called out to Fennell, "You fellow in the gray suit, I want to speak to you." The defendant, being an utter stranger to Fennell, was told so by him, and directed to go away. The Fennell party proceeded hurriedly along their way. O'Neill, who had stopped to say good-bye to some friends, was a short distance in the rear of his companions, and upon coming up to defendant said to him: "You don't know any of us. Go home, young man." Immediately defendant struck O'Neill, knocking him down. Thereupon, O'Neill having called for help, Fennell came to his assistance. In the meantime the defendant had backed from the sidewalk to the middle of the street, and was carrying his right hand by his side with "something in his hand." Fennell, after having advanced to within about 12 feet of the defendant, noticing this, "hesitated," and said, "Why did you hit that man?" whereupon, without any explanation, threat, or warning of any kind, defendant fired two shots from a pistol at Fennell, the second of which struck Fennell in the head. Fennell was unarmed. The defendant's version of the affair is that the Fennell party was being followed by a suspicious looking character, and, believing that he knew Fennell, he called out to him, intending to warn him and his companions of their danger, but upon discovering that he was not acquainted with Fennell, and that his good offices were resented, he concluded that he would mind his own business and go home; that after proceeding on his way for a block O'Neill stepped from behind a pile of structural material and engaged him in a fist fight; that presently Sullivan and Fennell came to the assistance of O'Neill; that during the altercation Fennell called him a vile name and reached toward his hip pocket, and at this point, fearing for his life, he drew his pistol and fired two shots, intending both to go into the air, the second one of which, however, accidentally hit Fennell.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon this evidence the jury has found the defendant guilty, and the trial judge, by denying defendant's motion for a new trial, has approved the verdict. The defendant, as before stated, asks us to reverse the case upon the ground that the verdict is not supported by the evidence. The mere statement of the facts of the case as testified to, it seems to us, is a complete answer to this contention. The defendant was roaming the streets of San Francisco at an early and unusual hour of the morning. With no plausible reason he accosted Fennell and his companions, and persisted in following them, and without provocation struck O'Neill, knocking him to the ground, and a few moments later shot and very seriously wounded the complaining witness, without any apparent necessity or justification therefor. The defendant is fortunate that his shot did not kill Fennell. From the record before us he might have been prosecuted for a more serious offense.

At all events, the question of his guilt or innocence was for the jury, and, the verdict being sustained by substantial evidence, it cannot be disturbed by this court, unless it is vitiated by the failure of the trial court to give the following instruction requested by defendant: "The court instructs you that if you find from the evidence that the defendant had no motive for the commission of the offense charged in the information, that the absence of a motive is a circumstance in favor of one accused, which must be added to the presumption of innocence, and which you should take into consideration in deliberating upon your verdict." In People v. Glaze, 139 Cal. 154, 72 Pac. 965, the refusal to give a similar instruction was upheld by the court, where it is said: "The Constitution declares that 'Judges shall not charge juries with respect to matters of fact.' Article 6, § 19. A statement to the jury that a failure to prove the existence of a motive impelling the defendant to commit the crime is a 'circumstance in favor of his innocence,' while perhaps a correct statement of the view to be taken by the jury of such failure of proof, is nevertheless an instruction with respect to a matter of fact. As such the court was not bound to give it." While the giving of this instruction would have been harmless, still the refusal of the court to give it was not error.

The judgment and orders are affirmed.

We concur: COOPER, P. J.; HALL, J.

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14 Cal. App. 143

PEOPLE v. WARD. (Cr. 161.)

(Court of Appeal, Second District, California. Aug. 19, 1910.)

1. Criminal Law (§ 1159*) — Verdict—Conclusiveness.

The court will not disturb a judgment of conviction, after verdict, where it is warranted by any evidence found in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. Embezzlement (§ 16*) — Statutes — Evidence.

Defendant obtained possession of money and personal property belonging to another under an agreement to hold it as security for the performance of certain duties connected with a contract of employment entered into between the parties, and upon the termination of such employment he refused to return the property in his possession and appropriated it to his own use. *Held*, that the crime of "embezzlement," as defined by Pen. Code, § 503, was made out.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 17, 18, 21; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 3, pp. 2350–2358; vol. 8, p. 7649.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

James Ward was convicted of embezzlement, and he appeals. Affirmed.

Walter & Pratt and Stephen L. Sullivan, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The information charged defendant with the crime of embezzlement, the jury found him guilty, and his motion for a new trial was denied. From the judgment of conviction, and an order denying such new trial, defendant appeals.

The only contention presented is that the evidence in the record is insufficient to support the verdict. An examination of such record develops a decided conflict in the evidence. The jury, however, accepted as true the statements of the prosecuting witness, and the court, upon the motion for a new trial, justified this action upon the part of the jury. It is not the province of this court to disturb such conclusion, if any evidence in the record warrants the same.

We are further of opinion that an examination of the record establishes that defendant obtained possession of money and personal property belonging to the prosecuting witness under an agreement that the same should be held only as security for the faithful performance of certain duties connected with a contract of employment entered into between the parties; that thereafter, upon the termination of such employment, defendant refused to return the same or any part thereof, and appropriated such money and personal property to his own use. The crime of embezzlement, as defined by section 503 of the Penal Code, was thus made out. The verdict, in our opinion, was a righteous one, and should be sustained.

Judgment and order affirmed.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 139

LUCKENBACH v. SMITH. (Civ. 701.)

(Court of Appeal, Second District, California. Aug. 19, 1910. Rehearing Denied Sept. 17, 1910.)

1. FRAUD (§ 58*)—ACTIONS—SUFFICIENCY OF EVIDENCE—MISREPRESENTATIONS—MALICE.

In an action for damages by falsely representing to plaintiff that an automobile sold him was the latest 1907 model, evidence *held* to sustain a finding of willfully false representations as claimed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. § 58.*]

2. FRAUD (§ 58*)—ACTIONS—SUFFICIENCY OF EVIDENCE—DAMAGE.

In an action for damages for falsely representing to plaintiff that an automobile sold him was of the latest 1907 model, evidence *held* to show material injury to plaintiff by the misrepresentation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. § 58.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding made by the trial court upon a sufficient basis will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

4. FRAUD (§ 58*)—ACTIONS—SUFFICIENCY OF EVIDENCE—VALUE OF PROPERTY.

In an action for damages by false representations that an automobile sold plaintiff was the latest model, evidence *held* to show that the machine given defendant by plaintiff in part payment was of the value at which it was taken by defendant.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. § 58.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John Luckenbach against A. J. Smith. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Haas, Garrett & Dunnigan, for appellant. Valentine & Newby, for respondent.

ALLEN, P. J. Action for damages. Findings and judgment for plaintiff, and defendant appeals from such judgment and a subsequent order denying a new trial.

The case as presented by the findings is this: On January 14, 1907, plaintiff and defendant entered into an agreement, whereby defendant agreed to sell and deliver to plaintiff, and plaintiff agreed to buy, one latest improved, four-cylinder, 1907 Elmore automobile, together with certain extras in connection therewith, for the sum of $2,815. Plaintiff was unfamiliar with automobiles, and the different models and makes thereof, while defendant had for several years been engaged in the business and was familiar with the same. At the time of entering into the agreement defendant exhibited to plaintiff a certain automobile, No. 1,547, then in stock at Los Angeles, and defendant represented to plaintiff that such automobile possessed all the latest and best improvements that were put into the 1907 four-cylinder automobile, and that said automobile so exhibited was the latest model of 1907 make of automobiles. That these representations of defendant were false, and known by him to be false, and plaintiff relied thereon, believed them to be true, and entered into the agreement of purchase. That pursuant to said agreement plaintiff delivered to defendant a certain secondhand automobile at an agreed valuation of $1,000, which was fairly worth that price, and on the 26th of January, 1907, defendant delivered to plaintiff an automobile, No. 1,547, which was in fact the model of 1906, and plaintiff paid to defendant, on the 2d of February following, $1,815, the balance of the agreed purchase price. That in truth and in fact said automobile so delivered to plaintiff was not of the latest model of 1907, and did not contain the latest improvements of 1907. That plaintiff did not discover until April the falsity of the representations made to him, when he immediately demanded that defendant deliver to him an automobile of the kind and character agreed to be purchased, which defendant refused to do. The court finds that the value of the automobile so delivered was but $2,120; that the market value of the machine contracted to be purchased, without extras, was $2,650; and judgment was rendered in favor of plaintiff for $530, the difference between such values.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is appellant's contention that the findings as to the false and fraudulent representations are not sustained by the evidence. There is evidence in the record that defendant assured plaintiff absolutely that the car shown to him was the 1907 car; that, in addition, he represented that there was no difference between the 1906 and 1907 models, except some change in the oiling system; that defendant assured him that the car exhibited was a 1907 model, and was the only car the company would put out in 1907; that the company had given him an advance shipment of 1907 machines, which was the reason why he had the 1907 models in store so early in the season. There is evidence tending to show that, as a matter of fact, the 1907 model of Elmore machine was a decided improvement upon the model of 1906, not only in the transmission, but in the axle, in the springs, the size of the wheel base, and the location of the clutch, as well as other material changes; that as a matter of fact an improved Elmore machine, model of 1907, was in process of construction at the factory on the date when the contract was made for the delivery of a car to plaintiff, and before delivery thereof to plaintiff such improved machines were constructed and upon exhibition, and at about that time were being sold by the Elmore people. It is further in evidence that defendant told a witness, who was familiar with the various types of machine, that he was selling the model 15 of 1906 to the trade in Los Angeles as a 1907 car, and the people here did not know the difference, and requested the witness not to say that he had seen the model of 1907 car; that he might get the later model after he had gotten rid of the model 15 of 1906. Accepting this testimony as true, which the trial court did, we are unable to see how the court could have found otherwise than as it did. There was ample evidence to justify the court in finding that the representations which induced the purchase were false, and known by defendant to be false when made.

It is next contended that, assuming the falsity of the representations, no material injury is shown to have resulted by reason thereof. Aside from the fact that one desiring to purchase an article is entitled to the precise thing which he contracts to buy, there is evidence tending to show that the model of a preceding year is not as valuable in the open market as the model containing the improvements of the succeeding year. While it may be true that the earnest desire of purchasers of automobiles to procure the very latest models, without particular reference to the character of the improvements, may be denominated as a fad, nevertheless one paying the money is entitled to gratify even a whim; and it very clearly appears from the record that, without reference to the differences between the models of various years, there is a marked difference in the market value between the models of the current and of a preceding year. It is true that the evidence as to the comparative values of the 1906 and 1907 cars is not of the most convincing character, yet there is sufficient as a basis for the finding made by the court, and it is not our duty to disturb such finding.

It is also contended that there is insufficient evidence to warrant the finding of the court that the car of plaintiff taken in exchange by defendant was of the value of $1,000. There is evidence in the record that the defendant, an expert motor-car man, examined the car which plaintiff proposed to trade him, saw its condition and manner of construction, and fixed the price at which he was willing to receive it in exchange. It further appears that no representation of any kind or character as to the value, construction, or condition of the machine was made by plaintiff at any time, but, on the contrary, that the machine was taken by defendant upon the faith of his own examination and at a value determined by himself. Considering the circumstances, the situation of the parties and their knowledge respectively in relation to the automobile business, we are not surprised that the court accepted as true plaintiff's testimony and fixed the value accordingly.

Numerous objections are urged as to the action of the court in the admission and exclusion of evidence during the progress of the trial. We find nothing in any of such exceptions indicating any prejudicial error, at least nothing which would warrant a reversal of the judgment. The record indicates to our mind that the judgment rendered in this case is a just one and should be affirmed.

Judgment and ordered affirmed.

We concur: SHAW, J.; JAMES, J.

14 Cal. App. 117

PEOPLE v. DAVIS. (Cr. 136.)

(Court of Appeal, Third District, California. Aug. 18, 1910.)

1. CRIMINAL LAW (§§ 763, 764*) — INSTRUCTIONS ON WEIGHT OF EVIDENCE.

The instruction that a witness willfully false in a material part of his testimony is to be distrusted in others is a correct statement of the law, not invading the constitutional sphere of the jury to pass on the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1764; Dec. Dig. §§ 763, 764.*]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS.

Though the court did not in its instruction give the usual statement that "the mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not of itself and standing alone, sufficient to justify a conviction," yet the statement "and the accused is bound to explain the possession," in the instruction that, if the stolen property was found in defendant's possession shortly after being taken, failure of defendant to account for such possession, or to show it was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, even if open to the construction, when standing alone, that, in order to be relieved of the effect of the possession of the property, defendant had to take the witness stand and explain such possession consistently with his innocence, cannot be given such meaning where the jury were also instructed that it is the right of defendant to introduce no evidence; that he is never required to introduce evidence for the purpose of establishing innocence; that he is not required to act as a witness in his own behalf, but may stand mute and demand that the people make the case against him beyond a reasonable doubt; and that his neglect or refusal to be a witness cannot in any way prejudice him, and no presumption can be indulged against him, because of his failure to testify in the case on any point in it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823.*]

3. CRIMINAL LAW (§§ 763, 764*) — INSTRUCTIONS ON WEIGHT OF EVIDENCE.

Modification of defendant's requested instruction that the circumstance of flight is not strong presumptive evidence of guilt, as no such presumption could arise from such fact as a matter of law, and that it is not sufficient alone to justify conviction by the addition that flight of a person immediately after the commission of an offense of which he is charged, is a circumstance to be weighed as tending in some degree to prove consciousness of guilt, and may be given such weight as the jury think it entitled to, in the light of all the facts and circumstances, does not make it erroneous as an instruction on the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748; Dec. Dig. §§ 763, 764.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Harry Davis was convicted of grand larceny, and appeals. Affirmed.

Carroll Cook, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant, having been convicted of the crime of grand larceny, complains on this appeal from the judgment on the judgment roll alone that the trial court gave to the jury three erroneous instructions, which seriously prejudiced his rights.

There is a preliminary objection by the Attorney General to the consideration of the record on this appeal based upon the ground that the defendant, against whom the judgment appealed from was pronounced after section 1239 of the Penal Code, as amended by the Legislature of 1909 (St. 1909, c. 711), went into effect, failed to take an appeal under the new method of taking appeals in criminal cases as prescribed by said amended section. The specific contention is, of course, that this court has not acquired jurisdiction to review the record and the points for a reversal made by the appellant. There is undoubtedly much force in this objection; but, as there appears to be little merit in the points urged by appellant for a reversal, and as the judgment was pronounced only a few days after the amended section went into effect, we shall not consider the objection against a review of the record.

There are three of the given instructions which the appellant asserts involve erroneous and prejudicial statements of what the court conceived to be the law applicable to his case. These we shall consider in the order in which counsel presents them in his brief.

1. "The court instructs you that a witness willfully false in a material part of his testimony is to be distrusted in others." The foregoing instruction has perhaps been given in every criminal case, where pertinent, that has been tried in this state for the past 30 years, and it simply means, in plain language, that, if the jury find that a witness has deliberately lied under oath with respect to some material fact in the case, they are from that fact alone justified in distrusting him in anything else he might have stated under oath of importance. A jury of just and intelligent men would do this whether they were told by the court to do so or not. But the specific objection made here to said instruction is that it instructs on the weight of evidence, and therefore invades the constitutional sphere of the jury and in this case has greatly prejudiced the accused. But a conclusive answer to this proposition is, if there were no other, that the Supreme Court in many cases has said that the instruction involves a correct statement of a principle of the law of evidence which it is not improper to declare to the jury. People v. Dobbins, 138 Cal. 694, 72 Pac. 339; People v. Tibbs, 143 Cal. 103, 76 Pac. 904; People v. Farrington, 140 Cal. 656, 74 Pac. 288. In the comparatively recent case of the People v. Grill, 151 Cal. 597, 91

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Pac. 517, the court says, speaking of this identical instruction: "That this is a principle of the law of evidence, and one of the rules by which the court or jury must be guided in the consideration of the weight of evidence, cannot be disputed, for it is made so by statute. Code Civ. Proc. § 2061. It has been repeatedly held by this court that the giving of such an instruction is not cause for a reversal, and we adhere to the precedents thus made"—citing a large number of cases.

2. The second instruction assailed by the appellant reads as follows: "If the jury believe from the evidence that the property mentioned in the information, or any portion thereof, was feloniously taken from the person of the prosecuting witness, John Nimmons, as described in the information, and was found in the possession of the defendant shortly after being so feloniously taken, the failure, if failure there be, of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, *and the accused is bound to explain the possession*, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose any." We have italicised the particular language contained in the foregoing instruction to which appellant objects. It is argued that by said instruction the court in effect stated to the jury that in order to be relieved from the effect of the possession of the property charged to have been stolen, the defendant was bound to take the witness stand and explain such possession consistently with his innocence. The instruction ordinarily given on the question of the possession of stolen property which is the subject of the crime charged usually contains a statement that "the mere possession of stolen property, unexplained by the defendant, however soon after the taking is not of itself and standing alone sufficient to justify a conviction," even though it be shown beyond a reasonable doubt that the crime charged was committed. The court in the case at bar did not embrace this statement within its charge upon the subject of the possession by the defendant of the property alleged to have been stolen, and we think it was a mistake not to do so. But with this omission we do not think that the jury could have given the instruction the interpretation to which it is subjected by counsel for appellant. The very same instruction has been given by trial courts and approved by the higher courts in many cases, although, as stated, generally in connection with an explanation that the circumstance of possession was not of itself of sufficient probative significance and weight to justify a conviction.

Counsel does not deny, nor could he do so, in view of a long line of decisions in this state approving such course, that the court has a right to say to a jury that possession of stolen property shortly after the same has been feloniously taken, while not sufficient, standing alone, to warrant a conviction, is a circumstance which unexplained may be considered by the jury as tending to establish guilt. The jury, if possessed of common intelligence, would know this whether the court told them so or not, and so it is true, of course, with regard to the criticised language in the instruction under review. But if, standing alone, the instruction might bear the interpretation that it was the duty of the defendant to take the witness stand and explain that he had obtained possession of the property honestly, if he would avoid the damaging effect of the circumstance unexplained, it certainly could not be given any such meaning when considered, as presumptively it was, with the instructions given on the presumption of innocence, on the degree of proof required to justify a conviction and on the right of the defendant to refuse to become a witness in his own behalf without prejudice to himself, if he so chose. The court explicitly instructed the jury that "it is the right of the defendant to introduce no evidence," and that "he is never required to introduce evidence for the purpose of establishing innocence"; that "he is not required to act as a witness in his own behalf," but may "stand mute and demand that the people make the case against him beyond a reasonable doubt"; that "his neglect or refusal to be a witness cannot in any way prejudice him, and no presumption can be indulged against him, by reason of his failure to testify in the case, upon any point in the case." Considered in connection with these instructions, the natural and the rational understanding which a jury of intelligent men would receive of the criticised instruction is, as before stated, that where there is no explanation showing the possession of stolen property immediately or shortly after it has been feloniously taken to have been innocent or that such possession is devoid of criminality, the circumstance of such possession may be considered as indicative of guilt. We can perceive little, if any, material difference between the language, "the accused is bound to explain the possession," and the language most generally used and often approved in instructions upon the question of possession of stolen property, that "the circumstance of such possession, unexplained by the defendant, may, with other inculpatory circumstances, be considered by the jury in determining the question of the guilt or innocence of the defendant." By this language it is distinctly declared that, if such circumstance is not accounted for compatibly with innocence, it may be regarded as a fact tending to establish guilt, and manifestly this is only putting in another form of words the declaration contained in the challenged instruction that "the accused is bound to explain the possession."

3. The court at the request of the defendant instructed the jury that the circumstance of flight "is not strong presumptive evidence of guilt, as no such presumption could arise from such fact as a matter of law," and that "it is not sufficient alone to justify a jury in convicting a defendant." To this instruction the court added the following: "But the flight of a person immediately after the commission of an offense with which he is charged is a circumstance to be weighed by the jury as tending in some degree to prove consciousness of guilt, and is entitled to more or less weight according to the circumstances of the particular case. Evidence of flight is received, not as a part of the res gestæ, but as some evidence indicative of a guilty mind. The flight of a person immediately after the commission of the offense charged against him and an attempt to escape and avoid arrest are circumstances to be weighed by a jury as tending in some degree to prove a consciousness of guilt, together with all the other circumstances of the case, if any there be. You are to give it, if proved, such weight as you think it entitled to in the light of all the facts and circumstances of the case." The objection to the foregoing language is that it involves an instruction upon the weight of evidence, and is therefore erroneous. But substantially the same instruction has often been given in this state, and while it has been criticised, and justly so, we think (People v. Lem Deo, 132 Cal. 202, 64 Pac. 265) it has never been regarded sufficient cause for a reversal.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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14 Cal. App. 102

PEOPLE v. SEIFERT. (Cr. 235.)

(Court of Appeal, First District, California. Aug. 17, 1910.)

1. Criminal Law (§ 1130*)—Review—Variance Between Commitment and Information.

If the information charges a different offense from that for which accused was committed for trial, the variance should be pointed out in his brief, and called to the court's attention.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965–2970; Dec. Dig. § 1130.*]

2. Indictment and Information (§ 122*)—Information—Conformity to Commitment.

Under the provision of the Penal Code (section 956) that an accusation for a private injury sufficiently described to identify the act shall not be affected by erroneous allegation as to the person injured, that an information for delivering a fraudulent check charges that accused intended to defraud persons other than him named by the committing magistrate, if it charges intent to defraud that person, is not a material variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 323; Dec. Dig. § 122.*]

3. Bills and Notes (§ 176*)—Checks—Indorsements—Nature.

An indorsement on a check is no part of it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 422; Dec. Dig. § 176.*]

4. Bills and Notes (§ 527*)—Checks—Payment—Evidence.

That a check bears the payee's indorsement does not show payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847–1855; Dec. Dig. § 527.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

C. A. Seifert was convicted of delivering a fraudulent check, and he appeals. Affirmed.

Philip C. Boardman and Joseph W. Boardman, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

COOPER, P. J. The defendant was charged in the information with the crime of unlawfully and feloniously drawing and delivering to one Louie Joe a certain draft or check for the payment of money, to wit, $103, said check being drawn upon the bank of E. Cooke Smith, with intent to defraud said Louie Joe and others named in the information, without having funds or credit with the said bank with which to meet said draft, contrary to the statute in such case made and provided. The jury returned a verdict finding defendant guilty as charged, and he prosecutes this appeal from the judgment and order denying his motion for a new trial, and also from an order denying his motion in arrest of judgment.

The first point urged in his brief is that the court erred in denying his motion to set aside the information. We are told in the brief that the court should have set aside the information for the reason that it does not describe the same identical offense as that set forth in the order of commitment made by the committing magistrate. It is said that the courts have universally held that the district attorney has no power to charge the defendant in the information with any other or different crime than the one for which he has been held to answer by the magistrate. But the brief is entirely silent as to the material question of the difference between the information and the order made by the magistrate as to the offense. If the information charges a different offense from that for which defendant was held to answer, the appellant's counsel in their brief should have pointed out wherein they differ, and the court's attention should have been called to the variance. We are, however, referred in the brief to the folios of the transcript wherein may be found the order made by the committing magistrate and the information. By looking at the transcript at the places pointed out, and comparing the information with the order made by the magistrate, we find that both the order and the information describe the same check or draft, giving a copy of it, the bank on which it was drawn, the date, the person to whom it was delivered, with a statement that defendant had no funds in the bank on which it was drawn. The only difference that we perceive is that the committing magistrate held the defendant for having delivered the draft with the intent to defraud one Louie Joe, while the information charges that the draft was delivered with the intent to defraud Louie Joe, Louie Fat, Louie Shung, Louie Hung, and Louie See. Nevertheless the information charges that the draft was made and delivered with intent to defraud Louie Joe. It matters not that the allegation in the information charges that the defendant intended to defraud other persons than the person named by the committing magistrate so long as it charges the intent to defraud the person named by the committing magistrate.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The Penal Code provides: "When an offense involves the commission of or attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material." Pen. Code, § 956. It was held under this section in People v. Smith, 112 Cal. 333, 44 Pac. 663, that, where the committing magistrate held the defendant for stealing a steer "belonging to and owned by the estate of W. C. Elledge, deceased," the information was good, although it recited that the steer was "owned by Joseph Elledge and Mrs. M. J. Elledge, as executor and executrix of the estate of W. C. Elledge, deceased." So, where a defendant was charged by information for arson with burning a barn belonging to one Charlie Quong, it was held that the ownership of the barn was immaterial so long as the evidence identified the barn as being the barn described in the information. People v. Davis, 135 Cal. 162, 67 Pac. 59. In People v. Price, 143 Cal. 351, 77 Pac. 73, the complaint before the magistrate in a prosecution for burglary described the building entered as, "that certain building situate at No. 1247 Fresno street in the city of Fresno," and the information described it as "that certain house, room, store, dwelling, and apartment of Charles C., situate at the corner of Fresno and C streets, and designated by the number of 1247 Fresno street in the city of Fresno." It was held that there was no variance as the same house was referred to by the committing magistrate and by the district attorney.

In the case at bar, the defendant was told by the information of the acts with which he was charged and which it was claimed constituted a crime, and they are the same acts which were set forth in the complaint before the committing magistrate. This gave the defendant fair notice of what he was to meet, and was all that the statute requires. It is not for the defendant to claim that he shall perchance go free because the committing magistrate did not know that besides Louie Joe he had other persons in mind at the time he delivered the draft. The material question was defendant's intention to defraud; and we are not required to pause and speculate as to the particular person he had in mind and whom he intended to wrong. His intention was to get money on the draft, and by issuing it and negotiating it the injury or wrong was perpetrated upon every person, man, woman or child who had any interest, present or contingent, in the money he wrongfully obtained by so negotiating the draft.

The court properly denied the motion for a new trial and the motion in arrest of judgment. The evidence is sufficient to sustain the verdict, and, as has been already shown, there was no variance between the proof and the information.

The indorsement on the draft is no part of it. Such indorsement was evidently made by the payee before it was presented to the bank for payment. We cannot conclude that the draft was paid simply because it contains the indorsement of the payee, which evidently was made on the back of the draft.

The judgment and orders are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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14 Cal. App. 106

PEOPLE v. SCHULTZ. (Cr. 242.)

(Court of Appeal, First District, California. Aug. 17, 1910. Rehearing Denied by Supreme Court Oct. 15, 1910.)

1. CRIMINAL LAW (§ 1105*)—REVIEW—PREREQUISITES.

Before proceedings in a criminal trial can be reviewed on appeal, they must be authenticated as required by law or the rules of the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2887–2889; Dec. Dig. § 1105.*]

2. CRIMINAL LAW (§ 1092*)—BILLS OF EXCEPTIONS—SETTLEMENT—METHOD.

Under the express terms of Supreme Court rule 36, a bill of exceptions pending for settlement when Pen. Code, §§ 1170–1175, 1177, were repealed, should have been settled according to those sections, and not according to the repealing act of April 22, 1909 (St. 1909, c. 709), which did not take effect until 60 days afterward.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 1105*) — TRANSCRIPT — CERTIFICATION.

Pen. Code, § 1247, requiring the transcript of the reporter's notes to be certified by him under oath to be correct, requires him to make oath to the correctness of his transcript.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1105.*]

4. Criminal Law (§ 1121*)—Record on Appeal—Sufficiency.

Sufficiency of the evidence to sustain a conviction cannot be reviewed where the evidence is not contained in a bill of exceptions settled as prescribed by Supreme Court rule 36, nor set forth in a transcript certified or prepared according to Pen. Code, §§ 1247, 1247a, where proceedings for appeal were pending April 22, 1909, when Pen. Code, §§ 1170–1175, 1177, were repealed (St. 1909, c. 709).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. § 1121.*]

5. Criminal Law (§ 1088*) — Review — Instructions.

Instructions neither indorsed nor certified, as required by section 1176, Pen. Code, nor contained in any settled bill of exceptions, are no part of the record on appeal, and cannot be considered by the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2797; Dec. Dig. § 1088.*]

6. Criminal Law (§ 1105*)—Record—Statutory Provisions.

Pen. Code, § 1246, as amended in 1909 (St. 1909, c. 711), requiring the trial clerk to send a copy of instructions given, refused, and modified, must be read in connection with section 1176, requiring the judge to indorse his action on written instructions, and to certify to the correctness of the transcript of the oral charge.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1105.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Louis Schultz was convicted of robbery and previous convictions, and he appeals. Affirmed.

Spagnoli & Spagnoli, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. The defendant was charged by information with the crime of robbery, and with having, prior to the commission of said crime, suffered two convictions of the crime of burglary. On his arraignment he admitted the charge of prior convictions to be true, but pleaded not guilty to the charge of robbery. The jury, however, found him guilty of robbery as charged, and he has appealed to this court both from the judgment and the order denying his motion for a new trial.

The only points made for a reversal are insufficiency of the evidence to support the verdict, and the alleged error of the court in giving a certain instruction as to what constitutes the crime of robbery The evidence for the people contained in the transcript shows without contradiction (the defendant introduced no evidence) that on the 21st day of December, 1908, defendant entered the jewelry store of the prosecutor, Sig Hurtig, and, under the pretense of wishing to explain to Hurtig how defendant wanted a diamond transferred to a pendant attached to a necklace, induced Hurtig to hand to defendant a diamond ring from the stock of the jeweler. That while Hurtig and defendant were standing on opposite sides of the counter or show case, and while defendant was explaining how he wished the diamond transferred to the pendant, and while he, defendant, held the diamond ring in his left hand, defendant suddenly raised an iron bar with his right hand, and struck Hurtig over the head with the bar. Hurtig at the same moment snatched the ring from the hand of defendant, and thus recovered it. The charge against defendant was for the taking of said ring.

The contention of appellant is that the facts above set forth do not prove the commission of the crime of robbery. The Attorney General insists that upon the record before us we are precluded from considering this point. After a careful examination of the record before us, we are of the opinion that the evidence contained in the transcript is not authenticated in such a manner as to constitute a legal record, and that for such reason we cannot consider it. It has been repeatedly decided in this state that, before the proceedings of the trial court can be reviewed by the appellate court, such proceedings must be authenticated in the manner prescribed by law or the rules of the appellate court. People v. Martin, 32 Cal. 91; People v. Ferguson, 34 Cal. 309; People v. Armstrong, 44 Cal. 326; People v. Long, 121 Cal. 495, 53 Pac. 1097; People v. Terrill, 131 Cal. 112, 63 Pac. 141. The case at bar was tried in February, 1909, and judgment rendered on the 23d day of said month. The notice of appeal was filed the next day. As the law then stood, the defendant could have proceeded to procure the settlement of a bill of exceptions by the judge of the trial court in accordance with sections 1170, 1171, 1172, 1173, 1174, 1175, 1177, Pen. Code. These sections were, however repealed by an act which went into effect April 22, 1909 (St. 1909, p. 1083), but the acts passed the same day, providing a new method of appeal and making up the record on appeal, did not go into effect until 60 days later. To meet this situation the Supreme Court early in May, 1909, adopted a rule (xxxvi) providing that, "in any criminal case in which proceedings for the settlement of a bill of exceptions were pending at the time of the repeal of sections 1170, 1171, 1172, 1173, 1174, 1175, and 1177 of the Penal Code, such bill may be prepared, settled and filed in the manner prescribed, and within the times allowed, in those sections." Under this rule appellant could and should have procured the settlement of his bill of exceptions in accordance with the method prescribed in said repealed sections; for, unless he had already lost the right to have a bill of exceptions settled, such proceedings were pending when said sections were repealed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant, however, did not follow the method prescribed by the rule of court, but on October 5, 1909, filed a stipulation, signed by his attorneys and the district attorney, and ratified by the judge of the trial court, to the effect that the "whole of the record" in this action "may be sent to the District Court of Appeal, said record to contain copies of the whole of the stenographic notes and testimony taken down at said trial." Following this stipulation there is printed in the transcript testimony and other matters. This, however, is not settled or approved as a bill of exceptions by the judge of the trial court in the manner required by the law as it existed at the time of taking the appeal and as authorized by the rule of court above quoted. The only certificate of the judge of the trial court to this transcript of the proceedings is one "that no objections to the within transcript of proceedings have been made either by the defendant or his attorney, or the district attorney, within the time prescribed by law, or at all." So far as the form of the certificate of the judge is concerned, it seems to conform to the law (section 1247a, Pen. Code, passed April 22, 1909). But this law did not govern, and could have no application to, the proceedings for the settlement of a bill of exceptions upon an appeal taken four months before it went into effect. Section 1247, Pen. Code, prescribes the time, after taking the appeal, within which the defendant may make his application for the transcription of the reporter's notes of the proceedings. More than this period of time had long since expired before the passing or taking effect of section 1247, Pen. Code, and again and again expired after the taking effect of said section and before defendant took any steps toward procuring a transcript of the reporter's notes. Furthermore section 1247, Pen. Code, requires that the transcript of the reporter's notes "shall be duly certified by him under oath to be correct." We understand this to mean that he must make oath to the correctness of his transcript. The reporter's certificate in this case is not under oath; that is to say, he has not made oath to the correctness of his transcript. Even if appellant was entitled to adopt the method prescribed by sections 1247, and 1247a, Pen. Code, for bringing to this court the evidence in the case, which we do not believe, he has not complied with the provisions of said sections.

The evidence is neither contained in a bill of exceptions settled by the judge as prescribed by the rules of the Supreme Court, nor is it set forth in a transcript certified or prepared in accordance with sections 1247 and 1247a of the Penal Code. There is therefore no legal record before this court containing the evidence, and we therefore cannot consider the question as to the sufficiency of the evidence to support the verdict.

For similar reasons, the question attempted to be presented in regard to the instruction cannot be considered. The instruction is not contained in any bill of exceptions settled or approved by the trial judge, and is not indorsed or certified by the judge as required by section 1176 of the Penal Code. It is simply contained in the transcript of the reporter's notes, but without any indorsement or certificate as to its correctness by the judge of the trial court. Instructions neither indorsed nor certified as required by section 1176, Pen. Code, nor contained in any settled bill of exceptions, constitute no part of the record on appeal, and cannot be considered by the appellate court. People v. January, 77 Cal. 179, 19 Pac. 258; People v. Cole, 127 Cal. 546, 59 Pac. 984; Walker v. Superior Court (concurring opinion of Justices Angellotti and Shaw), 139 Cal. 110, 72 Pac. 829; People v. Ludwig, 118 Cal. 328, 50 Pac. 426; People v. Clark, 106 Cal. 32, 36, 39 Pac. 53; People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; People v. Clark, 84 Cal. 574, 24 Pac. 313. This was certainly the law when this appeal was taken, as is abundantly established by the cases just cited, and, even if it could be held that the record on this appeal should be governed by the law as amended by the acts of April 22, 1909, we find nothing in such acts changing or modifying the provisions of sections 1176, which requires the judges to indorse upon the written charges requested his action thereon, and to certify to the correctness of the reporter's transcript of the oral charge. For while section 1246, Pen. Code, as amended in 1909 (St. 1909, c. 711), directs the clerk to send to the appellate court, among other papers, "a copy of the written charges given by the court to the jury, or refused, or modified and given, also a transcript of the oral charge," such section must be read in connection with the provisions of section 1176, Pen. Code, which requires the judge to indorse his action on the written charges, and to certify to the correctness of the transcript of the oral charge, "and thereupon the same, with the indorsements, become a part of the record, and any error in the action of the court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions." The indorsements of the judge must appear upon the copy of the charges, for in no other way can it be known what instructions were given or refused.

As neither the instruction complained of nor the evidence is contained in any legal record before us, we are precluded from considering the points relied on by the appellant, and the judgment and order must be affirmed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

14 Cal. App. 148

PEOPLE v. McCARTHY. (Cr. 172.)

(Court of Appeal, Second District, California. Aug. 20, 1910.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—CONFINEMENT BEFORE OFFENSE.

While ordinarily evidence of confinement in jail before committing an offense is inadmissible, the people could show that one accused of robbery, on whose person money was afterwards found, was confined just before committing the offense, to show his previous penniless condition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE RELATING TO OTHER OFFENSES—ADMISSIBILITY.

Evidence relating to a previous offense is admissible to prove any material fact, though tending to prejudice accused in the jurors' minds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 1170½*) — VOLUNTARY TESTIMONY—EFFECT.

Accused cannot complain of voluntary testimony of a state's witness not responsive to a question, where it was stricken on the prosecuting attorney's motion, and the jury instructed to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

4. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—CONDUCT OF PROSECUTING ATTORNEY.

Attempt by the prosecution to show that a previous confinement in jail was under a commitment was harmless error, where evidence of the confinement was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

5. WITNESSES (§ 37*)—REPUTATION FOR TRUTH — QUALIFICATIONS OF IMPEACHING WITNESSES.

Witnesses who finally stated that they were acquainted with accused's general reputation in the community for truth, honesty and integrity were qualified to testify thereto, though they were not shown to have had a very intimate acquaintance with him, and they did not understand without considerable explanation what was meant by "character," "reputation," or "acquaintance."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 84; Dec. Dig. § 37.*]

6. WITNESSES (§ 37*) — REPUTATION FOR TRUTH — QUALIFICATIONS OF IMPEACHING WITNESSES.

To qualify one to testify to another's reputation in the community for truth and honesty, it is sufficient that he be acquainted with the prevailing impression in the community as disclosed by actions, conduct, or conversations relating to the character in issue, but it is not necessary that the witness testifying should know that a majority of the community have that impression.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 84; Dec. Dig. § 37.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

J. McCarthy was convicted of robbery, and he appeals. Affirmed.

Carpenter & Gibbons, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant and appellant was convicted of the crime of robbery, and from the judgment and an order denying a motion for a new trial he appeals.

The record discloses that on the 21st of January, 1910, the prosecuting witness was brutally assaulted and robbed, and that beyond peradventure defendant was guilty of the crime. It is sought to have the judgment reversed on account of technical matters connected with the trial; the most prominent being a claim that the court erred in admitting testimony tending to show that defendant had been incarcerated in the jail of San Luis Obispo county before commission of the robbery. Were this character of evidence disconnected with that tending to show guilt of the offense charged, the error would be apparent (People v. Derbert, 138 Cal. 470, 71 Pac. 564); but it is obvious that the object and purpose of the district attorney in proffering and making this proof was to show that defendant on the morning of the robbery, and within a few hours before the same was committed, was penniless. This was material and important, in view of the fact that upon his arrest in the evening of the same day defendant was found in possession of wearing apparel recently purchased, and a sum of money secreted in one of his socks. The proof of his incarceration, therefore, was relative to the issue being tried. As said by our Supreme Court, speaking through Chief Justice Beatty, in People v. Walters, 98 Cal. 141, 32 Pac. 865: "Whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion." We can see no reason why this rule as applicable to proof of independent substantive crime should not be equally so when the evidence merely tends to show confinement in the jail, which may or may not have been on account of previous criminal conduct, and when such confinement and the circumstances connected therewith, including the search of defendant's person at the time of incarceration and condition at the time of discharge, all tend to show facts proper and competent as aiding the jury in arriving at a proper verdict. We see no misconduct on the part of the district attorney in offering this proof, nor on the part of the court in its admission, considering its bearing upon the issue being tried.

Objection is made to the testimony of one Walsh with reference to confinement in jail at times other than the one immediately preceding defendant's discharge on the day of the robbery. This evidence of Walsh, however, was voluntary in its character, was not responsive to the question asked, and the district attorney asked to have it stricken out and the court ordered it stricken out and directed the jury to pay no attention to it, and the question propounded by the district attorney to the witness which elicited the objectionable testimony cannot be said to have been for an apparently improper object or purpose, and cannot be classed with the conduct of the district attorney in the case of People v. Grider, 110 Pac. 586, nor with that criticised in People v. Wells, 100 Cal. 459, 34 Pac. 1078.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We see no misconduct so prejudicial as to entitle defendant to reversal by reason of the attempt of the district attorney to show that when defendant was incarcerated in jail on the 12th of January, 1910, the same was by virtue of a commitment regularly issued. The court declined to admit the evidence, and properly so. If, however, as we are of opinion, his actual confinement under the circumstances was proper to be shown, no prejudice could have resulted by the tender of proof showing his incarceration under a commitment. Such proof was not necessary as establishing the main fact sought to be established, namely, that he was without money, yet certainly the mere tender of such proof could not prejudice the defendant.

It is finally claimed that the court erred in admitting the testimony of witnesses Guzzi, Kieran, and Barcellas, who were called by the prosecution in rebuttal to impeach and discredit the testimony of defendant by showing that his reputation for truth, honesty, and integrity was bad; it being claimed by appellant that sufficient foundation was not laid to warrant the admission of the evidence given by these witnesses. It is true that they were not shown to have had a very extended and intimate acquaintance with defendant, and that the witnesses did not understand without considerable explanation what was meant by the term "character" or "reputation," or even the word "acquaintance," but each of them finally stated that he was acquainted with defendant's general reputation in the community for truth, honesty, and integrity. It is sufficient that witnesses "be acquainted with the prevailing impression in the community, as disclosed by actions, conduct or conversations relating to the character in issue, although it is not necessary that the witness testifying should know that the majority of the community have that impression." People v. Cord (Sup.) 108 Pac. 511. The trial court in the exercise of its discretion determined that the witnesses had sufficient knowledge of the facts to entitle them to answer, and we find from their answers that the court did not abuse its discretion in admitting such testimony, the weight, and credibility whereof was a matter for the jury.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

14 Cal. App. 39

BRANDT v. KROGH et al. (Civ. 740.)

(Court of Appeal, Third District, California. Aug. 8, 1910. Rehearing Denied by Supreme Court Oct. 7, 1910.)

1. Witnesses (§ 317*)—Credibility.

The rule, false in one thing, false in everything, only means that, where a witness has sworn falsely in a material part of his testimony, his entire testimony may for that reason be rejected, but the jury or the judge trying the facts may believe other parts of the testimony of such witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080–1083; Dec. Dig. § 317.*]

2. Appeal and Error (§ 994*)—Findings—Conclusiveness.

The rule that, where a witness has sworn falsely in a material part of his testimony, his entire testimony may be disregarded, cannot be invoked on appeal, for the weight of the testimony and the credibility of the witnesses is not open for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

3. Appeal and Error (§ 994*)—Findings—Conclusiveness.

A finding based largely on the testimony of a party is conclusive on appeal, notwithstanding contradictory statements therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

4. Fraud (§ 11*)—Actionable Fraud.

Fraudulent representations cannot be predicated on a mere expression of opinion, however erroneous it may be or positively stated.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

5. Fraud (§ 11*)—Actionable Fraud.

A party inducing another to contract in reliance on estimates or opinions professedly based on alleged facts known to the party stating them to be nonexistent is liable therefor as against the objection that he was merely declaring his opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

6. Fraud (§ 58*)—Sale of Stock.

Evidence *held* to show that misrepresentations inducing a purchaser to purchase corporate stock were based on alleged facts known to the party making the representations to be nonexistent, so that he was liable therefor as against the objection that he merely declared his opinion.

[Ed. Note.—For other cases, see Fraud, Cent Dig. §§ 55, 56; Dec. Dig. § 58.*]

7. Contracts (§ 94*)—Detection of Fraud—Diligence.

One who seeks on the ground of misrepresentation and fraud restoration of the consideration which supported an executed contract cannot prevail where he could, by ordinary prudence, have detected the fraud, or have ascertained the facts which would have disclosed the fraud.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–425; Dec. Dig. § 94.*]

8. Fraud (§ 23*)—Sale of Stock—Fraudulent Representations—Reliance.

A buyer of stock of a corporation owning oil lands alleged fraudulent representations inducing the purchase. The lands and the business of the corporation were situated and managed in other counties than the one in which the buyer resided, and where the representations and the contract were made. The buyer was not an expert in oil lands or in the oil development business. The person making the representations was an oil land promoter, and had been engaged in the oil land business for a long time, and he made the buyer believe that he possessed perfect knowledge of the business in general and of the business and prospects of the corporation in particular. *Held*, that the buyer could rely on the representations, and could sue for the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.*]

9. Specific Performance (§ 53*)—Contracts—Fraud.

Equity will under no circumstances enforce or permit to be enforced the terms of a contract founded in fraud, though there existed and were accessible to the party defrauded the means and opportunity to detect the fraud by the exercise of ordinary prudence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160–171½; Dec. Dig. § 53.*]

10. Contracts (§ 94*)—Fraud.

A defendant in an action at law, who, by the interposition of an equitable defense and by a cross-complaint, brings plaintiff within the cognizance of the equity side of the court, and who, by appropriate allegations, asks relief from the consequences of an alleged fraudulent executory contract, is entitled to relief in equity, though there existed and were accessible to him the means of detecting the fraud by ordinary prudence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430; Dec. Dig. § 94.*]

11. Evidence (§ 266*) — Declarations — Effect.

Declarations of a party can bind no one but himself unless they are made in his capacity as an agent of another and are within the scope of his authority as agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1051; Dec. Dig. § 266.*]

12. Principal and Agent (§ 92*)—Contracts of Agent—Liability.

A party dealing with an agent, who is acting within the scope of his employment, is considered as dealing with the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 245, 246, 250–253; Dec. Dig. § 92.*]

13. Principal and Agent (§ 115*) — Contracts of Agent—Liability.

Where an agent at the time of the making of a contract with another makes any representation or admission, whether true or false, touching the matter of the contract, it is treated as the representation, or admission of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 339–343; Dec. Dig. § 115.*]

14. Principal and Agent (§ 23*)—Existence of Relation—Evidence.

Evidence *held* to show that a person making fraudulent representations inducing a purchase of corporate stock was the agent of the seller.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

15. Trial (§ 90*)—Evidence—Objections.

Where the direct testimony of a witness appeared to be material, relevant, and competent, and the immateriality, irrelevancy, and incompetency were disclosed on cross-examination, the cross-examiner must, to avail himself of the objections to the evidence, move to strike it out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 235, 237, 241; Dec. Dig. § 90.*]

16. Appeal and Error (§ 1051*)—Erroneous Admission of Evidence—Harmless Error.

Any error in permitting proof of a fact on cross-examination is harmless where the fact was subsequently shown by proper evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

17. Pleading (§ 129*) — Cross-Complaint — Admissions.

A fact alleged in a cross-complaint is admitted by a failure to deny it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270–275; Dec. Dig. § 129.*]

18. Appeal and Error (§ 1056*)—Harmless Error — Erroneous Exclusion of Evidence.

Where, in an action for inducing the purchase of stock of an oil corporation by fraudulent representations that the value of the stock would reach a specified sum per share within a specified time, the party charged with the fraud made no attempt to show that there were oil indications on the lands to any significant extent, any error in excluding evidence as to how close to the property of the oil company he had discovered oil indications was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

19. New Trial (§ 105*)—Newly Discovered Evidence—Impeaching Evidence.

A new trial will not be granted for newly discovered evidence, the purpose of which is only to impeach a witness of the adverse party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 221–223, 229; Dec. Dig. § 105.*]

20. New Trial (§ 102*)—Newly Discovered Evidence—Diligence.

An affidavit for new trial for newly discovered evidence, consisting of letters, which shows that one of the moving party's own witnesses had access to the letters, and had turned one of them over to one of the attorneys, and that a discovery of the other letters was made after a thorough search after trial, was insufficient to justify the granting of a new trial for want of a showing of diligence to procure the evidence before the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210–214; Dec. Dig. § 102.*]

21. New Trial (§ 82*)—"Surprise."

The word "surprise" in the statute authorizing a new trial on the ground of surprise denotes some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 167; Dec. Dig. § 82.*

For other definitions, see Words and Phrases, vol. 8, pp. 6818, 6819.]

22. New Trial (§ 98*)—Surprise.

A party moving for a new trial on the ground of surprise must not only show surprise, but injury resulting to him therefrom, and this can be done only by showing that he could establish an entirely different case favorable to himself in the event of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 199, 200; Dec. Dig. § 98.*]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by C. H. W. Brandt against J. C. Krogh and another. From a judgment for defendant Krogh on his counterclaim, and for the cancellation of the instrument sued on, plaintiff appeals. Affirmed.

R. C. Minor and C. W. Miller, for appellant. Cartwright & Cashin, for respondent.

HART, J. Brandt brought this action to recover on a promissory note for the sum of $3,750 which was executed in his favor by Krogh and Abrams on the 22d day of October, 1904, at the city of Stockton. Said note called for interest at the rate of 7 per cent. per annum, and it is alleged that on the 24th day of January, 1906, the sum of $596.95 was paid on account of said note, leaving a balance due thereon of $3,524.90, for which, with interest from said 24th day of January, 1906, judgment is asked. The defendant Abrams failed to answer the complaint, and therefore as to him judgment by default was entered.

The defendant Krogh in due time filed an answer in which he made specific denial of the essential averments of the complaint, and, in addition, set up a counterclaim for the sum of $5,000, and, besides, filed a cross-complaint, in which he charged that the note declared upon, as well as another note for a like amount executed by him and Abrams at the same time and in favor of plaintiff, were procured by and through misrepresentation and fraud practiced upon him by the defendant Abrams. The court found in favor of Krogh on the counterclaim, and further found that the charge of fraud and misrepresentation in the procurement of the notes as set forth in the cross-complaint was proved by the evidence. Krogh was accordingly given judgment for the sum of $5,000 and for the cancellation of the note upon which this action is founded; he having alleged his willingness and readiness and an offer to transfer, deliver, and restore to plaintiff the shares of stock, for part payment of which said note was given, and having indorsed and tendered said stock to plaintiff and filed the same in court as a "continuing tender." This appeal is by the plaintiff from the judgment and the order denying his motion for a new trial.

Among the grounds upon which the motion for a new trial was pressed are: (1) "Surprise during the trial of said action which ordinary prudence could not have guarded against." (2) "Newly discovered evidence material to the plaintiff which he could not with reasonable diligence have discovered and produced at the trial."

The findings are impeached for alleged insufficiency of the evidence to support them, and it is further charged that the court made a number of erroneous rulings at the trial which were prejudicial to plaintiff.

1. The findings are sufficiently sustained by the evidence. The facts as educed from the evidence and found by the court are substantially these: In the month of July, 1904, the defendant L. J. Abrams was a stockholder and manager of a concern known as the "Ashurst Oil Land & Development Company," a corporation which was then engaged in the business of working and developing oil lands, situated in the county of San Benito. In said month of July Abrams became acquainted with Krogh at the latter's residence in the city of Fresno. On that occasion, Abrams, evidently with the purpose of selling Krogh certain shares of stock in said corporation, proceeded to give Krogh a glowing account of the corporation's oil land holdings and of the flattering prospects foreshadowed by the alleged existing conditions on said properties. On the occasion now alluded to Krogh bought 250 shares of the corporation's stock. The character of the representations made by Abrams to Krogh with reference to the corporation's properties may best be told in the language of Krogh himself, who testified, in part, as follows: "At that time he got to talking about the Ashurst Company, how good it was, the number of wells, the number of acres they had, and stated they owned 900 acres of land, and had 1,500 acres of land on a 20-year lease, altogether 2,400 acres the company owned. He said the company had on hand anywhere from $70,000 to $75,000 in the treasury; that they had three wells, one was down 600 or 700 feet, one 800 or 900 feet, one of the wells flowed water, and it was of great value over there because water was scarce; that one of the wells was down 1,800 or 1,900 feet and it flowed oil, but that they intended to go down 2,400 feet and get an extra good well, and that they kept it capped for the purpose of buying up the surrounding land before any one found that oil was there. They kept the well capped for the purpose of keeping people from discovering they had oil. I was at home when these representations were made. Mrs. Krogh was also present. Mr. Webb was there, too. I don't think such a great deal was said when he was there. He didn't stay very long. I saw Mr. Abrams frequently after that; several times a week, sometimes several times a day. I met him afterwards when he came to sell me the 10,000 shares of stock belonging to Mr. Brandt. These statements he made to me were in July, 1904."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The conversation between Abrams and Krogh in the month of July was in the presence and hearing of Mrs. Krogh. In the month of September, 1904, Abrams represented to Krogh that Brandt was the administrator of the estate of his father-in-law, one Bachman, and that said estate had some 10,000 shares of stock in the corporation which was for sale. "At that time," continued Krogh, "he (Abrams) made representations to me about the condition of the company, and the acreage they owned, and the value of the stock. He stated that they couldn't buy any of the company's stock for $1.50 a share; that they had none for sale; he had sold all they wanted to, and had plenty of money to develop it, and that this was the only stock that could be had. At that time he stated, as he did before, the number of wells that was on it. One of the wells was capped for the purpose of buying up all the surrounding country, and that well flowed oil, but they wanted a better well so was going down deeper. I should say that I talked with him several hours at that time. He was talking all of that time about the oil business, telling me how good it was, etc. He told me at that time that the company owned 900 acres and 1,500 acres on a 20-year lease. He said that oil was high grade 32 gravity oil. He said he had a good flowing well, but that they wanted to make a better well. He spoke of the other wells, said one was a water well, and was of great value because water was a scarce article there. The other well he didn't say much about because it was shallow. They did not get oil there and did not get water. I surely did believe the statement of Mr. Abrams. Couldn't do anything else. I did subsequently buy these 10,000 shares of stock. I bought it because Mr. Abrams claimed it was a good thing, going to make me a lot of money, and did not have to be paid for until it was developed and had two or three years to pay for it, and he claimed inside of six months be worth $60 a share, because they were going to push the thing right through. He said: 'You can sell enough of the stock to pay Mr. Brandt or keep the whole thing if you feel like you can afford it.'" Krogh purchased the 10,000 shares at 75 cents per share, and gave therefor two promissory notes for $3,750 each, said notes having been indorsed, as security for their payment, by Abrams, who represented to Krogh that Brandt was willing to accept the notes upon condition that Abrams would so indorse them. Mrs. Krogh's testimony was corroborative of the testimony of her husband as to the representations made by Abrams at the first conversation held at Krogh's residence.

Brandt, testifying in his own behalf, stated on cross-examination that the shares of stock sold by Abrams to Krogh belonged to the directors of the corporation, and not to the estate of Bachman, deceased. He further stated that it was agreed among the directors that said 10,000 shares should be sold by Abrams for not less than 50 cents per share, which was the amount which he had paid for said stock, and that the proceeds should be devoted to the extinguishment of a note which he and the other directors had given the San Joaquin Valley Bank for the sum of $5,000, upon which there were credits reducing the amount to $4,500, said amount having thus been procured by the directors for the purpose of liquidating "the indebtedness of the Ashurst Oil Company." In this connection it may be explained that Brandt himself paid said note at the bank, on an agreement with the other directors that 10,000 shares of stock should be turned over to him, and that by the sale of the same he could thus be reimbursed for the sum paid by him to extinguish their obligation at the bank. This agreement was carried out and Brandt thereby secured the stock sold by Abrams to Krogh.

O. B. Parkinson, who was secretary of the corporation from its organization to the first of December, 1905, testified that during his said connection with it the corporation had no fee-simple title to any land; that all the lands it had ever had possession of and proposed to develop were leased; that he did not think that the corporation at any time had possession of or under lease as much as 1,500 acres of land. He declared that there was no oil found in any of the wells which were sunk by the corporation on its leased lands. He also testified that the corporation "never had as much as $70,000 available at any one time in the San Joaquin Valley Bank." In connection with this witness' testimony, the book containing the corporation's account with the San Joaquin Valley Bank was introduced in evidence, and from this book it appeared that the largest sum on deposit in said bank in the name of the corporation from June 23, 1904, to December 28, 1904, was $1,280.60.

J. P. Plaugher testified that he worked for the Ashurst Company as a driller on its San Benito lands from October, 1900, to June, 1901; that he assisted in sinking a number of wells on said lands during his employment with the corporation, but at no time did he strike oil or observe oil indications. After ceasing work for the Ashurst, he was employed by another company on a section of land adjoining the lands of the Ashurst Company, and for several years worked in that vicinity and frequently visited the Ashurst's properties to see whether oil had been found thereon; that during all those years oil was not struck on said properties, nor were there any perceptible indications of oil on said lands. This witness admitted writing a letter to Abrams in which he asserted that oil had been found on the property of his company, but he declared that he did not state the truth in said letter, his explanation being that Abrams had requested him to misrepresent conditions, if necessary, so that he

(Abrams) could effect a sale of the stock; the latter saying, "Report a little oil whether you have it or not—it will help me out selling stock." Therefore, "when," said the witness, "we struck sulphur gas, it was reported as oil gas."

There was other testimony given which disclosed that the representations made to Krogh by Abrams concerning the business and property of the Ashurst Company before Krogh purchased stock therein were grossly at variance with the true condition of the corporation's affairs.

As stated, the court found that the representations made by Abrams were false and untrue and so known to be by Abrams when he made them, and that Krogh, relying upon such representations, bought the stock.

It is only necessary to compare the findings with the evidence, of which we have presented only a brief synopsis, to make it readily manifest that the attack upon said findings is wholly devoid of merit. But counsel for appellant point out a number of apparent inconsistencies in the testimony of Krogh, and upon these build up the argument that his testimony is inherently improbable and unbelievable and that it should have been disbelieved and wholly discarded by the trial court. But it is obviously a mistake to suppose that, because a witness may make inconsistent statements in the course of testimony given by him, such testimony is, in its entirety, to be disbelieved. The rule, falsus in uno, falsus in omnibus, does not mean that a witness' entire testimony must necessarily be disregarded or disbelieved because there may be found falsehood in certain parts of it. The rule merely means that, where the witness is found to have sworn falsely in a certain material part of his testimony, his entire testimony may for that reason be rejected. But no one will attempt to challenge the right of a jury or a judge trying the facts to believe and credit certain parts of the testimony of a witness who has been shown to have sworn falsely as to certain other material parts thereof. However, this rule is one which cannot well be invoked in a court of appeal on a review of the facts. It, like any other rule which may be resorted to by triers of facts for the purpose of weighing testimony and measuring the credibility of witnesses, is intended as a guide to those who must hear and see the witnesses and thus receive the evidence at first hand. It is only stating a commonplace to say that on a trial of issues of fact the evidence addressed to the disputed point must satisfy the jury or the judge trying such issues. When a verdict or findings are supported by some evidence which is not, upon its face, improbable or unbelievable, the presumption is that the jury or the judge have been satisfied by such evidence to the extent of warranting the conclusion reached, and that, in considering the evidence, no arbitrary method has been pursued but that all the rules by which weight and credibility are tested have been their sole guide in arriving at the final determination. It is therefore not within the province or the right of reviewing courts to declare that the minds of the jury or judge who tried the facts had not been satisfied by the evidence from which the verdict or findings have been educed.

It is to be presumed that the judge in the case at bar reconciled and accounted for, to his own satisfaction, any and all inconsistencies which might have been made to appear in the testimony of Krogh, and it may be, for aught that appears from the record to the contrary, that what seem to be contradictory statements in his testimony were not the result of a desire or an intention to make a false statement, but were due to mistake, or, it may be, to a treacherous memory. But whatever may have been the particular view or the character of the analysis of Krogh's testimony by the trial judge, to whom the determination of the questions of fact was submitted, his findings, no doubt based largely on Krogh's evidence, are conclusive upon this court. In connection with the discussion of the alleged failure of the evidence to support the findings, appellant declares that "manifestly the principal inducement for Krogh's buying the stock was the suggested marvelous increase in value from seventy-five cents per share to $60 per share inside of six months' time," and the contention is made that such representation involved a mere expression of opinion, "or wild irrational speculation, and is not legal evidence to establish fraud." It is true, as a general rule, as the authorities hold, that fraudulent representations cannot be predicated of a mere expression of opinion, however erroneous such opinion may be or however positively stated. Johnson v. Johnson, 134 Cal. 662, 66 Pac. 847; Lee v. McClelland, 120 Cal. 147, 52 Pac. 300; Lloyd v. Kehl, 132 Cal. 107, 64 Pac. 125; Colton v. Stanford, 82 Cal. 398, 23 Pac. 16, 16 Am. St. Rep. 137; Oppenheimer v. Clunie, 142 Cal. 317, 75 Pac. 899; Henry v. Continental Building, etc., Ass'n, 156 Cal. 675, 105 Pac. 960. But, as is clearly pointed out by the Supreme Court in Henry v. Continental Building, etc., Ass'n, supra, this rule "is subject to some qualification. A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion."

The testimony of Plaugher, the corporation's driller, distinctly shows that Abrams' representations to Krogh with regard to the probable future value of the stock involved more than a mere opinion. It discloses, if anything at all, deliberate design on the part of Abrams to mislead all persons to whom he might attempt to sell stock as to the actual conditions of the corporation's business and properties. "Report a little oil whether you have it or not" was his injunction to Plaugher, and, he added, "It will help me out selling stock." It is very evident not only from Plaugher's testimony, but from other evidence adduced at the trial, that, so far as the prospective increase in the value of the stock was concerned, Abrams' opinion was "based upon alleged facts known to him to be nonexistent."

2. But it is vigorously insisted that, conceding the representations to which Krogh testified had been made by Abrams and that they were false, still the defendant cannot prevail, since it is clear that opportunity to ascertain for himself whether such representations were true or false was readily available to him; that he had the means of acquiring knowledge of the facts for over three years; and that, having negligently failed to prosecute an inquiry to that end, he cannot now maintain the plea that he was misled and deceived thereby and so escape the consequences of his obligation. It is doubtless well-settled law that where one undertakes to secure, upon the ground of misrepresentation and fraud, restoration of the consideration which supported an executed contract, he cannot prevail, if it be made to appear that he could, by the exercise of ordinary prudence or diligence, have detected the fraud, or have ascertained facts which would have disclosed that the representations were false and fraudulent. There is no ellipsis in a long line of authorities to this effect. As is said by Chancellor Kent, in the second volume of his great work (page 485): "The law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." See Rockafellow v. Baker, 41 Pa. 319, 80 Am. Dec. 624; Saunders v. Hatterman, 24 N. C. 32, 37 Am. Dec. 404; Brown v. Gray, 51 N. C. 103, 72 Am. Dec. 563; Lee v. McClelland, 120 Cal. 147, 151, 52 Pac. 300. In the first place, we cannot say that Krogh had accessible means of ascertaining whether the representations were false or true. The lands and the business of the corporation were situated and managed in other counties than the one in which Krogh resided, and where the representations and the contract were made. Krogh, so far as we are advised to the contrary by the record, was not an expert in oil lands or the oil development business, and it is highly probable that, had he inspected the properties of the corporation, he would not have added any more wisdom on the proposition to that which he had acquired in listening to the tale so seductively unfolded before his mind by Abrams. Abrams' business was that of an oil land promoter—at least, he had been engaged in the oil land business for a long period—and Krogh was undoubtedly made to believe by him that he (Abrams) possessed full and perfect knowledge of the oil development business in general and of the corporation's business and prospects in particular. Abrams had thus ingratiated himself into the confidence of Krogh to such an extent that the latter placed implicit reliance upon every representation that he made. Krogh declared that he believed the representations, and we think that, under the circumstances, he had a right to rely upon facts which were not and could not be expected to be within his own knowledge. Bank of Woodland v. Hiatt, 58 Cal. 237; Mead v. Bunn, 32 N. Y. 275. But, assuming it to have been the duty of Krogh to investigate for himself before purchasing the stock, the case here does not come within, nor is it to be decided on, the principle laid down by Mr. Kent. Here the plaintiff seeks to recover on an executory contract. The defendant appeals to the equity side of the court, and declares that the plaintiff should not be permitted to enforce the contract because, as he charged, the same was procured through fraudulent representations. A court of equity is a court of conscience, and will under no circumstances enforce or permit to be enforced the terms of a contract founded in fraud, even if there existed and were accessible to the defendant the means and opportunity to detect such fraud by the exercise of ordinary prudence.

In Rockafellow v. Baker, supra, cited by counsel for appellant, it is said: "No doubt the plaintiff parted with property most foolishly. If the suit were upon an executory contract, we would not enforce it. The total failure of consideration would be a sufficient reason. And such ruling would be according to the doctrine of Bellas v. Hays, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; Geiger v. Cook, 3 Watts & S. (Pa.) 266, and numerous other cases cited in the argument. But the contract is not executory. It has been fully executed by the parties. They asked no aid of equity to enforce it. Our interposition is invoked, not to carry out and accomplish what the parties have begun, but to undo what the parties have accomplished." As seen, the defendant here, in response to plaintiff's demand in a court of law, has, not alone by the interposition of an equitable defense, but, by a cross-complaint, brought the plaintiff within the cognizance of the equity side of the court, and has, upon appropriate allegations, asked relief from the consequences of an alleged fraudulent and unconscionable executory contract. As stated, a court of equity, upon the principle that he who comes into equity must do so with clean hands, could under no circumstances lend its aid to enforce, or allow, where asked to prevent it, the enforcement of an unexecuted contract which the chancellor finds, upon sufficient evidence, was brought about through deceit and fraud. There may be in a given case no inconsistency between a refusal by a court of equity to enforce the specific performance of a contract and a refusal to rescind the same contract, and, in the case at bar, whether the defendant was entitled to affirmative relief or not, it was nevertheless the duty of the chancellor to refuse to allow the plaintiff to enforce or recover upon a contract that was, according to evidence which appeared to satisfy the mind of the judge, conceived in and consummated through fraud. The case of Lee v. McClelland, supra, will be found, on examination, to be entirely different from this case in almost every material respect.

3. The counterclaim for $5,000, pleaded by the defendant and allowed by the court, arose under the following circumstances: In the year 1905, and subsequently to the date of the transaction culminating in the execution by the defendant of the promissory notes, of which the note declared upon is one, Abrams went to Fresno, where he had a conversation with Krogh concerning an oil company known as the "Pacific Gateway Oil Company." Krogh testified that in said conversation Abrams stated that Brandt had sent him (Abrams) to Krogh for the purpose of inducing the latter to buy "a one-eighth interest in the Pacific Gateway Company." Abrams said to Krogh that all those interested in said company had paid for their shares, except one Dave Wolf, who had failed to pay for his stock; that Wolf's interest, as were likewise the respective interests of the other shareholders, was of the value of $5,000. He stated to Krogh that, if he (Krogh) would take Wolf's interest in the Gateway and pay $5,000 therefor, the company would thus be able to "square up." The agreement was, so Krogh testified, that, upon the payment of $5,000, he should not only receive the one-eighth interest of Wolf in the Gateway, but that one of the notes heretofore referred to as having been made by Krogh in favor of Brandt would be canceled and returned to Krogh as paid. Krogh accepted this proposition and borrowed money from a Stockton bank, with which he paid the $5,000. It appears that said money was left on deposit in the bank by Krogh, who ordered it paid to Brandt with the understanding that it should be paid into the Gateway Company. Brandt, it seems, instead of so utilizing said $5,000, applied the sum on the payment of Krogh's notes, one having thus been fully paid, and the balance of the sum thereupon remaining being credited on the note involved in this action. Krogh, as may be understood from what has thus far appeared of the Gateway transaction, denied that said sum of money had anything to do with or was intended to be applied on the notes, and as tending to corroborate this testimony a document, executed by the parties after the execution of the notes, was introduced in evidence, by the terms of which the times at which said notes would mature were definitely fixed, the note bearing interest at 6 per cent. per annum having thus been made collectible two years after the date of its execution and the note providing for 7 per cent. per annum made payable three years after the date of its execution. The probative significance of this agreement is in the fact that the payment of the $5,000 to Brandt was at a time anterior to the date of maturity of either of the notes under the terms of said agreement. Krogh never received the 25,000 shares or Wolf's one-eighth interest in the Gateway Company. The fact is undisputed that the note which Brandt and Abrams claimed was paid by the application thereto of such part of said sum of $5,000 as was necessary to fully satisfy it never was sent or returned to Krogh.

By cross-examination it was sought to be shown that Krogh, after paying the $5,000, agreed to dispose of his interest in the Gateway Company for $115, the purpose of this proof being manifestly to discredit his statement that he had invested $5,000 in that concern. There was introduced in evidence an instrument, signed by Krogh, purporting to assign and transfer in consideration of the sum of $115, all his interest in the Gateway to Brandt. Krogh admitted the execution of said instrument, but explained that it was intended as a mere formal transfer to Brandt, all the other stockholders having executed a similar assignment, to enable him (Brandt) to sell the property of said company to some eastern people who were negotiating for its purchase, the proceeds of said sale to be divided equally among the stockholders. This, Krogh said, is what Brandt represented to him when he requested the assignment. Krogh stated that he never received the $115 mentioned in said assignment.

Upon the testimony thus briefly narrated, the court found that said sum of $5,000 had been diverted by Brandt from the purpose for which it was paid, and that Krogh knew nothing of the misapplication of said sum of money until the time of the institution of this action, and that Krogh had never received Wolf's or any shares of stock in the Gateway. The finding as to this sum of $5,000 is amply supported by the evidence.

4. Certain rulings of the court are assigned as prejudicially erroneous. The most important of these assignments is involved in the exception to the overruled objection to the testimony of the wife of Krogh. Mrs. Krogh, it will be recalled, was present at the time of the conversation held in the month of July, 1904, at her residence, between Krogh and Abrams. The objection to her testimony concerning said conversation was in effect upon the ground that it did not appear that Abrams had authority at that time to act for Brandt in the sale of any stock in the Ashurst Company. It does not affirmatively appear from the record whether Abrams was or was not the personal agent of Brandt, authorized to sell stock for him in the Ashurst Company, in the month of July, 1904, when the former first conversed with Krogh relative

to the Ashurst oil properties. It is, of course, only elementary to say that the declarations of a party can bind no one but himself unless such declarations are made in his capacity as an agent of another party and are within the scope of his powers or authority as such agent. And it is furthermore a well-established principle that a party dealing with an agent, who is acting within the scope and authority of his employment, is to be considered as dealing with the principal himself. In the case of a contract, if the agent, at the time of making the contract, makes any representation, declaration, or admission, whether true or false, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself. Story on Agency (9th Ed.) p. 152. Abrams testified that, while he had no special agreement with Brandt before he sold the stock to Krogh, he, in a general way, looked after his affairs "as well as my own," and we think it is fairly inferable from the whole transaction, as it is exposed by the evidence, that Abrams' sole purpose in visiting and interviewing Krogh in the month of July, 1904, was to infuse into the latter's mind false views as to the condition of the Ashurst Oil Company's oil lands and business in the hope, thereby, of laying the foundation for dumping a large block of worthless stock, of which Brandt, either for the corporation or himself, was anxious to dispose, into the lap of Krogh in return for a large sum of money. In other words, we think that, from the whole record, the court below was justified in drawing the inference that Abrams was acting for Brandt in the month of July, 1904. That Abrams had some motive when taking the pains on that occasion to regale Krogh with the marvelous tale of the existing promising conditions of the corporation and its business is very apparent, and that his design was in his first conversation with Krogh to sell the latter Ashurst stock is inferable from the testimony of Plaugher, the driller, according to which Abrams knew the utter worthlessness of the corporation's lands as oil producers, for, as seen, he urged Plaugher to make favorable reports of the development operations, regardless of whether such reports were based upon fact or falsehood. His desire to sell the stock was at all times the point uppermost in his mind. He, beyond peradventure, knew, and it would be absurd to say there were any of the stockholders who did not as well know, at the time Krogh was first interviewed by Abrams relative to the Ashurst, that the corporation's lands in San Benito county had been sufficiently tested and experimented with to plainly demonstrate that as oil properties they possessed absolutely no value, and that therefore whatever could be realized on the sale of the stock in the corporation would amount to just so much gain to the promoters of the concern. Besides, Abrams was the manager of the corporation in the month of July, and as such was as much the agent of Brandt as he was of any of the other members of the corporation. Brandt was a director, and had, with the other directors, executed a note at a bank on which they had received money with which they had paid the corporation's debts. The object in selling stock was to secure money with which to reimburse Brandt for taking up said note, and Abrams was directed to sell stock for that purpose.

Moreover, it does not appear from Mrs. Krogh's direct testimony that she referred to the conversation had in July, 1904. She stated that: "I was present at a conversation in 1904 between Mr. Krogh and Mr. Abrams regarding the sale to Mr. Krogh of some oil stock in the Ashurst Oil Company. I remember the conversation." She was then asked to state the conversation and the representations that were then made by Abrams concerning the Ashurst Oil Company. The objection to this question was, as seen, that it called for testimony that was "incompetent, irrelevant, and immaterial," and not binding on Brandt, and the objection overruled. It did not appear that the conversation to which Mrs. Krogh referred took place in the month of July, 1904, until the fact was brought out on cross-examination, and we think it was the duty of counsel, in order to avail themselves of the objection here, to have then moved to strike out Mrs. Krogh's testimony, which they failed to do. On its face the direct testimony appeared to be material, relevant, and competent, and, while from the testimony of Krogh previously given it appeared that Mrs. Krogh was present at the conversation held in July, the court would not have been justified in assuming from his testimony alone that Mrs. Krogh intended to give the details of that particular conversation. To the contrary, the court could not but assume, until it otherwise appeared from her testimony, that she referred to some conversation which would relevantly respond to the issues raised by the answer and the cross-complaint.

That portion of Krogh's testimony relating to his conversation with Abrams and the latter's statements in July, 1904, was objected to and the objection overruled. The same contention is here made with regard to this ruling as is made concerning the ruling admitting Mrs. Krogh's testimony of said conversation and statements. What we have said generally respecting the ruling admitting her testimony applies with equal force to the objection here referred to. It may, however, be added, with regard to the objection to Krogh's testimony detailing the statements made by Abrams in the month of July, that substantially the same statements and representations were made by Abrams in the months of September, when Krogh bought the stock, and testimony thereof given by Krogh.

The question asked plaintiff on cross-examination and objected to by his counsel as to who constituted the membership of the Pacific Gateway Company was not, strictly viewing it, proper cross-examination; yet the answer thereto was harmless in view of the fact that later in the trial the matter of the organization and existence of the Gateway was necessarily gone into and some of the members of that corporation who were named by plaintiff in response to the question testified and referred to their connection with that corporation. The admission in evidence of a letter from the secretary of the Ashurst Oil Company to Krogh, assuming that the ruling admitting it was error, was without injury to plaintiff. The letter contained nothing of probative importance but a statement from which it could be inferred that Krogh had actually bought stock in the Gateway Company. The allegations in the cross-complaint regarding this transaction are not denied in the answer thereto. In this state of the pleadings on this proposition it was obviously unnecessary to introduce proof that Krogh had in fact bought stock in the Gateway, the fact having been in effect admitted by a failure to deny it. Wells v. McPike, 21 Cal. 216; West Coast Lumber Co. v. Newkirk, 80 Cal. 280, 22 Pac. 231; Curran v. Kennedy, 89 Cal. 98, 26 Pac. 641.

Abrams, having testified that he had examined and found indications of oil on lands belonging to other parties and situated in the neighborhood of the lands of the Ashurst corporation, was asked: "How close to the property of the Ashurst Oil Company did you discover oil indications or seepages?" To this question an objection was made by the defendant and sustained by the court, and it is claimed that prejudicial error was thus committed. But, while it would probably have been proper to have allowed an answer to the question, we think the ruling was harmless. Abrams had previously testified that the lands, not belonging to his corporation, which he had inspected and on which indications of oil were observable, adjoined the properties of the Ashurst Company. Besides, there was no effort made by the plaintiff to show, nor was there any pretense, that there were indications of oil on the Ashurst properties which would justify the prognostication that the value of the stock would reach $60 per share within six months. In fact, there was not any serious attempt made by the plaintiff to show that there were oil indications on the lands of his corporations to any significant extent.

There are some other rulings admitting and rejecting evidence complained of by appellant, but we cannot perceive any harm which could have resulted therefrom to plaintiff, conceding that some of them were not strictly correct.

5. The appellant, on his motion for a new trial, and in support of the claim of "newly discovered evidence" and of having been taken by "surprise during the trial of said action which ordinary prudence could not have guarded against," filed a number of affidavits in which it is alleged that, after the trial and the rendition and entry of judgment, a number of letters written by Krogh to Abrams, containing important admissions by the defendant in conflict with his testimony, were found in the possession of Cohn, the secretary of the Ashurst Company. These letters are set out and made parts of said affidavits. It appears very clear from these letters that the only use to which they could have been put at the trial by the plaintiff would have been for the purpose of impeaching Krogh's testimony, and it is well settled that, where the only purpose or effect of newly discovered evidence is the impeachment of an adverse witness, a new trial will not be granted on that ground. Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; Hamm v. Romine, 98 Ind. 77; Gardner v. Kellogg, 23 Minn. 463; James v. Oakland Traction Co., 10 Cal. App. 802, 103 Pac. 1082, and cases therein cited.

Furthermore, the affidavits on their face do not make a very strong showing in the matter of the exercise of diligence on the part of plaintiff to procure said "newly discovered" evidence. One of the plaintiff's own witnesses had access to, if, indeed, not possession of, all the correspondence between Abrams and Krogh, and, when requested before the trial to do so, turned over to one of plaintiff's attorneys all such correspondence as he could find. The discovery of the letters forming the basis of the alleged newly discovered evidence was made after a "thorough search," as the attorney's affidavit describes the effort resulting in their discovery, after the trial was had and judgment entered against plaintiff. Admitting that the newly discovered evidence was of a sort that would justify the granting of a new trial, there is not, in our opinion, such a showing of diligence in the efforts put forth by plaintiff to secure said evidence before the trial as would compel the court to exercise its discretion in disposing of the motion favorably to the plaintiff.

Appellant contends that he was taken by surprise "which ordinary prudence could not have guarded against" by the testimony of Krogh to the effect that he and Abrams jointly bought the 10,000 shares of stock. The plaintiff's answer to the cross-complaint alleges that "he has at all times looked to said defendant Abrams as an indorser of said promissory note to whom he would look for the payment of said note in the event said defendant Krogh was not able to pay said note," and plaintiff testified to the same effect. After this testimony was given by plaintiff, Krogh asked and was granted leave to amend his cross-complaint so that it would conform thereto, and the court found that Abrams was not a joint purchaser with Krogh of the stock, but signed the note only as an indorser to secure its payment. Manifestly, even if plaintiff was surprised by the testimony of Krogh on this point, it cannot be said that he suffered any injury from such testimony, since Krogh acquiesced in and the court found with plaintiff's theory as to the relations between Abrams and Krogh in the transaction. "Surprise," as used in the statute prescribing the grounds on which a motion for a new trial may be urged, denotes "some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against." Bouv. Law Dict.; Anderson's Law Dict.; McGuire v. Drew, 83 Cal. 229, 23 Pac. 312.

It is a rule thoroughly settled and understood that the party moving for a new trial on the ground of surprise must not only show surprise, but must show that injury resulted to him from the cause of such surprise, and this can be done only by showing that he could establish an entirely different case favorable to himself in the event that a new trial be granted.

After a painstaking examination of the record before us and the points urged for a reversal, we have been unable to discover a just reason for disturbing either the judgment or the order, and both are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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14 Cal. App. 170

FORRESTER v. LAWLER. (Civ. 829.)

(Court of Appeal, Second District, California. Aug. 27, 1910.)

1. Dismissal and Nonsuit (§ 53*)—Motion to Dismiss.

A motion to dismiss an action on the ground that the answer sufficiently pleaded a former judgment as a bar to a recovery is not the proper procedure.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 114; Dec. Dig. § 53.*]

2. Appeal and Error (§ 105*)—Orders Appealable.

An order refusing to dismiss an action is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Marie Forrester against Oscar Lawler. From an order denying a motion to dismiss an action, defendant appeals. Dismissed.

See, also, infra.

Lon K. Wisehart, Carroll Allen, Henry S. Van Dyke, and Lawler, Allen, Van Dyke & Jutten, for appellant. Job Harriman, for respondent.

ALLEN, P. J. In an action brought by respondent as plaintiff against appellant as defendant she sought to recover judgment upon two certain promissory notes. The answer, in addition to pleading want of consideration, for a separate answer alleged that an action had theretofore been brought by plaintiff upon the same causes of action between the same parties, which action had been, by consent of the parties, dismissed by the court and judgment regularly entered therein for costs. Defendant then, after such answer had been filed, moved the court for dismissal of the pending action, for the reason that the original action dismissed by consent was a bar to the present action. This motion the court denied, and from the order of the court denying the same defendant appeals.

Conceding for appellant all that he claims for his answer, and that the original action and judgment pleaded therein was res adjudicata as to all the matters involved, nevertheless a motion to dismiss on account of the sufficiency of the answer as a bar to recovery was not the proper procedure. In addition to this, an order of the court refusing to dismiss an action is not itself appealable. Garthwaite v. Bank of Tulare, 134 Cal. 243, 66 Pac. 326.

This appeal is therefore dismissed.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 171

FORRESTER v. LAWLER. (Civ. 830.)

(Court of Appeal, Second District, California. Aug. 27, 1910. Rehearing Denied Sept. 26, 1910; Denied by Supreme Court Oct. 27, 1910.)

1. Judgment (§ 305*)—Amendments—Power of Court.

The court has inherent power at any time to correct the record of a judgment as entered by the clerk to conform to the judgment actually rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 596, 597; Dec. Dig. § 305.*]

2. Judgment (§ 304*)—Amendments—Power of Court.

Judicial errors committed by the court in the rendition of a judgment cannot be corrected under the guise of an amendment of its record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 595; Dec. Dig. § 304.*]

3. Judgment (§ 304*)—Amendments—Power of Court.

The failure of the court in rendering judgment to make it conform to the order on which it is based is a judicial error of law committed at the trial, whether due to fraud, inadvertence, or other cause, and the remedy is by motion for new trial, and not by motion to amend the judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 595; Dec. Dig. § 304.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Marie Forrester against Oscar Lawler. From an order amending a judgment previously rendered and entered, defendant appeals. Reversed.

See, also, 111 Pac. 284.

Lon K. Wisehart, Carroll Allen, and Henry S. Van Dyke, for appellant. Hammack & Hammack and Blaine Taylor, for respondent.

SHAW, J. This is an appeal from an order granting a motion to amend a judgment theretofore rendered and entered.

Upon a hearing had on February 28, 1908, of defendant's motion to dismiss the action for want of prosecution, the court, as disclosed by the minute entry of the clerk, ordered the cause dismissed without prejudice. Thereafter, on August 26, 1908, the court rendered judgment wherein it was recited that the dismissal was by consent of parties and omitted to state that such dismissal was without prejudice. This judgment was signed by the judge of the court and duly entered by the clerk on August 28, 1908.

Thereafter, more than six months having elapsed from the rendition and entry of such judgment, plaintiff, pursuant to notice thereof, made a motion to have the same amended, the ground therefor being that the judgment so rendered did not conform to the order of dismissal made February 28, 1908, as shown by the minute entry of the clerk, in that it omitted to state that such dismissal was had without prejudice and recited that it was made by agreement of the parties. This motion was based upon the records and files in the action and upon certain affidavits presented. At the hearing thereof the court granted the motion, and on March 22, 1909, ordered the judgment amended in accordance with the form and substance of a proposed judgment, copy of which was attached to the notice of motion and served upon defendant. The court erred in granting this motion and in making the order from which defendant appeals.

No doubt exists as to the power of the court to allow amendments, regardless of the lapse of time, where the record as entered by the clerk fails to conform to the judgment rendered by the court. Freeman on Judgments, § 70; Egan v. Egan, 90 Cal. 15, 27 Pac. 22; City and County v. Brown, 153 Cal. 644, 96 Pac. 281; Williams v. Hayes, 68 Wis. 248, 32 N. W. 44. That judicial errors committed by the courts in the rendition of judgments cannot be thus summarily corrected is equally well settled. Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; Blondeau v. Snyder, 95 Cal. 521, 31 Pac. 591. While the court has the inherent right and power at any time to cause its acts and proceedings to be correctly set forth in its records, it cannot, under the pretense of the form of an amendment of its record, thus correct or revise a judgment which it has in fact rendered. Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139. In the case at bar, the rendition of the judgment which it was sought to amend was the judicial act of the court. Attached thereto was the signature of the judge of the court. As thus solemnly attested it was duly entered by the clerk. "To entitle a party to an order amending a judgment, order, or decree, he must establish that the entry as made does not conform to what the court ordered." Freeman on Judgments, § 70. Respondent does not claim that there was any mistake on the part of the clerk in entering the judgment, but contends that the court erred by reason of the fact that the judgment rendered fails to conform to the order upon which it was based. If so, it was a judicial error, as to which the court had no power to correct by the amendment ordered. As said in Egan v. Egan, supra: "If it should be admitted that the court ought to have included the provisions of this stipulation in its decree, its failure to do so was an error resulting either from a misconception of the law applicable to the facts before it, or from a failure to give sufficient consideration to those facts. In either case it was an error of law committed at the trial, which the defendant should have sought to remedy through her motion for a new trial." So in the case at bar. If it be true that the court should in its rendition of judgment have followed the order of dismissal, its failure so to do was an error, but, whether due to fraud, inadvertence, want of sufficient consideration of the order, or other cause, it was nevertheless an error of law which could not be corrected by the summary order from which this appeal is prosecuted.

The order appealed from is therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

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14 Cal. App. 253

PEOPLE v. GORMAN. (Cr. 246.)

(Court of Appeal, First District, California. Sept. 19, 1910. Rehearing Denied by Supreme Court Oct. 27, 1910.)

ROBBERY (§ 24*)—IDENTITY OF ACCUSED—EVIDENCE—SUFFICIENCY.

Evidence *held* to identify accused as one of two robbers.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 34; Dec. Dig. § 24.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Frank Gorman was convicted of robbery, and he appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Spagnoli & Spagnoli, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

HALL, J. Defendant was charged with the crime of robbery and with having suffered a prior conviction of the crime of manslaughter. Upon his arraignment he admitted the charge of prior conviction to be true, and upon his trial he was found guilty of the crime of robbery. Upon judgment being pronounced against him, he appealed from the judgment and the order denying his motion for a new trial.

The point principally relied upon for a reversal is that the verdict is not supported by the evidence, in that the defendant, as it is claimed, is not by the evidence sufficiently identified as the person who committed the robbery. The contention is entirely without merit. The evidence shows that on the morning of the 17th day of April, 1909, two masked men, armed with pistols, entered the office of the Thomson Bridge Company at 103 Main street, between Mission and Howard streets, in San Francisco, and, finding the bookkeeper, one Rosengreen, alone, securely bound and gagged him. Shortly after this was done Mr. James M. Thomson returned to the office from the bank, bringing a sack of money containing $3,200 with which to pay the workmen of the company for their week's labor. Thomson dropped the sack of coin on the counter, and immediately discovered the two masked men, with pistols pointed at him. One of the men had a pistol in each hand, while the other had but one pistol. Thomson attempted to draw his own pistol, and was immediately shot through the arm, and again through the chest. A third shot was fired at him, which scorched his neck and set his overcoat on fire. Thomson then escaped to the street, going down a stairway to the sidewalk, and was closely followed by the two men. On reaching the sidewalk he saw one of the men run towards Howard street. He turned and saw a second man come out of the stairway, holding a gun in one hand and the sack of coin under his left arm, partly hid under his coat, which he observed had a rent under the left shoulder. He saw this man run to a buggy, just around the corner from Main street, on Mission street, and throw the sack of coin into the buggy. At this point Thomson shot at the man, who returned the fire, and jumped into the buggy and drove away. While the man was at the buggy Thomson saw his face, and testified that the face was that of the defendant. A Mr. White also saw Thomson come out of the stairway bleeding and wounded, followed quickly by a man with a gun and a sack of something under his arm. White saw this man run to the buggy on Mission street, throw in the sack, exchange shots with Thomson, jump into the buggy, and drive away. White immediately jumped into his own buggy, about 20 feet away, and followed this man, stopping only to pick up a police officer, Mr. Dowd. White and the officer followed the man in the buggy, without losing sight of him, until he was caught and arrested, upon his flight being checked by a jam of vehicles in the street. The man thus pursued and arrested proved to be the defendant. Upon his arrest there was recovered and taken from the buggy the sack of coin ($3,200). He had upon him and in the buggy two pistols, a small pistol fully loaded, and a large Colt's revolver containing four empty shells and two cartridges. He wore a coat with a rent under the left shoulder, which Thomson testified to be the coat worn by the man who carried the sack of coin to the buggy. White testified that he never lost sight of the man who came out the stairway with the sack under his arm until he was arrested. Upon his arrest the defendant gave no explanation of his flight, or possession of the sack of coin, but did say that he wished he had been shot, and all thus ended. Other evidence was given by other witnesses, but what we have stated is quite sufficient to show that defendant is one of the men who committed the robbery of which he was convicted.

We have examined the other points presented by appellant's brief, but we do not consider that any of them are of sufficient importance to require particular discussion.

We find no error in the record, and the judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

158 Cal. 441

In re WARNER'S ESTATE.

WARNER v. WARNER.

(Sac. 1,809.)

(Supreme Court of California. Oct. 1, 1910.)

1. Appeal and Error (§ 1097*)—Law of the Case.

A decision of a court of appeal on a point directly involved is the law of the case on a subsequent appeal to the Supreme Court from the judgment rendered on the subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. Husband and Wife (§ 31*)—Antenuptial Agreement—Performance.

An antenuptial contract binding the husband to support and properly educate a minor child of the wife, in consideration of the wife releasing her rights in his property, is not performed by the husband where almost immediately after the marriage the child, about 12 years old, is sent out to work for a living under conditions making it impossible for the child to attend school, so that on the husband's death the wife may claim her rights as heir.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 193; Dec. Dig. § 31.*]

3. Contracts (§ 346*)—Performance—Pleading and Evidence.

Proof of waiver of performance of an agreement does not justify a finding of performance thereof, and a party relying on waiver must allege it in order to have a basis for the proof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1732; Dec. Dig. § 346.*]

4. Appeal and Error (§ 1122*)—Disposition of Case on Appeal—Findings.

Where the trial court's findings of performance of an agreement are contrary to the evidence, and it made no finding on the conflicting evidence of waiver of performance, the court on appeal will not supply a finding thereon to sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4420; Dec. Dig. § 1122.*]

5. Husband and Wife (§ 31*)—Antenuptial Agreement — Construction — "Without Any Administration."

An antenuptial contract, which provides that the wife, on the death of the husband, shall receive from his estate "without any administration" $1,000, does not require the husband to provide the sum by will or other affirmative means, but the contract makes the wife a creditor, and authorizes collection of her claim in the mode applicable to creditors of estates; the quoted phrase merely allowing the wife to receive the sum in advance of complete administration and distribution.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 193; Dec. Dig. § 31.*]

Department 1. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Letters of administration on the estate of Adam Warner were granted to Adam J. Warner, his son, and from the order and from an order denying her a new trial, Katie Warner, the widow, appeals. Reversed.

See, also, 6 Cal. App. 361, 92 Pac. 191.

Hiram W. Johnson and A. A. De Ligne, for appellant. A. L. Shinn and W. F. Renfro, for respondent.

SLOSS, J. Adam Warner having died intestate, a contest over the right to act as administrator of his estate arose between Katie Warner, his widow, and Adam J. Warner, his son. The superior court made an order granting letters of administration to the son, and the widow appeals from the order, and from an order denying her motion for a new trial.

Where the surviving wife is entitled to succeed to some portion of the personal estate, she has a preferential right to letters. Code Civ. Proc. § 1365. The right of the widow in this case was disputed on the ground that she had, by an antenuptial agreement, surrendered her right of succession to any part of Adam Warner's estate. The agreement in question was in writing. It provided that, in consideration of the covenants to be performed on the part of the appellant (then Mrs. Heidt), Warner agreed to care for, keep, maintain, and support her and her minor child, and to properly educate said child, so long as the said appellant should be a good, faithful, and dutiful wife to him, and also to pay her $100 per annum, and that at his death she should "receive from his estate, without any administration, the sum of $1,000. Each of the parties relinquished any and all claims to the property of the other, either as heir or otherwise. This agreement was set up by the son in his own petition for letters, and also in his contest to the widow's petition. In both of these pleadings he averred the full performance of the terms of the agreement by Adam Warner. The widow filed an answer to the contest, and in this she denied the allegation of performance and alleged more specifically that Adam Warner had failed and refused to support or educate her minor child, and had failed to provide the sum of $1,000 to be paid to her at his death. She also set up that the agreement was, as the result of fraud or misrepresentation on the part of Adam Warner, so drawn as not to express her intention, and that the consideration was inadequate as to her. The findings were in favor of the respondent on all these issues.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

So far as the charges of fraud and inadequacy of consideration are concerned, the findings are clearly sustained by the evidence. Even if we adopt the appellant's view that the contracting parties occupied such a relation to each other as to make the agreement presumptively invalid, in so far as it assumed to confer any benefit upon Adam Warner, the testimony regarding the circumstances under which the agreement was made fully justified the trial court in finding that the nature and extent of the property rights of the two parties, and of the effect of the agreement, were fully known and understood by Mrs. Heidt, and that the provision made for her was a proper and fair one and was accepted as such.

But the appellant further attacks, as unsupported by the testimony, the finding that Adam Warner had performed all the conditions of the contract. That this was a finding on a material issue is put beyond controversy now by reason of the decision in Estate of Warner, 6 Cal. App. 361, 92 Pac. 191. That was an earlier appeal in this very proceeding. The court below had sustained a demurrer to the widow's answer to the son's opposition and had granted letters to the son. On the appeal of the widow the judgment was reversed; the appellate court holding that the allegation of nonperformance on the part of the decedent raised a material issue. "We think," says the court, "that where a woman in an antenuptial contract releases all her rights in the property of her intended husband as his heir, in consideration of his doing certain things, if he fails to perform material covenants on his part, she may show this and still claim her rights as heir." This declaration, affecting a point directly involved, is binding upon this appeal as the law of the case.

The testimony contained in the record shows without conflict that one of the substantial obligations assumed by Adam Warner in his contract was not fulfilled by him. The agreement bound him to support and properly educate the minor daughter of the appellant. The child, a daughter, was less than 12 years of age at the date of the agreement. Almost immediately after the marriage, she was sent out to work for her living under conditions which made it impossible for her to attend school. The finding that Adam Warner fully performed the terms of the agreement is, therefore, not sustained by the evidence. There was, to be sure, testimony which would have warranted the trial court in finding that performance in this respect was waived by the appellant. Such a finding might have been regarded as within the issues on the ground that Mrs. Warner, in her answer, alleged affirmatively the failure to perform, and the adverse party would under our system of pleading, which does not allow a replication, have been entitled to prove anything which would overcome the effect of affirmative matter of defense. Without passing on this question, which may hereafter be obviated by amendment, we shall assume that the pleadings were such as to authorize the respondent to show that the appellant had consented to Warner's treatment of her daughter. But the admissibility of evidence to show a waiver of performance does not meet the point that such waiver is not the same thing as performance, and proof of it will not support a finding of performance. Thompson v. Jewell, 8 Ky. 195; Colt v. Miller, 10 Cush. (Mass.) 48; Palmer v. Sawyer, 114 Mass. 1; Shinn v. Haines, 21 N. J. Law, 340; Crandall v. Clark, 7 Barb. (N. Y.) 169. While a sufficient excuse for nonperformance will often confer upon a party the same rights that he would have had upon performance, the distinction between the two remains a substantial one. "The rule is fundamental," said this court in Daley v. Russ, 86 Cal. 114, 24 Pac. 867, "that the complaint must allege either performance or a valid excuse for nonperformance. One is not the same as the other. And if the plaintiff did not perform the contract, but relies upon the consent of the defendants as an excuse, he must set forth the excuse in his complaint." See, also, Poheim v. Meyers, 9 Cal. App. 31, 37, 98 Pac. 65; Seebach v. Kuhn, 9 Cal. App. 485, 99 Pac. 723. If, as is thus held, a party relying upon an excuse for nonperformance must allege his excuse in order to have a basis for proof, it necessarily follows that evidence of such excuse will not support a finding that he has performed. In the case before us the evidence concerning the appellant's waiver of the obligation to support and educate her child was sharply conflicting. On this issue the court has not found and we cannot, of course, supply a finding. The finding of performance, which was made, would have sustained the judgment; but, since this finding is contrary to the evidence, there must be a new trial.

As a guide to the lower court upon a retrial of the issues, we may add that the part of the agreement providing that the appellant was, upon Warner's death, to receive "from his estate, without any administration, the sum of $1,000" is not in our opinion to be interpreted as requiring Warner to provide this sum by will, or by other affirmative means. It made her a creditor, and authorized collection of her claim in the mode applicable to creditors of estates. The phrase "without any administration" is given full effect by reading it as allowing the appellant to receive the sum in advance of complete administration and distribution of the estate. As a creditor she could so receive it.

There are no other points requiring notice. The judgment and the order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

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158 Cal. 446

LAWSON v. LAWSON. (S. F. 5,652.)

(Supreme Court of California. Oct. 1, 1910.)

1. STATUTES (§ 74*)—SPECIAL LEGISLATION.

Code Civ. Proc. § 710, permitting a transcript of a money judgment to be filed with the auditor of any county or city, etc., from which money is owing to the judgment debtor, whereupon such official shall draw his warrant in favor of, or pay into the court from which the transcript was taken, so much of the money belonging to or owing to the judgment debtor as will cancel the judgment, does not violate the constitutional provisions against special legislation and requiring a general law to have a uniform operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 76; Dec. Dig. § 74.*]

2. GARNISHMENT (§ 63*)—SALARIES OF PUBLIC OFFICERS.

The statute is applicable to the salaries of all public officers to which its application is not prohibited by a constitutional provision, and hence is applicable to justices of the peace; neither Const. art. 6, § 1, nor section 11, relating to justices, their number and powers, nor section 15, providing that no judicial officer, except justices of the peace and court commissioners, shall receive to his own use any perquisites of office, or any other provision, preventing its application.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 126; Dec. Dig. § 63.*]

3. CONSTITUTIONAL LAW (§ 70*)—DIVISION OF GOVERNMENTAL POWERS—JUDICIAL QUESTIONS—STATUTORY POLICY.

If a statute is constitutional, the question of its wisdom or policy is not for the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

4. EXEMPTIONS (§ 16*)—MONEY NECESSARY FOR SUPPORT OF "FAMILY."

Code Civ. Proc. § 690, subd. 10, provides that the earnings of the judgment debtor for his personal services rendered within 30 days preceding the levy shall be exempt from execution, when necessary for the use of the debtor's family residing in this state, supported in whole or in part by his labor. An adult judgment debtor permanently resided apart from his mother in another county, and it did not appear that she was a poor person, unable to maintain herself by work, so that he was not legally bound under the statute to maintain her to the extent of his ability. *Held*, that the word "family" implied a collection of persons of which the debtor was the head, and while one might be a member of his family though residing apart from him, especially the debtor's wife and minor children, the debtor's mother in the present case was not a member of his family, so as to exempt money due him for services from execution.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 15–19; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 3, pp. 2673–2691; vol. 8, p. 7661.]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Sadie Lawson against Alfred B. Lawson. From an order directing the disposition of money deposited with the Superior Court, plaintiff appeals. Reversed.

See, also, 111 Pac. 356.

H. H. McPike and Crittenden Thornton, for appellant. Leon Samuels and Jacob S. Meyer, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order directing the disposition of certain money placed within the control of the superior court under the provisions of section 710, Code Civ. Proc. Plaintiff was the judgment creditor under a decree of divorce which, among other things, required the defendant to pay to plaintiff $100 per month for her maintenance and support. On May 31, 1910, plaintiff filed with the auditor of the city and county of San Francisco, of which city and county defendant was one of the justices of the peace, a duly authenticated transcript of the judgment, accompanied by her affidavit stating the exact amount due her from defendant under said judgment and that she desired to avail herself of the provisions of said section 710, Code Civ. Proc. At that time there was due and owing to defendant from said city and county the sum of $300, salary as justice of the peace, which was less than the amount due on the judgment. The money due defendant having been placed by the auditor within the control of the court rendering the judgment as required by section 710, Code Civ. Proc., defendant gave notice of a motion for an order directing the payment of all of the same to him as property exempt from execution under subdivision 10 of section 690, Code Civ. Proc., serving and filing therewith his affidavit making such claim of exemption and stating the facts upon which the claim was based. At the hearing of the motion further evidence was taken. The trial court concluded that $200 of said salary was exempt and the remainder not exempt, and made its order requiring the payment of $200 to defendant and $100 to plaintiff. This is the order appealed from.

1. It is established by the decision in Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782, that section 710, Code Civ. Proc., is not violative of the provisions of our Constitution inhibiting special legislation and requiring that a general law shall have a uniform op-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

eration. It is further established by that decision and the decision in Payne v. Baehr, 153 Cal. 441, 95 Pac. 895, that the section is applicable to the salaries of all such public officers and employés as do not come within the term "constitutional officers" as that term is used in Ruperich v. Baehr, supra. In that case the court, expressly reserving the question whether the Constitution prohibited its application to certain officers, said: "But with respect to those clearly within legislative control, if it fairly appears that by this act, properly construed, the legislative intent to declare as its policy that the salaries or wages may be thus diverted to the payment of debts of such officers and employés is manifested by the language used, then the courts are bound by this declared policy, with respect to the officers to whom it can be applied." The effect of the two cases cited is that the section must be held applicable to the salaries of all officers as to which its application is not inhibited by reason of some provision of the Constitution. Assuming for the purposes of this decision that with relation to some officers the effect of existing constitutional provisions may be to prevent the application of this section, we are satisfied that there is nothing in the Constitution precluding its application to salaries or fees of justices of the peace. Such salaries or fees are not fixed by the Constitution, and there is no provision therein, as in the case of some officers, that they "shall receive for their service" a compensation, fixed either by the Constitution or to be fixed in some other way. Nor is there as to such officers any provision, as in the case of some officers, to the effect that the compensation so to be received, whether fixed by Constitution or otherwise, shall not be diminished during the term for which the incumbent shall have been elected. They are simply mentioned as one of the tribunals in which the judicial power of the state is vested (section 1, art. 6), the Legislature is authorized to determine their number in townships, cities, and towns and cities and counties, and to fix their powers, duties, and responsibilities (section 11, art. 6), and it is expressly provided that "no judicial officer, except justices of the peace and court commissioners, shall receive to his own use any fees, or perquisites of office"(section 15, art. 6). There is nothing in any of the provisions of the Constitution effectual to preclude the Legislature from declaring and enforcing as to justices of the peace the policy of diverting their salaries or fees so far as may be necessary to the payment of such of their debts as are evidenced by judgment. The question of the wisdom of such a policy is not one within the province of the courts.

2. Section 710, Code Civ. Proc., provides that "upon the receipt by any court of money under the provisions of this act so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor." Defendant's claim that any of this money was exempt from execution is based on provisions of subdivision 10 of section 690, Code Civ. Proc., which, so far as is material here, is as follows: "The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labor." This is one of the subdivisions of a section declaring what property is exempt from execution or attachment.

Various contentions are made by plaintiff in response to the claim of exemption, under this subdivision. Among other contentions, it is substantially urged that, except in so far as his divorced wife constituted his family, defendant had no "family," within the meaning of that word as used in subdivision 10, § 690, Code Civ. Proc. If this contention be well based, it is apparent that there was no exemption in his favor under this subdivision. There is no conflict in the evidence material on this proposition. The alleged family, according to defendant's affidavit, "consists of my mother and myself." It was shown by the plaintiff and in no way disputed by defendant that the defendant resided in the city and county of San Francisco and that his mother resided in the city of Oakland, Alameda county. We construe the evidence given on this point as showing without conflict that this adult son and his mother had no abode in common, but permanently resided apart, one in one county and the other in another county. There was no showing that the mother was a "poor person who is unable to maintain" herself by work, and hence there was no legal duty shown on the part of the defendant to maintain her to the extent of his ability, under section 206, Civ. Code. Divergent as may be the authorities upon the exact meaning of the word "family" when used in exemption and homestead statutes, we have found no basis for such a construction as would make defendant's mother, under the circumstances above stated, a part of his family within the meaning of subdivision 10, § 690, Code Civ. Proc. The words "his family" as used in this statute imply a collection of persons of which he is the head. Under the most liberal construction given by any of the decisions, they would not include the mother of a judgment debtor when she is not a member of his household, and when her circumstances are not such as to impose upon him the legal duty to maintain her. Were she a member of his household, even though temporarily absent therefrom, she might properly be held to be a part of "his family" within the meaning of the provision, for there are many authorities in support of the proposition that the word "family" as here used means a collection of persons living together under one head, under such circumstances or conditions that the head is under a legal or moral obligation to support the other members, and the other members are dependent upon him for support. In 12 Am. & Eng. Ency. of Law (2d Ed.) p. 89, this is said to be the definition supported by the weight of authority. Under such circumstances, the son would be the "head of a family" according to the definition declared by our statute relative to the selection of homesteads. Civ. Code, § 1261. As noted in 2 Freeman on Executions, § 222, however, the above definition is not absolutely correct, for it is clear that one may be a member of the debtor's "family" although residing apart from him, and this is clearly implied by the language in subdivision 10 of section 690, Code Civ. Proc., "for the use of his family residing in this state." The mere fact that a man's wife and minor children reside in a different place from him does not render them any the less members of "his family" within the meaning of our statute. Such persons constitute "his family" in the strictest sense of the words and come fully within the objects of the exemption statutes. See Pettit v. Muskegon, etc., Co., 74 Mich. 214, 41 N. W. 900. But it seems clear that they are the only relatives who can properly be held to be members of "his family" within the meaning of the statute, without being members of his household or residing with him, with the possible exception of such other relatives as to whom exists on his part the legal obligation of support and maintenance. Our conclusion on this point is amply supported by the authorities. See 2 Freeman on Executions, § 222, and cases there cited. The showing made in this case was not sufficient to warrant the conclusion that defendant's mother was a member of "his family" within the meaning of the exemption statute. So far as was made to appear, the defendant therefore had no family on account of which exemption could legally be allowed, and the court should have directed that the whole sum placed under its control by the auditor be paid to plaintiff on account of her judgment.

The order appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

158 Cal. 451

LAWSON v. LAWSON. (S. F. 5,605.)

(Supreme Court of California. Oct. 1, 1910.)

Garnishment (§ 177*)—Judgment—Time for Rendition.

Code Civ. Proc. § 710, permits a transcript of a money judgment to be filed with the auditor of any county or city from which money is owing to the judgment debtor, whereupon such official shall draw his warrant in favor of, or pay into the court, so much of the money due the judgment debtor as will cancel the judgment. *Held*, that the superior court had no power to order the payment of money to a judgment debtor due him as salary as a justice of the peace, which had been levied upon under the statute, until such money had been paid into the court, or the auditor's warrant therefor drawn in favor of the court had been delivered to it.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 326–328; Dec. Dig. § 177.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Sadie Lawson against Alfred B. Lawson. From an order directing a city auditor to pay certain money over to defendant, plaintiff appeals. Reversed.

H. H. McPike and Crittenden Thornton, for appellant. Leon Samuels and Jacob S. Meyer, for respondent.

ANGELLOTTI, J. The parties to this appeal are the same as in appeal S. F. No. 5,652, this day decided. 111 Pac. 354. The order appealed from is one made by the superior court that rendered the divorce decree referred to in the opinion in that case, directing the auditor and treasurer of the city and county of San Francisco to pay to defendant certain money due him for salary as justice of the peace of said city and county, notwithstanding the claim of plaintiff that the same be applied on account of the amount due her under such divorce decree, and notwithstanding a full compliance by her with the provisions of section 710, Code Civ. Proc., in her effort to enforce such claim. This order was made by the court without notice to plaintiff, and upon the same day that plaintiff filed her affidavit, duly authenticated transcript of judgment, and claim with the auditor. The order was based upon an affidavit of defendant which set up the claim that the property was exempt from execution. It fully appears from the record that the money so levied upon was never received by or placed within the control of the superior court. In view of the language of section 710, Code Civ. Proc., it is clear that the superior court was without power to make any order for the disposition of the money thus levied upon until it had been paid into court, or the auditor's warrant therefor drawn in favor of the court (see Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782) had been delivered to the court. It has heretofore been so held by this court in a proceeding in prohibition involving the parties to this appeal, but no written decision was filed. Regardless of other considerations, it follows that the order must be reversed.

The order appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

158 Cal. 467

ROGERS v. SUPERIOR COURT OF SANTA CRUZ COUNTY. (S. F. 5,704.)

(Supreme Court of California. Oct. 4, 1910.)

1. Appeal and Error (§ 115*)—Orders Appealable—Orders Subsequent to Judgment—Sale of Perishable Property.

An order made after final judgment for the sale of property as perishable, as authorized by Code Civ. Proc. § 949, is appealable as provided by section 963.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 115.*]

2. Appeal and Error (§ 458*)—Order After Judgment—Sale of Perishable Property—Supersedeas.

Where, by an order after judgment notwithstanding appeal, property is ordered to be sold as perishable, which as a matter of law is not of that nature, or if its perishable character is doubtful, the Supreme Court has jurisdiction to order a stay of proceedings pending an appeal from the order on proper terms and security, notwithstanding Code Civ. Proc. § 949, providing for sales of perishable property, does not provide for a stay pending an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 458.*]

3. Appeal and Error (§ 458*)—Sale of Perishable Property Pending Appeal—Supersedeas.

Where property ordered sold as perishable pending appeal consists of real property and an electric railroad with the machinery and rolling stock for its operation, together with certain franchises to build and operate it, and no danger of immediate destruction or deterioration is apparent, a writ of supersedeas will be granted staying proceedings pending appeal from such order on the giving of a proper bond.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 458.*]

In Bank. Petition by one Rogers for a writ of prohibition against the Superior Court of Santa Cruz County, to restrain the execution of an order directing the sale of certain property as perishable. Proceeding treated as an application for supersedeas and allowed.

Walter H. Linforth, for petitioner. Netherton & Torchiana and Samuel Rosenheim, for respondent.

PER CURIAM. The petitioner asks this court to prohibit the execution of an order of the superior court directing a sale of certain property as perishable property, under the supposed authority of section 949, Code Civ. Proc., authorizing the sale of perishable property, notwithstanding a stay of proceedings by virtue of an appeal. It may be that the question whether or not the property so ordered sold in any case is perishable is so far a question of fact within the jurisdiction of the superior court to determine that we would feel constrained to hold that lack of jurisdiction could not be shown and that prohibition would not lie. We do not deem it necessary to consider this question. The parties to the suit in which the appeal is taken, and who are interested in the property in question, have all appeared in this proceeding, and there has been a sufficient hearing to enable this court to perceive the facts material to the case. We think the best course is to treat the application as for a supersedeas, and that, so treated, the applicant is entitled to an order from this court staying the proceedings under the order appealed from. The order, being made after final judgment, is appealable. Code Civ. Proc. § 963. The statute does not provide for any stay of proceedings upon an appeal from an order for the sale of perishable property made under section 949. Yet, if there could be no stay in such a case under any circumstances, the appeal would sometimes prove wholly useless and ineffective as a remedy. In ordinary cases, doubtless there should be no stay of such an order. But if it appears that the court below has ordered a sale of property as perishable which clearly, and as a matter of law, is not of that nature, or if, as a matter of fact, it is extremely doubtful if it is perishable within the meaning of section 949, we have no doubt this court, by virtue of its inherent powers as a court of appeal, has power to order a stay of proceedings pending such appeal, upon such terms and such security as, in its discretion, it may deem proper.

In the present case the property ordered sold consists of real property, an electric railroad with the machinery and rolling stock for its operation, and certain franchises to build and operate it. There does not appear to be any danger of immediate destruction or material deterioration. We would perhaps be warranted in holding that the bond of $300 given upon the appeal would be ample security for any damage that may be caused thereby if it should prove unsuccessful. But to make the matter certain, we will direct that a writ of supersedeas, staying proceedings upon the order appealed from, shall issue upon the giving of an undertaking, approved by the clerk of this court, in the sum of $1,000, for the payment of all damages that the respondents, or either of them, may suffer because of the appeal and the delay occasioned by such stay of proceedings.

It is so ordered.

158 Cal. 469

CONTINENTAL BUILDING & LOAN ASS'N v. BOGGESS et al. (Sac. 1,760.)

(Supreme Court of California. Oct. 4, 1910.)

1. Appeal and Error (§ 1099*)—Law of the Case.

A holding on appeal that certain averments of the answer constituted a good defense is the law of the case on a second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4375; Dec. Dig. § 1099.*]

2. Appeal and Error (§ 1010*)—Review—Findings of Fact.

The trial court having had before it evidence which pointed to the correctness of the facts found by it, its determination on the weight of evidence is not reviewable.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

3. PRINCIPAL AND AGENT (§ 177*)—CONTRACT BY AGENT—NOTICE TO PRINCIPAL.

Where persons in taking a mortgage to them as trustees, on their agreement to apply any funds coming to them by reason of the mortgage, first on debts of the mortgagor to others, and then on its debts to plaintiff, were acting for and on behalf of plaintiff, notice of their agreement was to be imputed to plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670–679; Dec. Dig. § 177.*]

4. NOVATION (§ 5*)—TAKING MORTGAGE FROM THIRD PERSON.

It is an equitable defense to an action on a mortgage given by defendant to plaintiff to secure money which she borrowed of it, and then loaned to E., that E. gave a mortgage to trustees on they, acting for and on behalf of plaintiff, agreeing to apply any funds coming to them by reason of the mortgage, first to enumerated debts of E. to others, including defendant, and then to E.'s debt to plaintiff, defendant knowing of and consenting to said trust undertaken for her, and that the trustees received, through sale under the mortgage from E., enough to pay E.'s debts to the others, but instead of applying it thereto, directly or indirectly, turned it over to plaintiff.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. § 5.*]

5. NOVATION (§ 12*)—EVIDENCE—COMPETENCY.

Defendant's testimony that her husband, a stockholder in E., told her of the agreement on which it gave a mortgage to trustees, that they should apply the money from the mortgage sale, first to payment of E.'s debt to her, and then to its debt to plaintiff, and that she consented thereto, was competent to show notice to her of the agreement, and her ratification thereof, if proof of ratification was necessary.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 12; Dec. Dig. § 12.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though proof of defendant's ratification of an agreement for her benefit was unnecessary, admission of evidence thereof was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4155; Dec. Dig. § 1050.*]

Department 1. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Continental Building & Loan Association against Emma A. Boggess and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Gavin McNab and Thomas J. Geary, for appellant. W. W. Sanderson and W. H. Carlin, for respondents.

SLOSS, J. This is an action to foreclose a mortgage given by Emma A. Boggess and Riley A. Boggess to plaintiff to secure the payment of a promissory note for $3,000. The defendants had judgment, from which, and from an order denying a motion for a new trial, plaintiff appeals.

Upon a former appeal (Continental Building & Loan Ass'n v. Boggess, 145 Cal. 30, 78 Pac. 245) this court reversed a judgment of foreclosure entered in favor of plaintiff. That judgment followed an order of the trial court striking out certain allegations of the answer of the defendants. The holding on appeal was that these averments constituted a good equitable defense to the action. This holding is binding on the present appeal, as the law of the case, and its correctness is not, in fact, questioned. Upon the second trial the court below found that the facts so averred were true. The principal contention of the appellant is that the evidence fails to support these findings.

The findings on the special defense set forth in substance these facts: Before and at the time of the execution of the note and mortgage in suit, Riley A. Boggess was interested in certain mining property in Colusa county known as the Abbott mines and owned a majority of the capital stock of the Empire Quicksilver Mining Company, a corporation which held options on said Abbott mines and other mining ground. The property covered by the mortgage here sued upon was the separate property of Emma A. Boggess, and she borrowed from plaintiff the $3,000 secured by said mortgage and loaned said sum to the Empire Quicksilver Mining Company. Thereafter and up to November, 1900, William Corbin, who was a director and the secretary and manager of the plaintiff corporation, advanced from time to time large sums of money aggregating $165,000 to the Empire Quicksilver Mining Company for the operation and development of said Abbott mines. Of this sum $159,000 was taken by him from the funds of the plaintiff. Upon the discovery by the directors of the plaintiff corporation that Corbin had so misused the corporate funds, Corbin assigned and transferred to the plaintiff corporation his claim against said mining company. Of the correctness of the findings to this point there is no question. But the appellant attacks further findings, which are as follows: Thereafter, on or about the 12th day of January, 1901, an agreement was entered into between the defendant Riley A. Boggess and others, owning in the aggregate more than two-thirds of the stock of the Empire Quicksilver Mining Company, on the one hand, and R. T. Harding, representing the plaintiff as its attorney and one of its directors, on the other, whereby the said mining company was to execute a mortgage in the sum of $377,000 upon all its property to R. T. Harding and Charles Page, as trustees, the said trustees undertaking and promising to pay out any funds that might come into their hands by reason of said mortgage and from the Abbott and adjacent mines in the following order: First, such sums as should be necessary to clear title to said mines; second, certain debts aggregating about $49,000 due by said Empire Company to certain creditors other than the plaintiff, including the moneys due and unpaid to the defendant Emma A. Boggess (which was the amount due on her promissory note and mortgage); and, third, after said payments aforesaid, the amount due by the Empire Company to the plaintiff. Such mortgage in the sum of $377,000 was accordingly executed by the Empire Quicksilver Mining Company to Harding and Page and was accepted by the latter upon the trusts and agreements above set forth. Thereafter, and while said mortgage was in full force and effect, there was paid to said trustees the sum of $268,000, out of which the trustees paid the cost of perfecting title to said Abbott mines and adjacent mines, expending therefor the sum of $176,000 and further sums aggregating $17,000; but said trustees refused to pay the amount due and unpaid to the creditors of said Empire Company (including said Emma A. Boggess) other than the corporation plaintiff, but, on the contrary, paid over the residue of said proceeds in the sum of $75,000 to the plaintiff in payment of the moneys misappropriated from it by Corbin, as aforesaid, and the plaintiff corporation thereby received, "as moneys of said trustees agreed to be paid to the defendant Emma A. Boggess, the full amount of all moneys at that time due, owing on or unpaid in any way from her to plaintiff upon or in connection with * * * said promissory note or mortgage." It is further found that at the time of the execution of said mortgage of $377,000, and of the receipt of said $75,000, the plaintiff had knowledge of all the terms of the trust undertaken by said trustees Harding and Page and of the rights of the defendant Emma A. Boggess, and likewise said defendant Emma A. Boggess had full knowledge of and consented to said trust so undertaken for her. This is followed by an additional finding that the promissory note sued upon and all of the indebtedness of the defendant Emma A. Boggess secured by said mortgage was fully paid to and received by plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In examining the sufficiency of the evidence to sustain these findings, it is perhaps hardly necessary to say that this court cannot undertake to pass upon the truthfulness of the testimony given by the respective witnesses where the record shows a substantial conflict in such testimony, and the trial court has accepted the statement of one witness rather than that of another. Here there was a very sharp and decided conflict between Mr. Harding and other witnesses regarding the exact nature of the transaction culminating in the giving of the $377,000 mortgage. Mr. Harding testified to a state of facts directly opposed in several important particulars to that found by the court below. But if that court had before it testimony which pointed to the correctness of the facts as found, its determination upon the weight of the evidence is beyond reach in this court. That the $377,000 mortgage was executed to Harding and Page upon the terms and conditions stated in the findings was testified to directly and positively by the witnesses Reece, Arms, and the defendant Riley A. Boggess. There was ample evidence that Harding was acting for and on behalf of the plaintiff, and notice of the agreement made by him was therefore to be imputed to said plaintiff.

The only remaining question of importance is whether the plaintiff did receive out of the sale of the mining property, over and above the amount necessary to pay the cost of clearing the titles, a sum sufficient to pay the claims of the creditors who were preferred under the agreement which resulted in the giving of the $377,000 mortgage. At the time of the execution of the mortgage Boggess was negotiating on behalf of the Empire Company for the sale of all of its properties to New York capitalists. There is evidence, i. e., that of Boggess, to the effect that $250,000 was subsequently paid on account of this purchase, $50,000 "in installments in periods of two or three months, the first installment being about February 2 or 3, 1901, and then the $200,000 was paid on or about the 4th of May, 1901." The disposition of that money is thus stated by Boggess: "That money went into the Continental Building & Loan Association and was paid to Mr. Corbin. He handled the $250,000. $176,000 net was used in getting title. That was for the Sulphur Banks and the Abbott, and the rest of the $250,000 and about $30,000 which he received from the net earnings of the mine went into the Continental Building & Loan Association. Outside of that it was required for title to the mines as stated, $176,000 and $10,000 which was paid to a man by the name of Watson and $4,000 to Mr. Reece on account of his notes. It was paid into the Continental Building & Loan Association. About $60,000 to the Continental Building & Loan Association. That is where it ultimately went." The statement that some part of the money paid by the prospective purchasers went into the hands of the plaintiff is corroborated by Harding's testimony on cross-examination.

There is, then, evidence sustaining the findings to the effect that an agreement was made on behalf of plaintiff whereby any moneys received by it over and above the amount necessary to clear title were to be applied in payment of the claim of the defendant Emma A. Boggess, and that sufficient money to pay this amount was subsequently received by the plaintiff. Under these facts, the plaintiff, as declared on the former appeal (see page 34 of 145 Cal., 78 Pac. 245), became equitably bound to apply the money received by it in payment of her debt to it.

We need not stop to inquire whether or not there is evidence to support that part of the findings which states that the money came into the hands of Harding and Page as trustees and was by them paid to the Continental Building & Loan Association. If the money resulting from the sale or operation of the mines did actually come into the hands of the plaintiff, it is immaterial whether it came through the medium of the trustees or otherwise. The essential point is that, according to findings which are sustained, the plaintiff agree to pay the claim of Emma A. Boggess out of any surplus moneys received from the mines, after paying the cost of clearing title. It was bound to apply any surplus moneys so received, whether or not they came to it directly from the trustees. The findings last referred to are, therefore, not material.

In addition to the attack on the sufficiency of the evidence, the only point made by appellant is that the court erred in permitting the defendant Emma A. Boggess to testify that her husband had told her of the terms of the agreement whereby the mines were mortgaged to Harding and Page, and that she had consented thereto.

This testimony was offered for the purpose of showing notice to Mrs. Boggess of an agreement made for her benefit and ratification of the same by her. If it was necessary to prove such ratification, the testimony was competent. If not, it is impossible to see how its admission could have prejudiced the appellant.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(158 Cal. 474)

TITLE INS. & TRUST CO. v. INGERSOLL.

(L. A. 2,552 and 2,660.)

(Supreme Court of California. Oct. 7, 1910. Rehearing Denied Nov. 3, 1910.)

1. Husband and Wife (§ 229*)—Enforcement of Trust—Complaint.

A complaint by a wife against her husband to enforce a trust as to her separate property, which alleged that money of her separate estate was received by the husband and invested by him in his own name in trust for her, that part of the money was invested in described real estate, title to which was taken in his name, that other parts thereof had been invested by him in other property, the character of which was unknown, that he had never rendered an account, and that a large amount of money was due the wife from him arising out of her funds, stated a cause of action for a personal judgment against the husband, in the absence of any objection that the claim relied on was not matured.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 229.*]

2. Judgment (§ 252*)—Conformity to Complaint—Prayer for Relief.

A complaint in an action by a wife against her husband to enforce a trust as to her separate estate, which prayed for the recovery of such sums of money as might be in the hands of the husband, justified a personal judgment against the husband for money which he had received in trust for the wife, and which he had expended in investments in his own name in a manner which he did not disclose at the trial so that it could not be traced.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

3. Judgment (§ 252*)—Conformity to Pleadings and Issues.

Where the complaint is answered, the court may, as authorized by Code Civ. Proc. § 580, go beyond the prayer of the complaint and grant plaintiff any relief consistent with the case, and within the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

4. Account (§ 11*)—Relief—Judgment.

In an action at law for an accounting, the usual relief is a personal judgment for the balance of money found due plaintiff after the accounting is had.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 26–61; Dec. Dig. § 11.*]

5. Account (§ 22*)—Suit in Equity—Relief.

In a suit in equity for an accounting, the court may render a personal judgment where a more specific remedy is not practicable.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 133, 134; Dec. Dig. § 22.*]

6. Executors and Administrators (§ 431*)—Claims—Trusts—Presentation—Necessity.

An action to declare property held by a decedent in his own name the property of plaintiff as beneficiary of a trust imposed on decedent is not technically an action on a claim against decedent's estate, while an action to recover trust money converted by the trustee to his own use, the identity of which cannot be traced, is an action on a claim against the estate, and is not maintainable unless a claim therefor has been presented to the administrator for approval.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1631; Dec. Dig. § 431.*]

7. Action (§ 45*)—Joinder of Cause of Action—Enforcement of Trust.

One suing to establish and enforce a trust may recover in one action the specific property into which a part of the trust fund is traced and a personal judgment for the remainder which cannot be identified.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 385, 403; Dec. Dig. § 45.*]

8. Husband and Wife (§ 49¾*)—Gift or Trust—Creation—Presumptions.

The rule that the mere acquisition by a husband of the possession of his wife's separate estate, and his subsequent management and control thereof with her consent, do not necessarily show her intent to make a gift to the husband or to change its status to community property, but that the husband presumptively takes in trust for her, so that it devolves on him, on his claiming that it is a gift or loan, to prove that fact, is not affected by Civ. Code, §§ 2221, 2222, declaring that the acts or words of the parties must indicate with reasonable certainty the intention to create and accept a trust, and the subject, purpose, and beneficiary thereof.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 256–260; Dec. Dig. § 49¾.*]

9. Trusts (§ 35*)—Express Trust—Creation.

Where a wife commits money of her separate estate to the custody and control of her husband, on his agreement that he will keep it for her and invest it for her use in his own name, the trust established is an express trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45–50; Dec. Dig. § 35.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

10. HUSBAND AND WIFE (§ 49¾*)—GIFT OR TRUST—EVIDENCE.

Evidence *held* to show that a husband received the money of the separate estate of his wife in trust for her, and not as a gift or loan.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 260; Dec. Dig. § 49¾.*]

11. APPEAL AND ERROR (§ 1010*)—FINDINGS—EVIDENCE.

The question whether the proof is sufficient to establish a parol trust is primarily for the trial court, and the rule that the parol evidence must be clear and convincing does not mean that the evidence must be entirely plain and convincing to an appellate court, and it will not disturb the findings of the trial court where there is substantial evidence warranting a clear and satisfactory conviction to that effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

12. HUSBAND AND WIFE (§ 238*)—LIABILITY OF TRUSTEE—PERSONAL JUDGMENT.

Where a trustee mingles the trust money constituting the separate estate of his wife with the community property so as to destroy its identity, the trust will be enforced by a personal judgment for the amount of money not traceable into specific parcels.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 854; Dec. Dig. § 238.*]

13. HUSBAND AND WIFE (§ 120*)—SEPARATE ESTATE—HUSBAND AS TRUSTEE FOR WIFE—COMMINGLING PROPERTY.

The fact that a husband holding money constituting the separate estate of his wife mingled it with the community property, so as to destroy the identity of the money of the wife, does not destroy the trust by converting the separate property into community property, though it may be a circumstance proving an agreement to that effect.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 430; Dec. Dig. § 120.*]

14. LIMITATION OF ACTIONS (§ 103*)—EXPRESS TRUSTS—ENFORCEMENT—LIMITATIONS.

Limitations do not begin to run against the enforcement of an express trust until there is a repudiation of the trust by the trustee or some act by him amounting to a violation of the trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent.Dig. §§ 506–510; Dec.Dig. § 103.*]

15. HUSBAND AND WIFE (§ 220*)—ENFORCEMENT OF TRUST—LACHES.

A suit by a wife against her husband to establish and enforce a trust as to her separate property is not barred by laches, where the delay in instituting the suit does not legally prejudice the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 801; Dec. Dig. § 220.*]

16. TRUSTS (§ 219*)—MANAGEMENT OF ESTATE—LIABILITY OF TRUSTEE—INTEREST.

A charge of interest against a trustee is authorized, where the transactions are such that it is difficult or impracticable to ascertain with any certainty what profits he has realized by his unauthorized use of the trust funds; the charge being not a punishment, but only to enforce the principle that the trustee shall not profit from his unauthorized use of trust funds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 314–317; Dec. Dig. § 219.*]

17. TRUSTS (§ 219*)—MANAGEMENT OF ESTATE—LIABILITY OF TRUSTEE—INTEREST.

The question whether any interest shall be charged against a trustee for his unauthorized use of the trust funds, and, if any, how much, depends on circumstances, and they may be such that a mere restoration of the trust property or its value, without interest, will satisfy the demands of justice.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 314–317; Dec. Dig. § 219.*]

18. TRUSTS (§ 219*)—MANAGEMENT OF ESTATE—LIABILITY OF TRUSTEE—INTEREST.

Where a trustee has in fact prudently invested and managed the trust funds, though confused with his own property, the rule charging him with interest rests on his neglect in failing to keep accurate accounts, and on the fact that by his neglect the actual profits realized have been made difficult to ascertain, and when the trustee is able to show that the mingled fund was well managed and what the profits are, and that the profits actually made do not exceed a specified amount, justice requires that the charge shall be limited to the equivalent of the gains actually made.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 314–317; Dec. Dig. § 219.*]

19. TRUSTS (§ 231*)—MANAGEMENT OF ESTATE—LIABILITY OF TRUSTEE.

Where the beneficiary knew that the trustee mingled the trust funds with his own money and did not object, and no charge of fraud or bad faith is made, the trustee should be held liable only for the results of the investments prudently made.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. § 231.*]

20. TRUSTS (§ 81*)—RESULTING TRUSTS.

Payment by a husband of a part of the price of land purchaser by him with money of his wife held in trust by him is in legal effect a payment by her, and a trust results in her favor for an interest equaling her share of the price.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 116; Dec. Dig. § 81.*]

21. HUSBAND AND WIFE (§ 4*)—SUPPORT OF WIFE—OBLIGATION OF HUSBAND.

A husband must maintain his wife, and must furnish her money to pay such of the living expenses as he leaves her to look after, or pay them himself.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 9, 10; Dec. Dig. § 4.*]

22. HUSBAND AND WIFE (§ 232*)—ACTIONS—EVIDENCE.

In the absence of evidence showing the fund from which a husband paid the living expenses of his wife, it is presumed that he paid them out of community funds, instead of her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 844; Dec. Dig. § 232.*]

23. HUSBAND AND WIFE (§ 151*)—SUPPORT OF WIFE—OBLIGATION OF HUSBAND.

Under Civ. Code, §§ 174, 176, making a husband liable for articles necessary for his wife's support, and requiring a wife to support the husband out of her separate property, when he has no separate property, and there is no community property, and he is unable to support himself, a wife's separate property acquired by devise or succession will not be resorted to even for her support, except where the community property fails and the husband refuses to pay or supply from his separate estate; but the wife may consent to the use of her separate estate for such support.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582–595; Dec. Dig. § 151.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Consolidated actions by the Title Insurance & Trust Company, executor of Rosetta S.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Ingersoll, deceased, against O. K. Ingersoll. From judgments for plaintiff in each action, defendant appeals. Affirmed in part; reversed and remanded in part.

Valentine & Newby, for appellant. Stephens & Stephens, for respondent.

SHAW, J. The record before us presents appeals in two different cases bearing the same title. One is a case in the superior court of Los Angeles county numbered, in that court, 42,663. The other is a case numbered, in that court, 48,027, which was begun during the pendency of the case first mentioned. The first-mentioned case was before this court upon former appeals by the plaintiff from a judgment in favor of the defendant and from an order denying plaintiff's motion for a new trial. That judgment and order were reversed because of the erroneous admission of evidence of the good character of the defendant. Title, etc., Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94. The first case involved the question of the investment by the defendant of certain moneys belonging to the separate estate of the deceased, who was his wife, and its principal objects appear to have been to impress a trust in her favor upon the property in which her money was invested, so far as it could be traced, to obtain an accounting from the defendant, as trustee, as to the disposition of the trust money, and the income and profits thereof, and a judgment for the amount of money intrusted to him and not identified and traced to specific property. In the course of the trial it was discovered that a certain part of the separate estate of the wife had been used to purchase a parcel of real estate, not described in the complaint, and thereupon the second suit was begun to establish a trust in behalf of the deceased as to an interest in that lot equal to the proportion which her part of the purchase money bore to the whole price thereof. The two cases were consolidated and tried together. The judgment in each case was in favor of the plaintiff, and a new trial was denied. The defendant has appealed in each case from the judgment and from the order denying his motion for a new trial.

The first action was begun on October 16, 1903, by Rosetta S. Ingersoll in her lifetime. On her death, the present plaintiff was substituted in her place. The defendant and the deceased were married in the year 1875, and continued in the relation of husband and wife until her death, which occurred on November 6, 1903. They never had any children. The complaint avers that during the marriage Rosetta S. Ingersoll received sums of money belonging to her separate estate, aggregating about $30,000, all of which, with the consent and acquiescence of the said wife, was received by the husband and invested by him, in his own name, in trust for her use and benefit, in pursuance of an agreement and understanding between them that he should receive and hold said money and all property in which it might be invested, if invested in his name, in trust for her use and benefit. It was alleged that part of said money was invested by him in certain described real property, the title to which, in accordance with said agreement, was taken and still remains in his name; that other parts thereof have been invested by him in other property, the character and description of which is unknown to plaintiff; that he has received large sums as rents, issues, and profits of said separate estate in his control; that he has never rendered an account to plaintiff; and that a large amount of money is due her from him, arising out of her said funds. The judgment was that the plaintiff recover of the defendant the sums of money of the wife's separate estate found to have been received by him in trust for her and not traced into any specific property, with compound interest at 6 per cent. per annum thereon, amounting in the aggregate to $40,764.76, and costs of suit, and that he holds certain described bank stock in trust for her estate, that he account to the estate for the dividends received thereon and transfer the stock to the plaintiff as executor thereof.

The defendant claims that the facts stated in the complaint do not authorize a personal judgment against the defendant. The complaint alleged that a large amount of money was due the plaintiff from the defendant. No point being made to the effect that a matured claim was not stated, this allegation, in connection with the other averments above given, is sufficient to authorize a personal judgment for such sum as the court found had been received by him in trust for her and which was not accounted for by a showing from him that it had been invested in some specific property for her use. 1 Cyc. 436, 438, 448; Green v. Brooks, 81 Cal. 333, 22 Pac. 849. The point that there is no prayer for personal judgment, except "for the recovery of such sums of money as may be in the hands of the defendant," and that this, if strictly construed, would not include any money which he had expended in the purchase of property to which the court could not trace it, but only that found to be still on hand, is without substantial merit. A prayer for general relief would have sufficed. 1 Cyc. 439. Money which he had received in trust for her, and which he had expended in investments in his own name, in a manner which he did not disclose at the trial, so that it could not be traced, would be money "in the hands of the defendant," within the meaning of that phrase as used in the prayer of the complaint. It was money thus in his "hands" which constituted the larger part of the sum recovered. Besides this, there was an answer to the complaint, and in such a case the court may go beyond the prayer of the complaint and grant the plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580. In an action for an accounting it is the proper practice to give a personal judgment for the balance of money found to be due the plaintiff after such accounting is had. Smith v. Smith, 88 Cal. 577, 26 Pac. 356. It was the usual relief in an action at law for an accounting. 1 Cyc. 408, 413. In equity, since the court there has larger powers than strictly at law, other and more effective relief may be given; but the court may render a personal judgment if a more specific remedy is not practicable. 1 Cyc. 416.

It is not a case where the plaintiff is required to elect between a suit in equity to trace trust property and recover it in specie, and an action to recover a personal judgment for the amount of trust funds converted by a trustee. In cases against an estate of a decedent in course of administration this necessity sometimes arises, because an action to declare certain property, held by the decedent in his own name, the property of the plaintiff, as beneficiary of a trust imposed on the decedent, is not, technically considered, an action upon a claim against the decedent's estate; whereas, an action to recover trust money converted by him to his own use, the identity of which cannot be traced, is an action upon a claim against the estate and cannot be maintained unless a claim therefor has been presented to the administrator for approval. Cases of this character have no application to the case at bar. The plaintiff had the right to allege the trust relation, the receipt of trust funds, the failure to account, and to recover in one action the specific property into which a portion of the fund is traced, and a personal judgment for the remainder which cannot be identified. The beneficiary of a trust, of course, cannot have a judgment declaring the defendant a trustee of specific property bought with trust funds, and decreeing such property to be the property of the beneficiary, and also a personal judgment for the money invested by the defendant in that property. So far as the trust fund is traced to specific property which the beneficiary elects to take, the part of the fund thus accounted for constitutes a credit on the general account, and personal judgment can be given only for the balance. This was the course followed by the court. There is no objection to the practice of trying the entire case in one action, and no inconsistency in the claims of plaintiff, provided the account is thus separated and judgment is not twice given for the same money.

The defendant contends that the evidence is insufficient to establish the finding that the money of his wife's separate estate was received by him in pursuance of an agreement or understanding that he was to hold and invest it for her use. Upon this point, in the decision upon the former appeal, it was said that the mere acquirement of the possession of the wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not necessarily show an intent on her part to make a gift thereof to the husband, or to change its status to community property, but that the effect of these facts, without explanation, was to raise a presumption that it continues to be her separate property and that the husband takes it in trust for her, that it devolves on the husband who claims that it is a gift or loan to prove the fact, but that this may be done by a showing of the nature of the transaction and the circumstances as well as by proof of an express agreement. 153 Cal. 5, 94 Pac. 94. These propositions are well supported by the authorities cited in the former opinion. It is unnecessary here to repeat them. Even if, as contended by appellant here, they were unnecessary to the decision and do not constitute the law of the case on the present appeal, we are entirely satisfied with the law as there stated. We do not find anything in sections 2221 and 2222 of the Civil Code that changes or affects this rule. They declare that the acts or words of the parties must indicate "with reasonable certainty" the intention to create and accept a trust and the subject, purpose, and beneficiary thereof. The effect of the authorities referred to is that the circumstances above detailed are sufficient to meet these tests. The Code sections merely declare the law as it previously existed. That the money in question was the separate estate of Mrs. Ingersoll, that the defendant was her husband, and that he received, invested, managed, and controlled it, in his own name, with her consent and in accordance with her wish, are facts established by his own testimony on the trial. The presumption of a trust relation therefore arises, and the trust must be deemed to have been established, unless there was other evidence of such a character that the court below was bound to give it sufficient force and weight to overthrow that presumption.

It is insisted by the appellant, however, that the cases cited in the former opinion all relate to involuntary trusts, that the principle of evidence established thereby has no application to express trusts, that the only trust claimed to exist in the case at bar is an express trust, since if an involuntary trust, only, is shown, the plaintiff's action is clearly barred by the statute of limitations. We cannot agree with this contention. Where a wife commits money of her separate estate to the custody and control of her husband, upon his agreement that he will keep it for her and invest it for her use in his own name, the trust established by the transaction is an express trust. The substance of the rule stated in the former opinion is that when proof is made of the circumstances stated, namely, that she committed her money to his keeping and control, and that he subsequently managed and controlled it, all with her consent, these circumstances unexplained raise an inference that there was an agreement between the two that he should take care of it for her and invest it for her use, and that if it further appears that he invested it in his own name with her consent, and nothing farther is shown, an inference is raised that he has agreed to hold it in his name in trust for her. Such a trust is an express trust. The facts stated, and the reasoning of the decisions in the authorities referred to, show that the rule is not confined to cases of involuntary trusts.

The finding of the court implies that the defendant did not succeed in showing that the money of his wife was received by him as a gift or loan from her to him, or as a contribution from her to the community estate; that the evidence in his behalf did not rebut the aforesaid presumption. We cannot say that the evidence was of such a character as to compel the conclusion that such a gift, loan, or contribution was made by her. Aside from his express denials, it is much more consistent with the inference made by the court that there was an agreement by him to hold it in trust for her. In his own testimony, which was extended to great length and occupied many days' time in the giving, he does not mention any word or act of his wife indicating any intention on her part to make a loan to him, or a gift either to him or to the community estate. In the absence of such intent, the law would make him her custodian or trustee, and the equitable title to the property would remain in her. The relations of the parties and their conduct with respect to her money justified the court in preferring the inference that the understanding was that he was to act as trustee for her in the management and disposition of it. He expressly denied that there ever was any such understanding or agreement between them. But his conduct as a witness, so far as we can judge from the record, was such that the court may have discredited him on all points wherein his testimony was in his own favor and the conditions were such that contradictory evidence could not be produced. The court was so impressed by this conduct that it made a finding stating that upon the trial he had "willfully and knowingly given false testimony concerning matters material to the issue." There was some evidence in support of this statement, and, although it is not a material finding, it shows that the court applied the doctrine that "a witness false in one part of his testimony is to be discredited in others." Code Civ. Proc. § 2061. Our conclusion is that the evidence is sufficient to support the findings on the subject of the trust.

Appellant contends that, even if the evidence would have been sufficient in an ordinary case, it is not of the clear and convincing character necessary to establish a parol trust, or to overcome the presumption that the property was community property. The proof that the money, when received, was her separate estate, was positive and indisputable. With respect to the trust it was not so strong. But upon a case of this kind, as in others, the question whether the proof is sufficiently strong and convincing is primarily addressed to the trial court, "and this court must accept the determination of the trial court thereon as conclusive." Brison v. Brison, 90 Cal. 334, 27 Pac. 186; Couts v. Winston, 153 Cal. 688, 96 Pac. 357; Wadleigh v. Phelps, 149 Cal. 637, 87 Pac. 93. The rule "does not mean that the evidence in the record must be entirely plain and convincing to an appellate court. * * * It will not disturb the finding of the trial court * * * where there is substantial evidence warranting a clear and satisfactory conviction to that effect." Wadleigh v. Phelps, supra. We cannot here give a statement of all the evidence upon which the trial court gave its decision. It was doubtless based in part on the demeanor of the defendant as a witness on the trial. It is sufficient to say that we cannot say that the trial court disregarded this rule in making its findings (Mahoney v. Bostwick, 96 Cal. 58, 30 Pac. 1020, 31 Am. St. Rep. 175), and that, considering the obligations of the husband to the wife, the decision does not appear to be unjust.

The fact that the trust money was in part commingled with the community property so as to destroy its specific identity does not necessarily destroy the trust as to that part, nor prevent its enforcement. It prevents the court from tracing it and declaring any specific parcel of property to be trust property; but the trust may still be enforced by a personal judgment against the husband for the amount of money not traceable into specific parcels. Lathrop v. Bampton, 31 Cal. 23, 89 Am. Dec. 141. The cases cited by the appellant (Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547; Reid v. Reid, 112 Cal. 278, 44 Pac. 564; Est. of Boody, 113 Cal. 686, 45 Pac. 858; Davis v. Green, 122 Cal. 366, 55 Pac. 9; Hamilton v. Hubbard, 134 Cal. 604, 65 Pac. 321, 66 Pac. 860), to the effect that specific parcels cannot be charged with a trust or declared the wife's separate estate, where the wife's money has been commingled with other property and cannot be identified and traced into the specific parcels, are not contrary to this doctrine. Nor does such commingling and loss of identity destroy the trust by converting the separate property into community property. It may be a circumstance tending to prove an agreement to convert it; but when the trial court, from all the circumstances, has concluded that it was not mingled in pursuance of any agreement to make it community property, but was mingled by the husband after he had received it in trust, we are bound by this conclusion. The only effect of such commingling, in that case, is to prevent identification, and the husband, as holder of the community property, with which he has mingled the trust property, is liable personally for the trust money. Appellant suggests that the rights of creditors of the community, or of third persons dealing with the husband, might be jeopardized by this doctrine. The answer is that no such rights are here involved, and that if third persons have equities superior to those of the wife they would be fully protected and enforced in a proper action.

We do not find anything in the decision in Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458, that is inconsistent with our conclusions here. In that case the facts found showed that there was no trust relation, as alleged, and the decision merely holds that a personal judgment as for money had and received, in a case based on a complaint to enforce a trust, was a judgment upon a cause of action not alleged. The question of the proper form of judgment and the relief to be given in an action for an accounting was not discussed.

The defense of the statute of limitations is made, and it is also claimed that the action is barred by laches. These defenses are necessarily based on the proposition that the trust alleged and found was an involuntary trust, and that, consequently, the statute of limitations began to run as soon as the trust arose. But it is apparent from the allegations, the findings, and the evidence that, if there was any trust at all in favor of the wife, it was an express trust. The husband was to take her money, keep it for her, invest it for her, and apply it to her use, recognizing, of course, her interest and rights in the property into which it went and her right to reclaim the money or property at any time she saw fit. The evidence shows that they lived together in entire harmony, and that she had the utmost confidence in him and in his method of caring for and using her money, until some two or three months prior to the beginning of the action. There is nothing to show that he ever at any time repudiated the trust relation or refused to comply with such requests as she made regarding her money. She had no occasion or cause for beginning any suit against him concerning it, and she appeared to be entirely satisfied with his management and disposition of it. They consulted together in regard to the investments he made from time to time, and no disagreement arose between them. If it was a trust at all, it was an express trust of a continuing character. In such cases it is well settled that the statute of limitations does not begin to run until there is a repudiation of the trust by the trustee, or some act by him which amounts to a violation of the trust. Baker v. Joseph, 16 Cal. 176; Butler v. Hyland, 89 Cal. 582, 26 Pac. 1108; Odell v. Moss, 130 Cal. 359, 62 Pac. 555. There is no ground for the application of the doctrine of laches. It is plain that no legal prejudice will be caused to the defendant by reason of the delay, nor by reason of a just enforcement of the trust.

We have discussed and decided the preceding propositions arising in the original case, because they are either necessary to the present disposition of it, or will probably again arise upon a new trial in the court below. We now come to an objection which makes it necessary to reverse the judgment in part.

The court found that the defendant had received, of his wife's money, in trust, the sum of $20,972.44. Of this $1,590 was accounted for by showing that it was used to buy certain specific property as to which the court declared a trust in her favor. The balance of $19,382.44 remained, and there is no finding that any of it was used to buy any specific parcel of property held by the defendant. Upon this balance the court computed and charged to the defendant compound interest at 6 per cent. per annum upon each sum received from the date it was received to July 31, 1909, the date of the judgment. This interest amounted to $21,382.32, and together with the principal it made up the sum of $40,764.76 for which the court gave personal judgment against the defendant. The receipts of his wife's money began in 1888, and up to 1890 he had received only $169 thereof. The findings state that in 1875, at the time of his marriage, he had $10,000 worth of property, including a farm in Kansas worth $5,000; that in 1885, with his separate funds, he bought a ranch in California for $3,780 which he sold in 1887 for $12,200. Nothing further is expressly found in regard to the amount of his receipts from his own separate property and community gains and earnings. The evidence shows, without conflict, that for the years from 1885 to 1890, inclusive, from his income, there was an accumulation of about $8,200 above living expenses, and that up to 1903 he had received from profits on the sale of his Kansas farm $3,300, and from sources other than his wife's funds $2,200. His bank books and diaries show total receipts amounting to over $82,000, in addition to those from his wife. But, as much of this represents successive deposits of the same money, it cannot be taken as the true amount of such receipts. From the above facts, it is clear, however, that his separate property amounted to at least $20,000, and that the accumulations from community earnings added at least $10,000 more to his estate. The findings state that, during all these years up to the time the suit was begun in 1903, he was an active business man, engaged in divers lines of business, that he never suffered any loss from bad loans or investments, that the living expenses of himself and wife amounted to only $600 a year, and that he never kept the different funds of his separate estate, the community earnings, and his wife's money separated in any way.

The only reasonable deduction from these facts is that his separate estate and the community earnings must have contributed at least as much to the accumulation of the property held by him and in his name at the time the action was begun as did the money received by him from his wife. But the court further finds that, at the time the suit was begun, the only property of any character held by the defendant, or in which he had any interest, consisted of seven parcels of real estate, nine certificates of stock in various banks, and $226.79 in money, and that for the real estate and stocks he had paid prices amounting in the aggregate to $36,620. In this list of prices there was included $840 that was also accounted for as money of the wife paid on the real estate involved in case No. 48,027 aforesaid, on account of which a trust was in that action declared to that extent in that property in her favor. Deducting that sum leaves $35,780 as the total aggregate price of all his interests and property. The land and stock purchased in the year 1900 and after represented $28,740 of this sum. It will thus be seen that at the time the suit was begun, if the findings are correct, all the property the defendant had, as the result of his investments of over $30,000 of his own money and $19,382.44 of his wife's money mingled together, and his admitted careful management, was this list of property aggregating a total investment of $36,006.79. On account of this investment of these joint funds, more than three-fourths of which was made after January 1, 1900, the court, in July, 1909, charged him with the sum of $40,764.76 as the result of his investment of his wife's money alone.

There is no finding nor evidence that the property in which it was found to be invested had increased in value after it was purchased. There is no averment or claim that the defendant had been guilty of any fraud or wrongdoing, or that he had mismanaged, misused, or squandered any of the money, either his own or that of his wife. The evidence shows that in addition to the $600 a year for living expenses there were other expenses, such as traveling expenses of the wife upon trips to the East and in California, and expenses of carrying on his farms and business, all of which were paid out of his income; but in the above estimate of net community contributions to the capital we have made ample allowance and deductions for these additional expenses.

The necessary conclusion is that the defendant did not obtain from his investments of the wife's money a profit equal to 6 per cent. per annum compound interest. The case made by the record does not authorize such a charge. A charge of compound interest, or simple interest, is authorized where the transactions are of such a nature that it is extremely difficult or impracticable to ascertain with any degree of certainty what profit was realized from the trust fund. Estate of Clark, 53 Cal. 359. It is not made for the purpose of punishing the trustee, but to enforce the principle of equity that the trustee shall not be permitted to make any profit from the unauthorized use of the trust funds. Miller v. Lux, 100 Cal. 615, 35 Pac. 345, 639. It is imposed "for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee, except, perhaps, his commission or compensation." Cruce v. Cruce, 81 Mo. 684, approved in Wheeler v. Bolton, 92 Cal. 172, 28 Pac. 558. The question whether any interest should be charged, and, if any, how much, depends on the circumstances of the particular case, and they may be such that a mere restoration of the property, or its value, without any interest, would be all that justice would require. Wheeler v. Bolton, supra.

From these statements of the underlying reasons of the rule allowing interest in such cases, it is plain that where the trustee has, in fact, prudently invested and managed the trust funds, although mingled and confused with his own money, the rule that he is to be charged with interest thereon upon an accounting rests principally, if not entirely, on his neglect in failing to keep accurate accounts and on the fact that by his neglect the actual profits realized have been made difficult to ascertain. When the trustee, notwithstanding his failure to keep the trust funds separate from his own, is able to show that the mingled fund was well managed and wisely invested and what the profits are, or that the profits actually made do not exceed a certain amount, all the reasons for imposing a charge of interest exceeding such profits are wanting, and justice requires that the charge be limited to the equivalent of the gains actually made. It is conceded in this case that the defendant was economical, prudent, energetic, and thrifty in the management and investment of these funds and his own in common. As he has shown to the satisfaction of the court that the investments did not produce the interest charged, it follows that the charge was excessive and should not have been made.

In this connection, and as a further reason for rejecting the charge of interest in excess of the actual profits shown, it is to be observed that the defendant, in thus mixing his wife's money with his own, did not violate the trust proven. She gave the money to him for the very purpose of having him deposit it with his own in the bank account kept in his name or in the names of both of them, and with the intention that he should invest it in his own name. Some of it she herself deposited in the common account, and all of it was so deposited with her knowledge, consent, and approval. In all this he was carrying out her wish and was not violating the trust, but was executing it. It further appears that she knew of the investments which he made of the common fund with which her money was thus with her approval mingled, and that she either approved of them, consented to them, or did not object to them. In these circumstances, it is clear that she has practically agreed to the actual investments made, and has no right to object to anything, except his neglect or failure to keep an account of her money separated from his own. When he shows, as he does show, if the findings state the case accurately, that the property he has on hand constitutes the result of these investments, she cannot, in justice, be allowed to receive more than the equivalent of her just share thereof. It may be true, as she claims, that she did not know that he was not keeping such an account. But she does not charge him with any fraud or bad faith in this respect. She can only claim the results of the investments, since she admits that they were prudently made. The mere fact that they were mingled with his own does not entitle her to more, when he makes complete disclosure of all his transactions, or when the court is able to ascertain the actual profits that were realized from the entire fund. She occupies more nearly the position of a silent partner in a well-managed business enterprise, than that of a beneficiary of trust funds wrongfully mingled and used with his own by a trustee. Upon the facts shown, she is entitled only to a sum equal to such proportion of the value of the property held by him at the time the suit was begun, as the money which she contributed to the purchase price thereof bears to the whole purchase price. If relief could be given by allotting to her such proportionate interest in the property itself, perhaps that method would be preferable. If it cannot conveniently be done in that manner, then she should be given a personal judgment for that proportion of its present value, and not for anything more.

In addition to the findings in the first case showing the receipt of his wife's moneys which the court was unable to trace into any specific parcel of property, and on account of which it gave her personal judgment against the defendant, the court found that he received $750 of her money and with it purchased certain 10 shares of stock in the First National Bank of Monrovia, in his name for her use. The judgment declared the defendant a trustee of this stock for the use and benefit of her estate. The claim that the finding that this money was received in trust by him is not supported by the evidence is disposed of by what has been said. It is sufficient to say further on this branch of the case that the evidence is sufficient to show that the price of the stock was paid out of the money received from her separate estate.

The matter involved in the second case, numbered 48,027 in the superior court, was the purchase by the defendant of a certain lot on Maple avenue in the city of Los Angeles. It was clearly proven that the price was $1,750, and that $840 of the identical money out of which the price was paid had just been received by the defendant from money belonging to her separate estate, and that it was received upon the same terms and understanding as the other moneys received by him from that source. The court found and adjudged that her estate was the equitable owner of $^{12}/_{25}$ of this lot and directed a conveyance thereof to the plaintiff as executor of the estate. This finding and judgment was clearly correct. Payment of a part of the price by him with her money held in trust by him was the same, in legal effect, as between the parties, as a payment by her. It created a resulting trust in her favor for an interest which equaled her proportion of the price. Moultrie v. Wright, 154 Cal. 523, 98 Pac. 257, and cases there cited.

Our conclusion on the respective appeals is that the judgment in the first action, in so far as it declares and enforces a trust in respect to the 10 shares of stock in the First National Bank of Monrovia, purchased by defendant on December 18, 1891, should be affirmed; that the judgment and order appealed from in the case numbered 48,027 in the superior court of Los Angeles county should be affirmed; that the personal judgment in the first action should be reversed; and that a new trial should be granted as to a part of the issues relating thereto, but not as to all. The case has been twice tried upon substantially the same evidence. Upon appeal after the first trial we were constrained to uphold the findings that no trust relation was established, solely because of the fact that this court cannot weigh the evidence and decide between the inconsistent inferences which may sometimes be drawn from the same facts, and the judgment was reversed solely because of the admission of evidence bearing upon this issue, which we held to be incompetent, and which would have been harmless, but for the fact that the finding seemed of doubtful verity. The case has been tried again, and it apparently received careful reconsideration in the lower court. We are satisfied with the findings and conclusions of that court on all points, except the conclusion as to the amount of interest or profit to be charged against the defendant and included in the personal judgment, and the finding that at the time the action was begun the defendant owned no property of any character, except that described in finding 13. It is claimed by the respondent that the defendant owned other property at that time, in addition to that described in the finding, and that the property described had greatly increased in value after its purchase, so that the amount allowed against the defendant is not, in fact, disproportionate to respondent's just share of the present value of the accumulations. It is claimed by the defendant that the amounts expended, other than for mere living, should be taken into the account, as perhaps they should, if it is necessary to do so in order to ascertain how much of his income was saved and accumulated. There should be a new trial of the question whether he had other property and as to the amount justly allowable to respondent as interest or profit, and upon those issues only.

Inasmuch as the question may arise upon the trial of these issues, it is necessary to say something upon the subject of the liability of a husband for the maintenance of his wife. The law imposes on him the duty to maintain his wife. Chaffee v. Browne, 109 Cal. 219, 41 Pac. 1028; Bashore v. Parker, 146 Cal. 530, 80 Pac. 707. This means that it is his duty to furnish her money to pay such of the living expenses as he leaves it to her to look after, or to pay them himself. In the absence of evidence showing the fund from which he paid these expenses, it will be presumed to be of community funds, rather than from her separate property. Her separate property, acquired by devise or succession, will not be resorted to, even for her support, except where the community property fails and he refuses to pay or supply from his separate estate. Civ. Code, §§ 174, 176. But, of course, she may consent to the use of her own separate estate, and if so it should be charged to her accordingly.

The judgment and order appealed from in case numbered 48,027, in the superior court, being case L. A. No. 2,660 in this court, are affirmed. The judgment and order in the other case, so far as they relate to the aforesaid 10 shares of stock in the First National Bank of Monrovia, are affirmed. The personal judgment for $40,764.76 is reversed, and the order denying a new trial is reversed as to a part of the issues only as hereinbefore indicated, and otherwise it is affirmed. The cause is remanded, and the superior court is directed to try the issues only so far as may be necessary to determine how much should be allowed to the plaintiff in lieu of profits received by defendant in the investment and use of her money in his own name, or her just proportion or interest in the property on hand at the time the action was begun, or its subsequent transmutations, if that method shall be deemed more just, advisable, and convenient. The appellant shall recover only one-half the costs of appeal.

We concur: ANGELLOTTI, J.; SLOSS, J.

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158 Cal. 453

In re SANITARY BOARD OF EAST FRUITVALE SANITARY DIST.

(S. F. 5,575.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

1. Municipal Corporations (§ 7*)—Concurrent Corporations.

There cannot be at the same time within the same territory two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 12, 13; Dec. Dig. § 7.*]

2. Municipal Corporations (§ 35*)—Annexation—Effect.

Generally, where one municipal corporation is annexed to another, the annexing city takes over the functions of the other, which by virtue of the annexation is extinguished, and its properties, powers, and duties are vested in the corporation of which it has become a part.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 35.*]

3. Municipal Corporations (§ 64*)—Legislative Control.

In the absence of constitutional restriction, the Legislature has absolute power over the organization, dissolution, extent, powers, and liabilities of municipal and other public corporations established as agencies of the state for purposes of local government.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.*]

4. Municipal Corporations (§ 35*)—Changing Boundaries—Effect.

The effect of enlarging or diminishing the boundaries, or of consolidating or annexing municipal corporations, is governed by legislative intent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 35.*]

5. Appeal and Error (§ 843*)—Review—Constitutional Provisions.

Where a question on appeal can be decided without challenging the Legislature's power in a given particular, that course will be followed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

6. Municipal Corporations (§ 35*)—Annexation of Sanitary Districts—Effect.

A sanitary district, formed under St. 1891, c. 161, is extinguished and dissolved on annexation of its territory to an adjacent municipal corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 35.*]

7. Municipal Corporations (§ 35*)—Sanitary Districts — Dissolution — Effect on Pending Bond Proceedings.

Bond proceedings, pending in a sanitary district formed under St. 1891, c. 161, on its dissolution by annexation to a city, fall, and any further steps to construct sewers in the territory must be initiated and conducted by the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 35.*]

8. Municipal Corporations (§ 450*)—Separate Sewer Districts — Authority for Creation.

Act April 21, 1909 (St. 1909, c. 673), expressly authorizes creation of separate sewer districts within municipalities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 450.*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by the Sanitary Board of the East Fruitvale Sanitary District to determine its right to issue bonds, and the validity of such bonds. From the judgment, the city of Oakland appeals. Reversed, with directions.

J. W. Stetson, for appellant. Reed, Black & Reed and John J. Allen (T. S. Gray and Snook & Church, of counsel), for respondents.

SLOSS, J. This is a proceeding instituted by the Sanitary Board of the East Fruitvale Sanitary District, pursuant to section 18 of the act for the formation of sanitary districts (St. 1891, p. 223), to determine the right of the board to issue bonds and the validity of such bonds. The East Fruitvale Sanitary District was organized in May, 1909, under the provisions of said act. The territory comprising the district is in the county of Alameda, and no part of it was, at the time the district was organized, within the boundaries of any municipal corporation. Following such organization the sanitary board initiated proceedings for the construction of a sewer system at an estimated cost of $54,000, to be raised by an issue of bonds of the district. An election was duly called for and held on the 10th day of July, 1909, and at such election the requisite two-thirds of the votes were, as shown by a canvass regularly had, cast in favor of the issuance of the bonds. Thereafter, on the 3d day of December, 1909, said sanitary board passed an order that the bonds of the district be issued as prescribed in the act and as directed by the vote of the electors of the district. All of the foregoing proceedings for the formation of the district and the steps precedent to the issuance of the bonds were regularly taken in strict compliance with the terms of the law governing sanitary districts.

On November 16, 1909, an election regularly called was held for the purpose of annexing to the city of Oakland certain adjacent territory, which included all of the territory embraced within the East Fruitvale Sanitary District. At said election a majority of the votes cast in the said city and a majority of the votes cast in the territory sought to be annexed were in favor of annexation. A certified statement of the result of the election was filed with the Secretary of State on the 8th day of December, 1909. The city of Oakland appeared in the present proceeding and contested the right of the sanitary board to issue the bonds. The contention of the city was and is that by the annexation the territory comprised in the sanitary district was merged into the municipal corporation of which it became a part, and that the power of such district to construct sewers or to issue bonds therefor ceased. The court below held to the contrary; its fifth conclusion of law being as follows: "That the East Fruitvale Sanitary District was not dissolved by reason of said annexation of the territory of said district to the city of Oakland and that the sanitary board of the East Fruitvale Sanitary District did not cede its powers to the council of the city of Oakland over the territory of the said district annexed to the city of Oakland. That the right of the sanitary board of the East Fruitvale Sanitary District to issue the bonds of said district, which, as set forth in the petition on file in the above-entitled matter, it intends to issue, has in no way been affected by the annexation of the territory of the district to the city of Oakland." Accordingly the court gave judgment declaring that said district is a duly and legally organized sanitary district "and that the said sanitary district possesses full power and authority to issue and sell, from time to time, the bonds of said sanitary district to the amount of $54,000." The city of Oakland appeals from this judgment.

Under section 5 of the act providing for the formation of sanitary districts, every such district has power to have and to use a common seal and sue and be sued by its name, to construct and maintain and keep clean such sewers and drains as in the judgment of the sanitary board shall be proper, and for this purpose to acquire, by purchase, gift, devise, condemnation, or otherwise, such property and rights of way as may be necessary, and to pay for and hold the same, and make contracts, deeds, etc., necessary or proper to the exercise of any of the powers of the district, to issue bonds, and to assess, levy, and collect taxes to pay the principal and interest on the same, and the cost of laying or maintaining any sewer or sewers that may be constructed subsequent to the issuance of said bonds, or any lawful claims against said district, to employ all necessary agents and assistants and pay the same, to lay its sewers and drains in any public street or road of the county, to make and enforce all necessary and proper regulations for the removal of garbage and the cleanliness of the streets and roads of the district, and for the purpose of guarding against the spread of contagious and infectious diseases and for the isolation of persons and houses affected by such diseases, and all other sanitary regulations not in conflict with the Constitution and laws of the state, to impose and fix penalties or forfeitures for any violation of its regulations or orders and to fix the penalty therefor, to call, hold, and conduct all elections necessary or proper after the formation of the district, to prescribe the time and manner of assessing, levying, and collecting taxes for sanitary purposes, to compel all residents and property owners within the district to connect their houses and habitations with the street sewers and drains, and, generally, to do and perform any and all acts necessary and proper to the complete exercise of any of its powers or the purposes for which it was formed.

The city of Oakland is governed by a freeholders' charter approved by joint resolution of the two houses of the Legislature adopted February 14, 1889. St. 1889, p. 513. This charter confers upon the city so formed every power ordinarily incident to the complete organization of a municipal corporation. These powers include each and every power conferred upon sanitary districts by section 5 of the act of 1891. The annexation act under which the territory of the East Fruitvale Sanitary District was annexed to the city of Oakland (St. 1889, p. 358) provides that from and after the date of the filing in the office of the Secretary of State of the document showing the returns of the annexation election "the annexation of such territory so proposed to be annexed shall be deemed and shall be complete, and thenceforth such annexed territory shall be to all intents and purposes a part of such municipal corporation."

It is a well-settled doctrine that "there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges." 1 Dillon Mun. Corp. (4th Ed.) § 184; King v. Pasmore, 3 Term R. 199, 243; Bloomfield v. Glen Ridge, 54 N. J. Eq. 276, 283, 33 Atl. 925. Accordingly, it is generally held that, where one municipal corporation is annexed to another, the annexing city takes over the functions of the annexed municipality, and the latter by virtue of the annexation is extinguished, and its property, powers, and duties are vested in the corporation of which it has become a part. 28 Cyc. 217; Mt. Pleasant v. Beckwith, 100 U. S. 514, 528, 25 L. Ed. 699; Adams v. Minneapolis, 20 Minn. 484 (Gil. 438); People v. Supervisors, 94 N. Y. 263; Stroud v. Stevens Point, 37 Wis. 367; Schriber v. Langlade, 66 Wis. 616, 29 N. W. 547, 554. If this be true where one of two municipal corporations having coextensive powers is annexed to another, the same result must follow a fortiori where a public corporation having powers more limited than those of a municipal corporation is annexed to a city, which possesses all of the powers of the corporation which has been annexed to it and others in addition.

These rules do not rest upon any theory of constitutional limitation. In the absence of any constitutional restriction, the Legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government. In re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. What shall be the effect of the enlargement or diminution of the boundaries of such corporations, or of the consolidation of two into one, or of the annexation of the territory of one to another, is a question to be answered by a determination of the legislative intent. The cases above cited declare the result of such action under laws which do not show affirmatively an intent to continue the existence of two separate public corporations within the same territorial limits. In the case at bar, the appellants contend that certain provisions of our state Constitution prevent the formation of a sanitary district which shall exercise jurisdiction over any part of the territory included within a municipal corporation. There have been, in our decisions, one or two intimations to this effect. Woodward v. Fruitvale San. Dist., 99 Cal. 562, 34 Pac. 239; In re Werner, 129 Cal. 567, 62 Pac. 97. But the expressions referred to were not, in either case, strictly necessary to the decision, and, as we think the question before us may (and therefore should) be decided without challenging the power of the Legislature to authorize the creation of sanitary districts covering, in whole or in part, the territory of cities or towns, we shall not enter into a consideration of the constitutional point.

Viewing the question purely as one of statutory construction, we are satisfied that, upon the general principle above stated, the various acts involved must be held to result in extinguishing and dissolving a sanitary district upon the annexation of its territory to an adjacent municipal corporation. This view, has found clear expression in the decision of this court in People ex rel. Cuff v. City of Oakland, 123 Cal. 598, 56 Pac. 445. That case involved the validity of proceedings for the annexation to the city of Oakland of the whole of one and part of another sanitary district. It was contended that territory included in a sanitary district could not be annexed to a city. Meeting this contention, the court said: "It may be conceded at the outset that sanitary districts are public corporations, though not designated as corporations by the statute, and that all their powers, duties, and privileges are such as are incident to municipal corporations formed under the municipal government act, or existing under freeholders' charters, though not possessing many important powers, duties, and privileges of the latter, and that the same powers could not, after annexation, be exercised by each in the same territory. But if the statute permits territory embraced in or covered by a sanitary district to be annexed to a city—a municipal corporation of a higher class and capable of exercising the same functions as well as others essential to municipal government—such statute contemplates, ex necessitate rei, a cession of the powers of the inferior corporations to the greater, and a consequent dissolution of the former as a result of the annexation. If the territory embraced in these sanitary districts had chosen to incorporate under the statutes as a town or city, instead of becoming annexed to the city of Oakland, it certainly could not have been necessary as a preliminary to such incorporation to disincorporate as such sanitary district, since by the incorporation they would have preserved every right and privilege they had before, and would at the same time acquire other rights and additional powers which would enable them the better to preserve and secure all the rights they had as sanitary districts; and if they might incorporate as a town or city without first dissolving the prior corporation, no reason is perceived why they could not accomplish the same thing by becoming annexed to an existing municipal corporation, under the act of 1889. * * *"

Even if this declaration may be regarded as dictum, we are satisfied that it states the true view of the statutes involved. To hold that a sanitary district retains its existence and powers notwithstanding the annexation of its territory to the city would lead to the existence within the territory annexed of two distinct local governmental bodies claiming to exercise the same powers over the same territory. Such a condition would produce intolerable confusion, if not constant conflict. We find nothing in the statute indicating an intent to so provide. It is true that the sanitary district act contains one or two expressions which might seem to indicate that a sanitary district may cover in whole or in part territory within the boundaries of a municipal corporation. Thus section 5, in granting the power to enter upon a street or road for the purpose of making excavations, declares that in "case such street or road shall be in an incorporated city or town the consent of the lawful authorities thereof shall first be obtained." Section 21 provides that upon dissolution of the district its property shall vest "in any incorporated city or town that may at said time be in occupation of a considerable portion of the territory of the district." It may be readily conceived that the Legislature had in mind the possibility that a region, including territory both incorporated and unincorporated, might be so situated as to require a single and comprehensive scheme of sewer construction, or that, in laying a sewer for a sanitary district outside of any city or town, it might be necessary to pass through the streets of some municipality in order to reach an outlet. The provisions referring to "incorporated cities or towns" may have been intended to apply in such cases, and, so read, they may be given full effect, without holding that the act contemplated the formation or the continued existence of a sanitary district entirely within the boundaries of a municipal corporation. Be that as it may, there is certainly nothing in the act for the creation of sanitary districts which indicates any intention to repeal or modify the law providing for the annexation of territory to incorporated cities. Where such territory is annexed, the law provides, as is above stated, "that such annexed territory shall be to all intents and purposes a part of such municipal incorporation." The annexed territory would certainly not be to all intents and purposes a part of the municipality, if it still remained subject in matters covered by section 5 of the sanitary district act to the control of the sanitary board.

It must accordingly be held that upon the completion of the annexation the powers of the sanitary district and of the district sanitary board ceased. We are not here confronted with the question of the validity of bonds already issued before annexation, nor with the manner in which the courts would protect the undoubted rights of creditors whose claims accrued before annexation. Upon December 8, 1909, when the document showing the vote on the question of annexation was filed in the office of the Secretary of State, no bonds had been issued and no indebtedness had been incurred. With that annexation the power of the sanitary district to issue such bonds, or to do any other of the things specified in section 5 of the act, ceased.

The appellant city suggests that, while the sanitary district and its sanitary board were, by virtue of the annexation, shorn of power to proceed further, the validity of the bond election should be upheld, and the further steps necessary to their issuance and the construction of the sewer should be carried out by the officers of the city of Oakland. No statute or other authority for this conclusion is cited, and we think the view is manifestly untenable. It is, indeed, destructive of the appellant's main contention that the district is dissolved; for, if the contemplated work is to be done and paid for as suggested, the sanitary district would in realty be continuing its existence and operations, and the only effect of the annexation would be the transfer of the duties of the sanitary board to a municipal board. In the absence of express statutory authority for such continuance and transfer, there is no escape from the conclusion that the bond proceedings already had fall, and that any future steps for the construction of sewers in the territory must be initiated and conducted by the proper authorities of the city of Oakland, of which such territory is a part. If it shall be desirable to create a separate district, which shall, apart from the rest of the city, bear the expense of constructing the necessary sewer, the means of so doing the work are fully provided by "An act to provide separate sewer districts within municipalities," approved April 21, 1909. St. 1909, p. 1011.

The judgment is reversed, with directions to the trial court to enter a judgment declaring that the East Fruitvale Sanitary District has been dissolved by the annexation proceedings, and that it has not, nor has its sanitary board, any power to issue the bonds in question.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

158 Cal. 461

In re SANITARY BOARD OF UPPER FRUITVALE SANITARY DIST.

(S. F. 5,576.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by the Sanitary Board of the Upper Fruitvale Sanitary District to determine its right to issue bonds. On appeal from the judgment of the superior court. Reversed, with directions.

J. W. Stetson and George W. Reed, for appellant. Reed, Black & Reed and John J. Allen (T. S. Gray and Snook & Church, of counsel), for respondents.

PER CURIAM. This is a proceeding involving the right of the Upper Fruitvale Sanitary District to issue bonds for sewer construction to the amount of $60,000. The questions presented are, in all material respects, identical with those considered in the Matter of the East Fruitvale Sanitary District (S. F. No. 5,575) 111 Pac. 368, this day decided, and the result here must be the same as in that case.

The judgment is reversed, with directions to the trial court to enter a judgment declaring that the Upper Fruitvale Sanitary District has been dissolved by the annexation proceedings, and that it has not, nor has its sanitary board, any power to issue the bonds in question.

158 Cal. 462

In re SANITARY BOARD OF FITCHBURG SANITARY DIST. (S. F. 5,577.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by the Sanitary Board of the Fitchburg Sanitary District to determine its right to issue bonds. On appeal from the judgment of the superior court. Reversed, with directions.

J. W. Stetson, for appellant. Reed, Black & Reed and John J. Allen (T. S. Gray and Snook & Church, of counsel), for respondents.

PER CURIAM. This is a proceeding involving the right of the Fitchburg Sanitary District to issue bonds for sewer construction to the amount of $75,000. The questions presented are, in all material respects, identical with those considered in the Matter of the East Fruitvale Sanitary District (S. F. No. 5,575) 111 Pac. 368, this day decided, and the result here must be the same as in that case.

The judgment is reversed, with directions to the trial court to enter a judgment declaring that the Fitchburg Sanitary District has been dissolved by the annexation proceedings, and that it has not, nor has its sanitary board, any power to issue the bonds in question.

158 Cal. 463

In re SANITARY BOARD OF ELMHURST SANITARY DIST. (S. F. 5,578.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by the Sanitary Board of the Elmhurst Sanitary District to determine its right to issue bonds. On appeal from the judgment of the superior court. Reversed, with directions.

J. W. Stetson and Heller, Powers & Ehrman, for appellant Stone. T. S. Gray and John J. Allen (Reed, Black & Reed and Snook & Church, of counsel), for respondents.

PER CURIAM. This is a proceeding involving the right of the Elmhurst Sanitary District to issue bonds for sewer construction to the amount of $75,000. The questions presented are, in all material respects, identical with those considered in the Matter of the East Fruitvale Sanitary District (S. F. No. 5,575) 111 Pac. 368, this day decided, and the result must be the same as in that case.

The judgment is reversed, with directions to the trial court to enter a judgment declaring that the Elmhurst Sanitary District has been dissolved by the annexation proceedings, and that it has not, nor has its sanitary board, any power to issue the bonds in question.

158 Cal. 465

In re SANITARY BOARD OF REDWOOD SANITARY DIST. (S. F. 5,580.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by the Sanitary Board of the Redwood Sanitary District to determine its right to issue bonds. On appeal from the judgment of the superior court. Reversed, with directions.

J. W. Stetson, for appellant. Reed, Black & Reed and John J. Allen (T. S. Gray and Snook & Church, of counsel), for respondents.

PER CURIAM. This is a proceeding involving the right of the Redwood Sanitary District to issue bonds for sewer construction to the amount of $36,000. The questions presented are, in all material respects, identical with those considered in the Matter of the East Fruitvale Sanitary District (S. F. No. 5,575) 111 Pac. 368, this day decided, and the result here must be the same as in that case.

The judgment is reversed, with directions to the trial court to enter a judgment declaring that the Redwood Sanitary District has been dissolved by the annexation proceedings, and that it has not, nor has its sanitary board, any power to issue the bonds in question.

158 Cal. 464

In re SANITARY BOARD OF SEMINARY PARK SANITARY DIST. (S. F. 5,579.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by the Sanitary Board of the Seminary Park Sanitary District to determine its right to issue bonds. On appeal from the judgment of the superior court. Reversed, with directions.

J. W. Stetson, for appellant. A. K. Farnsworth, John J. Allen, and Reed, Black & Reed (T. S. Gray and Snook & Church, of counsel), for respondents.

PER CURIAM. This is a proceeding involving the right of the Seminary Park Sanitary District to issue bonds for sewer construction to the amount of $75,000. The questions presented are, in all material respects, identical with those considered in the Matter of the East Fruitvale Sanitary District (S. F. No. 5,575) 111 Pac. 368, this day decided, and the result here must be the same as in that case.

The judgment is reversed, with directions to the trial court to enter judgment declaring that the Seminary Park Sanitary District has been dissolved by the annexation proceedings, and that it has not, nor has its sanitary board, any power to issue the bonds in question.

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158 Cal. 466

E. D. & A. L. STONE CO. v. REILLY et al.

(S. F. 5,581.)

(Supreme Court of California. Oct. 3, 1910. Rehearing Denied Nov. 2, 1910.)

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, F. B. Ogden, and T. W. Harris, Judges.

Petition by E. D. & A. L. Stone Company against Phillip Reilly and others, composing the Elmhurst Sanitary Board of the Elmhurst Sanitary District. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Heller, Powers & Ehrman (Sydney Schlesinger, of counsel), for appellant. T. S. Gray and Reed, Black & Reed (J. J. Allen and Snook & Church, of counsel), for respondents.

PER CURIAM. This action was brought by the plaintiff, a property owner within the limits of the Elmhurst Sanitary District, to enjoin the defendants, members of the sanitary board of said district, from issuing bonds of the district to the amount of $75,000, or from making or carrying out any contracts for the construction of a sewer system for said district. The court entered judgment in favor of the defendants, and the plaintiff appeals.

The facts concerning the status of said district and its right to make contracts or issue bonds are, in effect, the same as those disclosed in the matter of the petition of Sanitary Board of the East Fruitvale Sanitary District (S. F. No. 5,575) 111 Pac. 368, and upon the authority of that case it must be held that the sanitary district was dissolved and the powers of its sanitary board terminated upon the annexation of the district to the city of Oakland.

The judgment is reversed, with directions to the trial court to enter a judgment in favor of plaintiff as prayed for in its complaint.

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14 Cal. App. 175

BAKER v. THOMPSON. (Civ. 805.)

(Court of Appeal, Second District, California. Aug. 30, 1910.)

BROKERS (§ 43*)—AUTHORITY OF BROKERS TO BUY OR SELL REAL ESTATE—NECESSITY OF WRITTEN CONTRACT.

Civ. Code, § 1624, declaring invalid, unless in writing, subscribed by the party to be charged, an agreement authorizing an agent or broker to purchase or sell real estate for compensation or a commission, has no application to an agreement between brokers for a division of commissions received for sale or purchase of real estate.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43;* Frauds, Statute of, Cent. Dig. § 131.]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by J. M. Baker against A. C. Thompson. Judgment for plaintiff, and defendant appeals. Affirmed.

V. L. Ward, for appellant. E. A. Miller and Anderson & Anderson, for respondent.

SHAW, J. Action upon an oral contract by one real estate agent against another to recover share of commissions for sale of land. Judgment was for plaintiff, and defendant appeals therefrom upon the judgment roll alone; his sole contention being that the complaint fails to state a cause of action.

As set forth in the complaint, Baker & Lewis, the assignors of plaintiff, having obtained from the owner thereof the agency for the sale of a certain tract of land, entered into an oral contract with defendant, whereby it was agreed that the firm of Baker & Lewis and defendant should each endeavor to effect a sale of the property, and that, in the event of a sale being made by either party, the commission received therefor should be equally divided between said firm and defendant; that defendant, on behalf of all said parties, did bring about a sale of the property and did receive from the seller $1,170 as commission therefor, but declined and refused to share the same, or any part thereof, with said firm of Baker & Lewis. While the complaint contains other allegations, the foregoing are sufficient to illustrate the point urged as ground for reversal.

Appellant invokes the provisions of section 1624, Civil Code, and insists that as the agreement was not in writing, nor any memorandum or note thereof made and subscribed by the party to be charged, it is therefore void. The point is wholly without merit. The agreement had no reference either to the purchase or sale of real estate for compensation or otherwise, but related solely and alone to the commission which might be received by either party for effecting a sale. As said by Chief Justice Beatty, in discussing the effect of said section 1624, in Gorham v. Heiman, 90 Cal., at page 358, 27 Pac., at page 292: "But clearly that provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions." In our judgment, section 1624, Civil Code, has no application to an agreement made between brokers for a division of commissions received for the sale or purchase of real estate. Casey v. Richards, 10 Cal. App. 57, 101 Pac. 36; Saunders v. Yoakum, 12 Cal. App. 543, 107 Pac. 1007.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14 Cal. App. 164

Ex parte WILCOX. (Cr. 171.)

(Court of Appeal, Second District, California. Aug. 24, 1910.)

1. Municipal Corporations (§ 111*)—Ordinances—Validity.

A provision in an ordinance of a city requiring a fee for the procurement of a receipt of a deposit of money or the delivery of a bond required by the ordinance is in conflict with Code Civ. Proc. § 2075, entitling any person who pays money or delivers an instrument to a receipt therefor as a condition of the payment or delivery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 246; Dec. Dig. § 111.*]

2. Municipal Corporations (§ 682*) — Permit to Excavate in Street—Power to Impose Conditions—Notice.

The notice required by an ordinance prohibiting any corporation from excavating in any street of a city without first giving notice to the street superintendent of its intention to excavate and making a deposit based on the quantity of the proposed excavation, as shown by the notice, etc., is to afford a basis of computation to determine the amount of the deposit, and not as a basis for the right of a water company to enter on a street to make excavations in which to lay pipes for the distribution of water to the citizens of the city, for that right is by virtue of a constitutional franchise, and it cannot be withheld by the city for its only power is to specify general regulations for damages and indemnity for damages, and to require the work to be done under the direction of the street superintendent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1470; Dec. Dig. § 682.*]

3. Municipal Corporations (§ 682*)—Excavations in Streets—Power to Impose Conditions.

A city may prescribe regulations for damages for individuals or corporations excavating in the streets and indemnity for damages, provided the regulations are general and uniform in their application to all who may desire the privilege of making excavations.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1470; Dec. Dig. § 682.*]

4. Indictment and Information (§ 111*) — Requisites—Statutory Offenses.

Where a statute forbids the doing of a particular act without the existence of either one of two conditions, the indictment must negative the existence of both conditions.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. § 111.*]

5. Municipal Corporations (§§ 639, 683*)—Excavation in Streets—Violation of Ordinance—Complaint.

An ordinance making it unlawful to make excavations in any street of the city without making a deposit of money as indemnity for damages to the street, and authorizing in a proviso the giving of a bond for not less than $500 in lieu of the deposit, and requiring a notice of the extent of the excavation to determine the amount of the deposit, does not require a notice where a bond is given and where the amount of the cash deposit is fixed and received by the city without a notice there is a waiver of notice, and hence a complaint charging a violation of the ordinance which merely charges a violation of the parts of the ordinance which provide for giving notice and filing of bond is insufficient for failing to negative the fact of a deposit which obviates the giving of a bond.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1406–1409, 1476; Dec. Dig. §§ 639, 683.*]

6. Municipal Corporations (§ 111*)—Ordinances—Validity—Uniformity.

An ordinance regulating excavations in the streets of a city by individuals or corporations which provides that the one depositing money as indemnity for damages shall be subject to a penalty by which the city arbitrarily retains a part thereof to the credit of the street fund, and which provides that the one filing a bond shall avoid the penalty, and is only subjected to the obligation of replacing the street in as good condition as before, is invalid, because the regulations are not uniform in their application.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 247; Dec. Dig. § 111.*]

Application by George W. Wilcox for a writ of habeas corpus for his discharge from his arrest for a violation of a municipal ordinance. Writ issued, and petitioner discharged.

Hanson, Hackler & Heath, for petitioner. Sloan Pitzer, for respondent.

PER CURIAM. Petitioner, an employé of the Marengo Water Company, a California corporation engaged in distributing and supplying water to the inhabitants of the city of Alhambra, was on the 27th of October, 1908, arrested upon a complaint filed before a magistrate, charging him with a violation of an ordinance of said city enacted prior thereto, which ordinance, in so far as material in this case, provides:

"Section 1. That it shall be unlawful for any person, firm or corporation to make any excavation in any public street, road, alley or other public place, in the city of Alhambra, without first giving notice to the street superintendent of said city, and making a deposit or filing a bond, as the case may be, and securing a receipt therefor as hereinafter provided. The person, firm or corporation intending to make any such excavation shall file with said street superintendent a written notice of such intention, describing specifically the location and area of the excavation or excavations intended to be made, and, except as hereinafter provided, shall deposit with such street superintendent a sum of money equal to thirty (30) cents per square foot of surface of such excavation or excavations to be made in streets, roads, alleys, or places which are macadamized; a sum equal to twenty (20) cents for each square foot of surface of said excavation or excavations to be made in graveled streets, roads, alleys or places, and in streets, roads, alleys or places graded and oiled; and a sum equal to ten (10) cents for each square foot of surface of said excavation or excavations to be made in streets which are neither macadamized nor graveled or graded and oiled; provided that no deposit shall be less than one dollar ($1); and further provided that it shall be optional with such persons, firms or corporations so filing such notice of intention, instead of making such deposit to file with said street superintendent a bond in the penal sum of not less than $500, executed by said applicant and two sureties, who shall be conditioned upon the full and complete performance by said applicant of all the conditions, requirements and restrictions in this ordinance and of all other ordinances and regulations of and in force in the city of Alhambra in regard to excavations in public streets," etc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Sec. 1½. Upon filing every such written notice there shall be also paid to said street superintendent the sum of $1 as the fee of said street superintendent for issuing the receipt hereinafter specified; no part of such fee shall be refunded by said street superintendent, but all thereof shall be retained by him.

"Sec. 2. The street superintendent shall, on receiving the written notice of intention and the payment of the fee of $1 hereinbefore mentioned in section 1½ hereof, together with the deposit required by section 1 hereof (or if a bond shall be filed, then upon payment of said fee and his approval of such bond), issue a receipt for such deposit or bond, and shall keep an account thereof. Said receipt shall specify the person, firm or corporation to whom it is issued and the street, road, alley, or other public place and the particular portion or portions thereof to be excavated, and the extent of such excavations."

Then follow various sections of the ordinance with reference to the manner in which the street shall be replaced in its original condition after excavation and of the times at which it shall be done and the right of the street superintendent, if not done promptly, to cause it to be done at the expense of the party making the excavation.

Section 7 provides that the street superintendent shall deduct from the deposit made for an excavation a sum equal to 2½ cents per square foot of surface of the excavation in macadamized streets, and ⅕ of one cent for each square foot of surface of roads or alleys which are not paved or macadamized, and also to deduct the cost of any work done or repairs made by him from all deposits in his hands; and, further, upon the completion of the work of refilling and resurfacing for which a deposit has been made, the street superintendent shall refund to the person making such deposit the balance of such deposit after making all deductions herein authorized; that the street superintendent shall pay to the city treasurer all sums deducted by him from all deposits, which shall be placed to the credit of the street fund.

By section 11 it is provided that any person violating the provisions of the ordinance is guilty of a misdemeanor.

The affidavit of complaint filed charges defendant with a violation of those portions of the ordinace which provide for giving notice, filing a bond, and securing a receipt therfor. No other provision of the ordinance is claimed to have been violated. Judgment of conviction was pronounced against defendant by the magistrate, which, upon appeal to the superior court, was affirmed. Being in actual confinement, he now presents this petition upon the grounds, first, that the affidavit of complaint under which he was arrested, tried and convicted, does not charge a public offense; and, second, that the ordinance under and by virtue of which said complaint was issued is in contravention of the Constitution of the state.

That portion of the ordinance requiring a payment on account of an issue by the city of a receipt by reason of the payment of money or the delivery of an instrument to it is, in our opinion, invalid, being in conflict with general law (section 2075, Code Civ. Proc.; In re Sic, 73 Cal. 146, 14 Pac. 405); and a violation of the same could not support a conviction. An examination of the ordinance indicates that the notice required to be given the city of an intention to excavate was intended solely as affording a basis of computation where a cash deposit was made, in order to determine the amount of such deposit. In no event can it be said to have been intended as a basis for the right of a water company to enter upon a street for the purpose of making excavations in which to lay pipes for the distribution of water to the citizens of Alhambra. That right is by virtue of a constitutional franchise, and it cannot be withheld by the city, its only power being to specify general regulations for damages and indemnity for damages, and to require the work to be done under the direction of the street superintendent. "The municipality may prescribe regulations for damages and indemnity for damages, but these regulations must be general—i. e., uniform—in their application to all who may desire to exercise the privilege." In re Johnston, 137 Cal. 115, 69 Pac. 973. It will be observed that the offense charged with reference to the failure to give a bond is within the proviso clause of the ordinance. "Where a statute forbids the doing of a particular act without the existence of either one of two conditions, the indictment must negative the existence of both these conditions before it can be supported." Wharton's Criminal Pl. & Pr. § 239. The ordinance in question makes it unlawful to excavate the street without making a deposit of money as indemnity for damages to the street. The proviso authorizes a bond in lieu of this deposit. The fact of this deposit, which, if made, obviates a bond, is not negatived. For aught that appears in this affidavit of complaint, such deposit may have been made, and if made and accepted by the city the notice of the extent of the excavation would serve no useful purpose, such notice being only intended, as before said, in order to determine a basis for fixing the amount of cash deposit. If that were fixed, even without the notice, and the amount received by the city, it should be considered as a waiver of such notice. It will be observed, further, that the notice serves no purpose when a bond is given. The amount of that bond is arbitrarily fixed at $500 in all cases. It is true the ordinance says "not less than five hundred dollars," but there is no provision in the ordinance by which it may be increased beyond that amount. The ordinance, therefore, should not be construed as requiring a preliminary notice where the party gives a bond, no reason therefor being apparent. In our opinion, therefore, the affidavit of complaint did not state facts constituting a public offense.

In addition to all of this, we think the ordinance open to at least two criticisms, which would render certain of its provisions invalid: First, as to the matter of receipt heretofore treated; again, upon the authority of In re Johnston, supra, the regulations provided are not uniform in their application. The one depositing money as indemnity for damages is by the ordinance subjected to a penalty by which the city arbitrarily retains a large portion thereof to the credit of the street fund, while if another person or corporation desiring to excavate in the streets should file a bond, he avoids this penalty, and is only subjected to the obligation of replacing the street in as good condition as before and in the manner provided by the ordinance. Thus it is seen that uniformity in the application of the regulations authorized under the Constitution does not exist.

For these reasons assigned, we think the ordinance, at least to the extent criticised, and which covers all the provisions alleged to have been violated, is invalid. The writ is therefore ordered to issue, and the prisoner discharged.

14 Cal. App. 176

FIRST NAT. BANK OF IOWA CITY v. TROGNITZ. (Civ. 846.)

(Court of Appeal, Second District, California. Sept. 1, 1910.)

1. New Trial (§ 128*)—Questions Reviewable—Insuffiency of Evidence—Specifications.

A party moving for a new trial for insufficiency of the evidence set out in the bill of exceptions to justify the verdict must point out wherein the evidence is insufficient, though a party presenting his record in the form of a bill of exceptions need not specify the particular errors where the objections and rulings appear in the bill and need no more particular presentation.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257–262; Dec. Dig. § 128.*]

2. Bills and Notes (§ 68*)—Bill of Exchange—Acceptance—Sufficiency.

A bill of exchange was drawn against a person by an indorsement at its foot reciting, "To," followed by his name. At the right of the indorsement he affixed his signature. At the time the bill contained blanks for the date and amount, which blanks were subsequently filled in. Across the bill was stamped the word "Accepted," and after a blank line for signature the words, "Sign here," appeared. *Held*, that under Civ. Code, § 3195, providing that an acceptance written on any part of the bill is sufficient, the acceptance was sufficient.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 68.*]

3. Bills and Notes (§ 497*)—Liability of Acceptor of Bill of Exchange—Right of Indorsee.

Where an acceptor of a bill of exchange was misled when he signed it and he did not intend to execute more than a mere memorandum, an indorsee of the bill suing on the acceptance must show that he acquired the bill before maturity and for a valuable consideration, and the court must so find before rendering judgment against the acceptor.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 497.*]

4. Bills and Notes (§ 372*)—Blanks in Instrument—Effect.

Under Civ. Code, § 3125, making a party to a blank negotiable instrument liable on the instrument as completed, an acceptor of a bill of exchange, blank as to date and amount, may not assert as against an innocent holder for value before maturity that he did not intend to create any liability against himself.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 372.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the First National Bank of Iowa City against R. E. Trognitz. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

A. B. Bowman and C. N. Andrews, for appellant. Ward, Wells & Ward, for respondent.

JAMES, J. Plaintiff, as the indorsee of four bills of exchange drawn by a corporation called the Providence Jewelry Company, brought this action to recover from defendant, as an acceptor of said negotiable instruments, the aggregate principal sum of $379.30, together with certain other sums accruing as interest. It was alleged in the complaint that plaintiff acquired the bills before maturity and for a valuable consideration. Defendant in his answer denied specifically all of the allegations set out in the complaint, and upon a trial being had judgment was awarded in his favor. Plaintiff appeals from the judgment and an order denying its motion for a new trial. A statement of the evidence heard at the trial is set out in a bill of exceptions. Objection is made by respondent that this evidence cannot be considered for the purpose of determining whether it is sufficient to support the findings and judgment, because: First, the appeal from the judgment was taken more than 60 days after the entry thereof; and, second, that the particulars in which the evidence is insufficient are not set out in any specification, either generally or particularly. This objection of respondent has undoubted merit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Section 939 of the Code of Civil Procedure, referring to an appeal from a judgment, provides in part as follows: "But an exception to the decision, or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the entry of the judgment." It is the duty of a party, where he moves for a new trial on the ground of insufficiency of evidence to justify the verdict or decision, to specify and point out wherein the evidence is insufficient. Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 Pac. 352. It is true that it has been held, where the appellant presents his record in the form of a bill of exceptions, that particular errors need not be specified; but this is when the objections and rulings appear in the bill, and hence need no more particular presentation in order that the court's attention may be readily attracted to the errors claimed. We are therefore left in determining this appeal to a consideration alone of the judgment roll, and the only inquiry that can properly be made is as to whether or not the findings of the trial court, within the issues made by the pleadings, sustain the judgment. The court found that defendant signed his name on the face of each bill of exchange in the lower right-hand corner at the time the bills were presented to him; that the bills were not at that time complete, in that they contained blanks where the dates and amounts were afterwards filled in; that across the face of each was stamped the word, "Accepted," and after a blank line left for signature, the words, "Sign here"; that defendant had not signed at the place thus indicated; that he signed at the bottom of the instrument. There is no finding upon the issue as to whether or not there had been a transfer before maturity of the bills for a valuable consideration. The signing of the acceptor's name at the foot rather than across the face of the bill was not such an irregularity as to invalidate the acceptance. Section 3195 of the Civil Code provides: "The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance: (1) An acceptance written upon any part of the bill, or upon a separate paper. * * *" The several instruments here sued upon were drawn against and directed to the defendant by an indorsement at their foot in the words, "To R. E. Trognitz, San Diego, Cal." At the right of these words the defendant affixed his signature, which in our view of the matter, considered with reference to the provisions of the Code just quoted, constituted a sufficient acceptance.

It was important that the court should have found upon the issue as to whether or not plaintiff acquired the bills before maturity and for a valuable consideration, inasmuch as a finding is made that defendant was misled when he signed the instruments and did not intend to execute anything more than a mere memorandum form to be retained by the jewelry company in connection with the purchase of goods made from it by defendant. Where negotiable paper of the kind here sought to be recovered on is issued in blank, it is no protection to the acceptor to say, as against the claim of an innocent holder for value before maturity, that he did not intend to create any liability against himself. "One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form." Civ. Code, § 3125; Bedell v. Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307. If we were to assume, in the absence of a finding upon that question, that the allegations of the complaint to the effect that plaintiff acquired the bills prior to maturity and for value are true, then that fact, taken and considered with the other facts found by the court, would require that judgment be entered in favor of plaintiff.

As the record is presented, the findings are insufficient to support the judgment, and the judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 156

MILLER v. HIGGINS et al. (Civ. 823.)

(Court of Appeal, Second District, California. Aug. 22, 1910.)

1. ADOPTION (§ 12*)—NOTICE OF PROCEEDINGS—RIGHT OF PARENT.

Civ. Code, § 224, providing that a child may not be adopted without consent of its parent, except one against whom a decree of divorce has been awarded for cruelty, does not deprive a parent, so adjudged guilty of cruelty, of the right to notice of proceeding for adoption of his child, custody of whom was by the divorce decree awarded to the mother, till the further order of the court, where the court, which made the divorce decree, has, under the authority given it by section 138 to at any time modify or vacate the order for custody, entertained a petition of the father for custody of the child, and at the hearing, at which the mother was represented by counsel, indicated its intention to grant it, but granted an adjournment for production of the child.

[Ed. Note.—For other cases, see Adoption, Dec. Dig. § 12.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. DIVORCE (§ 303*)—CUSTODY OF CHILD—JURISDICTION OF COURTS.

The decree in divorce awarding the mother custody of the child of the parties only till further order of the court, and subject to the restriction that the child be not removed from the court's jurisdiction, retains to the court jurisdiction and control of the divorce proceeding, so far as it relates to care and custody of the child, and such court having afterwards entertained petition of the father for custody of the child, and the mother having appeared by attorney, the court had complete power and authority to make such order as it considered best for the best interests of the child with reference to its subsequent custody and control; which jurisdiction could not be defeated by the child being secretly removed by the mother to another county, and the jurisdiction of the court thereof being invoked in proceedings for adoption of the child.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 303.*]

3. ADOPTION (§ 16*)—SETTING ASIDE—FRAUD.

The mother and grandparents of a child by concealing from the court, in which they instituted proceedings for the adoption of the child by the grandparents, the facts that the court of another county—which granted the wife a divorce for cruelty of her husband, awarding her custody of the child till its further order, and subject to the condition of the child not being removed from its jurisdiction—had entertained a petition of the father for custody of the child, and at the hearing, at which the mother appeared by attorney, had indicated its intention to grant the order, concealed facts on which the jurisdiction of the court in the adoption proceedings depended, which was a fraud on it, for which the order of adoption will be set aside.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 27, 28; Dec. Dig. § 16.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John G. Miller against M. V. Higgins and others. Decree for plaintiff. Defendants appeal. Affirmed.

Jennings & Horton, James W. Scott, and Robert C. Owens, for appellants. D. K. Trask (M. M. Starr, of counsel), for respondent.

ALLEN, P. J. This is an appeal from a decree setting aside a judgment or order of adoption of the minor child of plaintiff and Nellie M. Stange, formerly Nellie M. Miller.

Nellie M. Miller procured an interlocutory decree of divorce from the plaintiff, John G. Miller, in the superior court of Contra Costa county on August 16, 1906, upon the ground of extreme cruelty, and the final decree was entered therein on December 2, 1907. By this decree the custody and control of Gerard Miller, a minor, the issue of said marriage, was awarded to said Nellie M. Miller until the further order of the court, subject to the restriction that said child was not to be removed from the jurisdiction of the court and the defendant John G. Miller (plaintiff here) should have the right to visit said minor child at all reasonable times. Nellie M. Miller thereafter married the defendant H. A. Stange and left the state of California, leaving the child in the custody of her mother in Contra Costa county. Whereupon the plaintiff herein, defendant in said divorce proceeding, on the 2d day of September, 1908, filed his petition in said superior court of Contra Costa county, setting forth the foregoing and other facts, and the hearing of said petition was set for September 14, 1908. Witnesses were called and examined on behalf of both parties, Nellie M. Stange appearing by attorney, and the court upon the hearing indicated its intention to vacate the order theretofore made awarding the custody of the child to said Nellie M. Stange; but, the child not being before the court, the court made an order directing the production of said child in court on the 5th day of October, 1908. On this latter date a further continuance was granted and another order made requiring the production of said child, and the further order that said last-named order be served upon the said Nellie M. Stange. It being made to appear on the 9th of November, 1908, that neither Nellie M. Stange nor the child could be found in the county, an order was entered modifying said decree of divorce and awarding the custody of the child to John G. Miller. During the interim between the 14th of September and the date of the actual entry of the order of modification, to wit, on or about the 16th day of October, Nellie M. Stange brought the child into Los Angeles county, and proceedings were instituted in the superior court of said county by M. V. Higgins, Vera H. Higgins, and the said Nellie M. Stange for the adoption of such child, which proceedings the court in this proceeding finds were instituted solely for the purpose of avoiding the lawful orders about to be made by the superior court of Contra Costa county with respect to the custody of the child, and for the purpose of affording a pretext for the taking of the child out of the state of California in violation of such order. It is further found by the court in this proceeding that neither of the moving parties therein acted in good faith; that neither of them informed the judge before whom the adoption proceedings were had, nor was he made aware of the fact, that proceedings were pending in the superior court of Contra Costa county relative to the custody of said child; that at the time of said adoption proceeding the only persons present in court were the said minor child, the mother, Nellie M. Stange, and the said M. V. and Vera H. Higgins; that the court, in ignorance of the fact that the superior court of Contra Costa county had assumed jurisdiction of the application to change the custody of the child, made its order of adoption, basing the same solely upon the ground that the decree of divorce awarding the custody of the child to the mother was of itself sufficient to warrant the order of adoption, without the father's consent or appearance in said proceedings of adoption; that said Higgins and wife did not assume the custody of said child and have never had the custody of said child since the order of adoption was made, but, on the contrary, the said Nellie M. Stange assumed and took the custody of said child and has ever since retained such custody and has kept and retained said child out of the jurisdiction of the court, to wit, within the state of Illinois; that in November, 1908, the father of said child, respondent herein, first obtained information of the proceedings of adoption, and in December following he filed his complaint setting forth the facts above stated and praying the court for a decree that the said adoption proceedings and the order and decree of adoption were and are illegal and void and that the same be vacated and set aside and plaintiff be decreed to be entitled to the custody of said child. Issue was presented as to all the matters set forth in the complaint, and the superior court, upon trial and hearing thereof, found the facts as hereinabove narrated and made its order vacating and setting aside said decree and order of adoption, from which action of the court this appeal is taken by appellants.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is claimed by appellants that the decree of adoption was valid; that the same was set aside by the court upon the request of a stranger to the proceedings; that Miller was not entitled to notice of the adoption proceedings under section 224, Civ. Code; that the concealment from the court of the fact that another court had assumed and was exercising jurisdiction over the custody of the child was not such a fraud as would warrant the annulment of the decree of adoption; and that to warrant the setting aside of a judgment of this character upon the ground of alleged fraud the fraud must have been perpetrated in the actual procurement of the judgment, and not in the cause of action upon which the judgment was founded. We do not regard either of the positions taken by appellants as tenable. While it is true that section 197 of the Civil Code, which confers the superior right of the father to the custody, services, and earnings of a child, is modified by the subsequent section, which removes this superiority of right in the event the husband and wife are living separate and apart; nevertheless, section 138 of the Civil Code confers upon the superior court in divorce proceedings jurisdiction and authority to make such orders for the custody and care of minor children as it may deem necessary or proper and may at any time modify and vacate the same. This last section is said by our Supreme Court in Crater v. Crater, 135 Cal. 634, 67 Pac. 1049, to have been enacted for the purpose of insuring to children of the marriage proper care and attention, and this power of the court cannot be abridged even by an agreement of separation between the parties in which is incorporated an agreement with reference to the custody of the children. Black v. Black, 149 Cal. 226, 86 Pac. 505. It is true that section 224 of the Civil Code with reference to the adoption of children provides that consent to such adoption is not necessary from a father or mother adjudged guilty of cruelty and for such cause divorced; but this section does not undertake, nor is it intended, to modify the other sections of the Code dealing specifically with the right of custody. This right to the custody and care of the children of a marriage is not by the Code necessarily affected by the cause upon which the decree of divorce is based, and for the obvious reason that, the children not being parties to the divorce proceedings, and their interests being affected by such a decree, the same are to be protected and guarded by the discretionary power of the court to be exercised in such divorce proceedings. It is within the power of the superior court in divorce proceedings to give the custody and care of the children of a marriage to the guilty party, whatever may be the offense, if in the opinion of the court the awarding of the custody to such parent is for the best interest of the children. It will be observed that in this particular divorce proceeding a limited custody was awarded to the mother; that is to say, a custody to be exercised and maintained while the child was within the jurisdiction of the court, to wit, within the county of Contra Costa, and even then only for such time as, in the opinion of the court, the interests of the child would be best subserved. The effect of the order of the superior court of Contra Costa county was to retain jurisdiction and control of the divorce proceeding in so far as it related to the care and custody of the children of the marriage, and this was provided for in the final decree of divorce. Circumstances having arisen which, in the opinion of the superior court of Contra Costa county, called for the exercise of this jurisdiction, and the parties having appeared before that court in answer to its order and demand and submitted themselves thereto, that court had complete power and authority to make such order as in its opinion was for the best interests of the child with reference to its subsequent custody and control. Having such jurisdiction, the same could not be defeated by removing the child secretly from the jurisdiction of the superior court of Contra Costa county and invoking the jurisdiction of the superior court of Los Angeles county in the adoption proceedings. Whether or not the father was entitled to notice of the adoption proceedings was a jurisdictional fact to be determined by the judge from extrinsic evidence. "Upon the appearance before the judge of the persons seeking to adopt the child and the child, he acquires jurisdiction to entertain a petition for adoption, but at this point it is only jurisdiction to preliminarily investigate and determine whether the presence at the hearing of the parents of the minor child is necessary or not. One parent being present and consenting, it is still incumbent upon the judge to ascertain whether the consent and presence of that parent alone is necessary to the relinquishment of the child, and to confer full jurisdiction to proceed with the hearing and make the order of adoption. * * * In all cases it becomes necessary to determine this jurisdictional fact." Estate of McKeag, 141 Cal. 407, 408, 74 Pac. 1040, 99 Am. St. Rep. 80.

The record discloses that the fraud practiced upon the court making the order of adoption in this case was the concealment from the court of facts affecting its jurisdiction. It is unnecessary to cite authorities in support of the proposition that when a court competent to adjudicate upon the subject-matter of the litigation obtains jurisdiction over the parties, within the territorial limits of its extent, such court alone has the power to adjudge upon the questions sought to be litigated in the suit, and no other court can deprive it of that power. The court finds, and it is most evident, that but for the concealment of the facts referred to it would not have made this decree of adoption in the first instance. Such concealment of facts affords ground for relief in equity. Bigelow on Fraud, vol. 1, p. 92. It is clear that the parties to the adoption proceedings concealed from the superior court the facts relative to the action of the superior court of Contra Costa county, and upon which facts the jurisdiction of the superior court of Los Angeles county depended. This was a fraud upon the court. Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70.

We do not regard the case of Younger v. Younger, 106 Cal. 377, 39 Pac. 779, as having any application to the case under consideration. That case simply determines that, where the adoption was regularly had, the status of the child was changed, and it no longer remained the child of the parties to the marriage, but became the child of another, and its relation to its natural parents ceased, and the jurisdiction of the divorce court was terminated. In that case, however, it is shown that the decree awarding the custody was absolute in its terms and not a limited custody, as here provided, and that no notice was necessary to the offending party in the divorce proceeding; but in that case the assumption of jurisdiction upon application to amend the order, and practically an amendment thereto or an intention to amend made manifest, does not exist. There is a marked distinction between the jurisdiction which a court may exercise and jurisdiction which it has assumed, upon proper notice, to exercise. Further than this, actions for divorce are equitable in their character. Wadsworth v. Wadsworth, 81 Cal. 187, 22 Pac. 648, 15 Am. St. Rep. 38. When necessary for the purpose of justice, courts will, by applying the doctrine of relation, consider an act to have been done at some antecedent period. Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534. The circumstances surrounding the decree entered in this case affecting the custody of this child, and the rights of the father with reference thereto, furnish an instance where the effect of such decree should, by vacation and modification, be made to operate from the date of the hearing and oral announcement of the decision. Were it assumed that section 224, Civ. Code, is intended to deprive a parent, who has been awarded the custody of a child, of the right to notice of adoption proceedings simply because he had violated the marriage obligation in some particular way, would be to render such section invalid as destroying a vested right without due process of law. We think it, however, not necessary to go so far as to determine such section to be unconstitutional, but rather to read it in connection with the other sections and construe it as intending to provide for this character of notice in a particular class of cases, of which this is not one.

Judgment affirmed.

We concur: SHAW, J.; JAMES, J.

14 Cal. App. 283

PEOPLE v. KINARD. (Cr. 284.)

(Court of Appeal, First District California. Sept. 22, 1910. Rehearing Denied by Supreme Court Nov. 10, 1910.)

Criminal Law (§ 149*) — Embezzlement — Limitations—Starting Point.

Where the prosecuting witness in a charge of embezzlement drew a check and gave it to accused with instructions not to cash it unless she sent for the money, but defendant cashed it at once and converted the money to his own use, the statute of limitations began to run immediately and not later when a demand of the money was made on accused; his withholding of the money being wrongful from the beginning.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 149.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

C. E. Kinard was convicted of embezzlement and he appeals. Reversed.

James H. Boyer, for appellant. Attorney General Webb, for respondent.

COOPER, P. J. The defendant was charged in the information with the crime of embezzlement in having received and appropriated to his own use on the 10th day of December, 1907, the sum of $225, the property of one Mrs. Louisa Lamprell. The evidence shows that on the 24th day of October, 1906, Mrs. Lamprell drew a check on the Oakland Bank of Savings in favor of the defendant, and expressly instructed the defendant not to draw the money until such time as she should send for it from Australia where she intended to go on a visit. The defendant, contrary to his instructions, cashed the check on the following day, and appropriated the money to his own use on said day by paying the same to one Whitehead on account of his own indebtedness by reason of the purchase of land from said Whitehead. Mrs. Lamprell returned to California in September, 1907; and, upon discovering by inquiry at the bank that defendant had collected the money on the day after the check was drawn, made various efforts to collect the money from defendant, who put her off from time to time with various misrepresentations, excuses, and subterfuges. On December 10, 1907, after various efforts to collect the money, she made a demand in writing upon the defendant for the return of the money, which demand was not complied with and the money has never been returned to her. The information was filed March 28, 1910, three years and five months after the defendant had appropriated the money, and two years and six months after Mrs. Lamprell knew of such misappropriation.

The claim is made that the offense is barred by the statute of limitations, and we are constrained to so hold. Pen. Code, § 800; Ex parte Vice, 5 Cal. App. 153, 89 Pac. 983; Territory v. Monroe, 10 Ariz. 53, 85 Pac. 651; People v. Goodrich, 142 Cal. 216, 75 Pac. 796; People v. Fly, 107 Cal. 497, 40 Pac. 805. In this case a demand was not necessary to start the running of the statute. It is not a case where the defendant held the funds in some official capacity, such as guardian, trustee of an express trust, treasurer of a society or corporation, or under such circumstances that he could not know to whom he could legally turn over the funds. The statute commenced to run on the day the money was wrongfully appropriated and the full three years expired with no attempt at prosecution.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14 Cal. App. 244

METCALFE, County Treasurer, v. MERRITT.

(Civ. 866.)

(Court of Appeal, Second District, California. Sept. 13, 1910.)

1. WATERS AND WATER COURSES (§ 222*) — "RECLAMATION DISTRICT"—NATURE.

A reclamation district is a public, as distinguished from a private, corporation, acting as a state agency invested with limited powers, but it is not a municipal corporation possessing in any degree general powers of government, though, within the limits of the authority granted to it, it exercises public functions.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

2. CORPORATIONS (§ 29*) — PUBLIC CORPORATIONS — VALIDITY OF ORGANIZATION — COLLATERAL ATTACK.

The existence of public corporations can only be questioned by the power from which they derive their right; a collateral attack testing the regularity of their organization not being permissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77, 79; Dec. Dig. § 29.*]

3. WATERS AND WATER COURSES (§ 222*) — RECLAMATION DISTRICTS — ORGANIZATION— VALIDITY.

One who successfully bids for reclamation district bonds on condition that they be legal and valid can question any proceeding which was so defective as to invalidate the bonds, but cannot attack the validity of the organization of the district if the district had a de facto existence when it issued the bonds.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

4. WATERS AND WATER COURSES (§ 222*) — RECLAMATION DISTRICTS — ORGANIZATION— PETITION—SUFFICIENCY.

A petition for organization of a reclamation district sufficiently described the land where it referred to a well-known ranch and to a map, though the latter is not shown to have been recorded.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

5. WATERS AND WATER COURSES (§ 222*) — RECLAMATION DISTRICTS — TERRITORY INVOLVED—DESCRIPTION—SUFFICIENCY.

The acreage of lots in a town involved in a reclamation project is sufficiently shown by a map, where the map shows the scale upon which it was drawn, and by simple calculation the quantity of ground contained in each lot can be readily ascertained.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by W. B. Metcalfe, County Treasurer of the County of Santa Barbara, against George P. Merritt. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Squier, for appellant. Richards & Carrier, C. U. Armstrong, and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, amici curiæ, for respondent.

JAMES, J. Plaintiff in April, 1910, as treasurer of the county of Santa Barbara, offered for sale certain bonds of a reclamation district known as "Reclamation District No. 798," which district had theretofore been organized under the provisions of section 3446 et seq., Pol. Code. In response to the offer defendant submitted a bid to purchase 10 of the bonds for the price of $1,021.20. Ten per cent. of this amount he deposited with his bid. Upon his offer being accepted, demand was made that he pay the remainder of the purchase price, which he refused to do. This action was then brought to compel payment for the bonds.

In the complaint the various steps taken preliminary to the organization of the reclamation district, with the proceedings had subsequent thereto, including those for the issuance and sale of the bonds in question, are set out in detail. It is alleged, referring to the offer of defendant to purchase the 10 bonds, that the bid "was made contingent upon said bonds being legal and valid." A general demurrer to plaintiff's complaint was presented and overruled. Defendant failed to answer, and judgment was entered against him for the amount prayed for. From that judgment this appeal is prosecuted. The defendant by his demurrer sought to call into question the regularity of the organization of the district, directing his attack solely to the original petition filed with the board of supervisors, by which the proceedings for the formation of the district were initiated. He contends that this petition was insufficient to give to that board jurisdiction to act, in that certain facts required to be stated therein were not set forth. Section 3446 of the Political Code provides that the petition shall contain, among other things, "a description of the lands by legal subdivisions, or other boundaries, the county in which they are situated, the number of acres in the proposed district and in each tract." The particular objection made, touching the sufficiency of the petition, is that it did not describe all of the land embraced within the proposed district by legal subdivisions or other boundaries, and that the acreage in certain parcels was not stated. The board of supervisors approved the petition, and all of the subsequent steps required to be taken by the statute are conceded to have been taken, and to have been in regular form. They so appear to have been, as alleged in the complaint. Trustees were selected to manage the affairs of the district, work of reclamation was undertaken, indebtedness was incurred, and money expended. The district became, and continued to be up to and after the time the bonds were issued, and still asserts the right to act as, a duly organized reclamation district. It had an existence de facto if not de jure.

Reclamation districts belong to that class of civil organizations denominated "public corporations." Mr. Dillon, in his work on Municipal Corporations at paragraph 22, says: "Corporations intended to assist in the conduct of local civil government are sometimes styled political, sometimes public, sometimes civil, sometimes municipal, and certain kinds of them, with very restricted powers, quasi corporations. All of these by way of distinction from private corporations. Thus an incorporated school district or county, as well as city, is a public corporation; but the school district, or county, properly speaking, is not, while a city is, a municipal corporation." Under this classification a reclamation district is a public as distinguished from a private, corporation. It acts as a state agency invested with certain limited powers, and restricted to the doing of a particular work, public in its nature. It is not a municipal corporation possessing in any degree general powers of government, but nevertheless, within the limits of the authority granted to it, it exercises public functions. Among other rights conferred is that to make rules for the government of the district which are binding upon the property holders and their successors. Indebtedness can be incurred for reclamation work, and the charge may become a lien against the real property of the district. The scheme of organization comprehends a complete system for the doing of reclamation work, with all of the incidental power to compel the payment of assessments levied, and secure the accomplishment of the intended project of reclamation. Such a district, to be sure, possesses autonomy in a very limited sense, but it is in no wise a private corporation. As to public corporations of any variety, the decisions are almost unvarying to the effect that their existence cannot be called into question by any suitor, except the power from which they derive their right to be; and that an attack, collaterally made, with a view to testing the regularity of their existence or organization, will not be permitted. Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514, 777. In the case of Reclamation District No. 542 v. Turner, 104 Cal. 335, 37 Pac. 1039, the Supreme Court, in considering a like question, said: "This court has repeatedly held that corporations similar to the plaintiff in this case are of a quasi public character, and that the legality and regularity of the proceedings leading up to their final creation, cannot be attacked collaterally. This is the course attempted to be pursued here, and a long line of authority is opposed to it."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant in this case is in the same position as was the defendant in the case last noted, and the attack which he makes is collateral and unauthorized, unless there is something in the terms of his bid which permits him to assume a different position. The bid for the 10 bonds was, as expressed in the language of the complaint, "contingent upon the bonds being legal and valid." This condition would entitle defendant to question any proceeding which was so defective as to invalidate the bonds. If the bonds are binding obligations against the property of the district, however, that is all that defendant can ask or require. As before suggested, the district had a live de facto existence when it issued the bonds. As a de facto corporation the acts of its trustees and officers were binding. The purchaser of bonds of such a district would acquire a lien against the property thereof, securing the payment of these obligations. Defendant here cannot go further in his inquiry when this fact has been ascertained, and it matters not at all to him then whether the district was duly organized or not. In the case of Hamilton v. County of San Diego, 108 Cal. 283, 41 Pac. 305, the plaintiff was a taxpayer within the Coronado school district and brought his action to recover money paid to satisfy an assessment levied for school purposes, basing his right to recover on the ground that the district had no legal existence. It was said by the Supreme Court in that case: "Since the Coronado school district had a de facto existence, the plaintiff could not have enjoined the collection of taxes, nor have resisted an action for the same on the ground of illegality of its organization"—citing cases. This decision, and the cases cited therein, fully support the position we have taken here, and these conclusions, we believe, are not in conflict with anything that was said in the cases of People v. Reclamation District No. 551, 117 Cal. 114, 48 Pac. 1016, and Reclamation District No. 537 v. Burges, 122 Cal. 442, 55 Pac. 156, when those decisions are considered strictly in the light of the particular points presented and the facts involved.

The appeal of defendant is thus disposed of; and while the court is not called upon to consider the objections urged to the sufficiency of the petition presented to the board of supervisors for the organization of the district, in view of further litigation which may follow upon the same subject, it is appropriate, and perhaps desirable, that something more be said. In our opinion, the petition was sufficient. The description of the land embraced within the Rancho Guadalupe was quite general in character, but it referred to what was apparently a well-known ranch and also referred to a map made by one Stratton. This map is not alleged to have been recorded, but with the reference to it, as made in the petition, under the decision in Vance v. Fore, 24 Cal. 444, the land was described with sufficient definiteness to make a good conveyance. If sufficient for that purpose, it must have been sufficient for the purposes of a petition like the one here attacked. So, also, as to the objection that the acreage of lots in the town of Guadalupe is not stated. There is a map of the town of Guadalupe attached to the complaint and made a part of it. This map bears indorsements that it was made in 1875 and recorded in 1880 in the recorder's office of Santa Barbara county. Where many of the lots are delineated thereon, the footage on exterior lines is shown dimly. There is a further indorsement on the map showing the scale upon which the lines are drawn. By a simple calculation the quantity of ground contained in each lot can be readily ascertained. A substantial compliance with the provisions of the statute is all that is required, and, tested by that measure, the petition was sufficient.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

14 Cal. App. 208

BANK OF ANDERSON v. HOME INS. CO. OF NEW YORK. (Civ. 704.)

(Court of Appeal, Third District, California. Sept. 10, 1910.)

1. Contracts (§ 335*)—Pleading—Waiver.

Plaintiff, relying on a waiver of performance of an act required by the contract on which his right of action depends, must specially plead waiver.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1675; Dec. Dig. § 335.*]

2. Pleading (§ 205*)—Judgment (§ 18*)—Complaint—Sufficiency.

A complaint which shows the necessary facts, though inaccurately or ambiguously stated or appearing by necessary implication, is good as against a general demurrer, and supports a judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 504; Dec. Dig. § 205;* Judgment, Cent. Dig. §§ 34–37; Dec. Dig. § 18.*]

3. Insurance (§ 634*) — Fire Insurance — Complaint—Sufficiency.

A complaint in an action on a fire policy, which alleges performance of all the conditions of the policy except that as to furnishing proofs of loss, and which avers that proofs of loss were not furnished "for the reason that said defendant denied and disclaimed all liability," sufficiently alleges that insured denied all liability, and refused to pay the loss, and thereby waived proofs of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1603–1605; Dec. Dig. § 634.*]

4. Insurance (§ 385*)—Contracts—Waiver.

An insurer issuing a fire policy stipulating that it shall be void if insured procures other insurance without consent indorsed on the policy, and that no officer or agent may waive any provision of the policy except such as by the terms thereof may be the subject of agreement indorsed thereon, and the waiver must be written on the policy, may be bound by a waiver of a general agent, though no indorsement is made on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1020–1023; Dec. Dig. § 385.*]

5. Insurance (§ 375*) — Agents — General Agents.

An agent of a foreign insurance company who issues, cancels, indorses, and delivers policies, solicits and writes insurance, collects the premiums for insurer, remits them to it, and attends to its business generally, is a general agent of insurer, and has authority to waive conditions in a policy, though the company has a general agent for the state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 948; Dec. Dig. § 375.*]

6. Insurance (§ 375*) — Agents—"General Agent."

An agent of an insurance company, with general authority, is an agent who is authorized to take risks and enter into contracts of insurance without consulting the company, and such an agent has the same power to waive conditions in policies as the company itself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 948; Dec. Dig. § 375.*

For other definitions, see Words and Phrases, vol. 4, pp. 3048–3051.]

7. Insurance (§ 386*)—Fire Policies—Waiver of Conditions.

Where insured in a fire policy stipulating that it should be void if he procured other insurance without consent indorsed on the policy procured additional insurance, and notified the agent issuing the first policy thereof, and the agent promised to make the proper indorsement but failed to do so, insurer in the first policy was equitably estopped from insisting on the forfeiture of the policy, notwithstanding its stipulation that no conditions should be waived unless written on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1024; Dec. Dig. § 386.*]

8. Insurance (§ 378*)—Fire Policies—Waiver of Conditions.

A fire policy stipulating that it should be void if insured procured other insurance without consent indorsed on the policy covered the property of insured, and neither the agent of insurer nor a bank to whom the loss was made payable as collateral for a loan amply secured by a mortgage had any interest in the property, and insurer knew that the agent was an officer of the bank. Insurer through its general agent had full knowledge of the transaction, and ratified it. Insured procured additional insurance with the knowledge of the agent, who promised to make the proper indorsement, but failed to do so. There was no fraud on the part of insured and the bank. *Held*, that insurer was bound by the acts of its agent, and could not defeat a recovery for a loss on the ground that the agent's and insurer's interests conflicted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 970–972; Dec. Dig. § 378.*]

9. Insurance (§ 87*)—Fire Policies—Waiver of Conditions.

Where one is an agent of an insurance company, the company is bound as to third persons dealing with the agent in good faith as to all matters within the scope of the agent's real or apparent authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 116, 121; Dec. Dig. § 87.*]

10. Insurance (§ 665*) — Fire Insurance — Denial of Liability—Evidence.

In an action on a fire policy, evidence *held* to justify a finding that an adjuster of insurer denied liability, so that insurer was relieved of the duty of furnishing proofs of loss to hold insurer on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1725; Dec. Dig. § 665.*]

11. Insurance (§ 558*) — Fire Insurance — Failure to Furnish Proofs of Loss.

Where the conduct of an insurer in a fire policy is such as to render the production of proofs or loss useless or unavailing, they are deemed waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1382; Dec. Dig. § 558.*]

12. Insurance (§ 670*) — Fire Insurance — Actions—Verdict.

Where, in an action on a fire policy, the jury found that there was a denial by the adjuster of insurer of all liability on the part of insurer, and that the general agent of insurer during the 60-day period after the fire denied liability, and refused to adjust the loss on the ground of a violation of a provision in the policy as to other insurance, a finding that a failure to furnish proofs of loss within 60 days after the fire was not on account of the refusal of insurer to adjust the loss did not defeat a recovery on the general verdict for insured.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1785-1787; Dec. Dig. § 670.*]

13. INSURANCE (§ 645*)—FIRE INSURANCE—PLEADINGS—ISSUES.

A plaintiff in an action on a fire policy must allege the performance of conditions precedent such as the giving of any required notice of loss and performance of promissory warranties, but stipulations which are in the nature of conditions subsequent going to defeat the liability of insurer must be alleged in the answer, and to the matters so alleged any defense by way of replication is open to plaintiff without pleading, and, where a forfeiture of the policy on the ground of plaintiff procuring additional insurance without consent indorsed on the policy is set up in the answer, plaintiff may show a waiver of the stipulation or an estoppel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1640; Dec. Dig. § 645.*]

14. INSURANCE (§ 390*) — FIRE INSURANCE — STIPULATIONS—WAIVER.

An insurer in a fire policy stipulating that it shall be void if insured procures other insurance without consent indorsed on the policy must, to avoid a waiver of the condition on insured procuring additional insurance with the knowledge of the agent procuring the policy who agrees to make the proper indorsement, express its dissent in some way as by objecting to the additional insurance or by canceling the policy and returning the premium, and it must object in some way.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.*]

15. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR — VERDICT — SPECIAL AND GENERAL VERDICTS.

Where, in view of special findings and the undisputed evidence, the general verdict was properly rendered for the successful party, the point whether an answer in the special verdict was correct was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

16. TRIAL (§ 358*) — VERDICT — SPECIAL AND GENERAL VERDICTS.

An answer in a special verdict to a question calling for a conclusion of law cannot prevail over the findings of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 856; Dec. Dig. § 358.*]

Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by the Bank of Anderson against the Home Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Riley, for appellant. Herzinger & Herzinger, for respondent.

BURNETT, J. The action was on a fire insurance policy, and from the judgment in favor of plaintiff and the order denying defendant's motion for a new trial this appeal has been taken. The trial was had before a jury who made special findings upon various issues and also rendered a general verdict in favor of plaintiff for the amount of the policy. The policy was issued December 13, 1906, to Seaman Bros. through one Barkuloo, the local agent of defendant at Anderson, Shasta county. The plaintiff had advanced said Seaman Bros. money to start them in business, and had the loss under the policy made payable to itself. After the issuance of the policy sued upon, some time in the spring of 1907, the exact time not appearing, Seaman Bros. secured other insurance from another company on the same property. The property was destroyed by fire in October, 1907, and the full amount of said second policy was paid. Other facts will appear as we proceed to notice the various points made by appellant.

1. The demurrer to the complaint was properly overruled. The complaint alleges a performance of all the terms and conditions of the policy, except that as to furnishing proofs of loss, and that said proof of loss was not furnished "for the reason that said defendant denied and disclaimed all liability." It is the contention of appellant that this is not an allegation that defendant did deny and disclaim all liability and refuse to pay the loss. The rule undoubtedly is that when a party relies upon the waiver of the performance of an act, upon which his right of action depends, such waiver must be specially pleaded. Aronson et al. v. Frankfort Accident, etc., Ins. Co., 9 Cal. App. 473, 99 Pac. 537. But it does appear, at least by necessary implication, that the defendant denied all liability, and it is elementary that "when necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained. Reason requires that this rule shall be applied in case of a general demurrer." Amestoy v. Electric R. T. Co., 95 Cal. 314, 30 Pac. 551. The allegation that a certain condition exists because of a certain fact necessarily carries with it the implication that the fact exists also. The other objections to the complaint are equally technical and untenable.

2. The policy provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void if insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and it also contained the usual and familiar provision that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." It is admitted that no agreement permitting the subsequent insurance nor any waiver of said provision was indorsed on said policy, and that circumstance presents the second question raised by appellant. Notwithstanding, however, the unequivocal and exacting terms of said provision, it is settled by the decisions beyond controversy that the insurer may be bound by the waiver of a general agent, although no indorsement whatever is made upon the policy.

In Arnold v. American Insurance Co., 148 Cal. 660, 84 Pac. 182, 25 L. R. A. (N. S.) 6, it was held that, "notwithstanding a printed stipulation that any waiver must be made in writing and attached to the policy, such stipulation could not prevent the conduct of the officers of the company from constituting a waiver or estoppel of the company, based upon its presumed knowledge, when its proper officer had knowledge, where such conduct led the insured to rely upon his policy as a valid policy, although there was a breach of condition of which the company knew, in which case it will not be heard to allege such breach against a claim for a subsequent loss." In Mackintosh v. Agricultural Fire Insurance Co., 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234, the rule is stated as follows: "General agents authorized to issue and deliver new policies are regarded as having the same power to waive conditions and forfeitures as the companies themselves. The limitations embodied in the stipulation do not prevent them from making new contracts; and waivers constituting a new contract upon sufficient consideration need not be evidenced by writing nor indorsed upon the policy, if made by a general agent having power to make the contract, no matter what limitations or conditions may be expressed in the policy." To the same effect is Raulet v. N. W. National Ins. Co. (Sup.) 107 Pac. 292. See, also, 16 Am. & Eng. Ency. of Law, p. 935.

The evidence shows that the agent, Mr. Barkuloo, was clothed with authority to waive said condition and stipulation, and that his conduct and declarations must be regarded as a waiver of the same. He testified that "as agent for the Home Insurance Company I issued policies, canceled policies, indorsed policies, issued and delivered policies, solicited and wrote insurance, collected the premiums for the company, remitted them to the company, and attended to the business of the company generally." There is no evidence to the contrary. If the foregoing powers did not constitute him a general agent in that community, it is difficult to conceive what additional authority is required for said purpose. "Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the company themselves, and can therefore waive conditions and forfeitures." Mackintosh Case, supra. "It may be laid down as a general rule that an agent with general authority is an agent who is authorized to take risks and enter into contracts of insurance without consulting the company, may waive any of the conditions contained in the policy, and his knowledge of the facts contained in the risk is the knowledge of the company." 16 Am. & Eng. Ency. of Law, p. 942.

In Farnum v. Phœnix Insurance Co., 83 Cal. 261, 23 Pac. 874, 17 Am. St. Rep. 233, it is said: "Whether or not any particular agent has the general power of the company to make an oral contract or an oral waiver of a condition, notwithstanding the provision in the policy requires a writing, is a question of fact. Insurance Co. v. Norton, 96 U. S. 234 [24 L. Ed. 689]; Steen v. Niagara Fire Ins. Co., 89 N. Y. 326, 42 Am. Rep. 297. The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions direct from the home office, in the state of New York, and who signed himself as the direct agent of the defendant." The foregoing must set at rest the proposition that Barkuloo had authority to waive said condition and bind the company.

Did his conduct and declarations in reference to the said second policy of insurance amount to a waiver of said stipulation? Concerning this there can be no more doubt than of his authority to bind his principal. Philip Seaman testified that "I told Mr. Barkuloo that we had taken out other insurance, that the other agent told me to notify him about it and to note it on the policy of the Home. I told him to attend to the matter, and he said he would and note it on their policy. At the time the Home policy was in the Bank of Anderson and I showed him the policy of the Insurance Company of North America. I had a slip with me that Mr. Gardner gave me along with this policy. I gave it to Mr. Barkuloo and told him to note it on the policy." The testimony of the agent is substantially the same. Additionally he gives the substance of the slip which he says was in the usual form, and testifies that "I had the policy before me at the time that I had the slip. All that I had to do to affix it to the policy was to put mucilage on the slip and stick it on the policy," and he admits that he simply neglected to do it.

Strictly speaking, this is probably not a waiver of the said conditions, but a case of equitable estoppel. The effect, however, is the same. The insured did everything required of them. When they took out the second policy, they notified the agent of the Home Insurance Company who promised to make the proper indorsement for his company. The insured had a right to rely upon this promise by virtue of which they probably refrained from securing other insurance, and equity will treat that as done which ought to have been done, and not permit appellant to question it. The rule is well settled, which is stated in the case of Ætna Ins. Co. v. Eastman (Tex. Civ. App.) 80 S. W. 255, as follows: "When a general agent of a fire insurance company, with power to issue and deliver policies, solicit and write insurance, and otherwise to act for and on behalf of the company in the conduct of its business in a certain place, receives notice from the insured of the taking of other insurance on property covered by a policy issued by such agent, but fails to indorse the company's consent on the policy, as required by the policy's terms to maintain its validity, and fails to make any objection to the taking of the other insurance, the company is estopped to assert a forfeiture for want of such indorsement, though the policy further provides that no agent has power to waive the provisions unless the waiver shall be written on or attached to the policy, and that no privilege affecting the insurance shall exist or be claimed by the insured, unless also written or attached."

Neither can there be any question that the evidence showing the waiver or estoppel was properly admitted. Arnold v. American Ins. Co., supra; Phœnix Ins. Co. v. Grove, 215 Ill. 299, 74 N. E. 141, 25 L. R. A. (N. S.) 1.

But it is contended by appellant that, admitting that "one with the powers of Barkuloo could be held to be empowered to waive the provision as to other insurance in this transaction, he could not be considered and in law was not the agent of defendant, and his acts or neglect could not bind the defendant," for the reason that his interests and those of the defendant were conflicting by virtue of the fact that he was the vice president, cashier, and manager of the bank to which the policy was made payable. The evidence, however, shows clearly that the property insured belonged to Seaman Bros., and that neither the Bank of Anderson nor Barkuloo had any interest therein and appellant had knowledge of Barkuloo's relation to the bank. Said policy was made payable to the bank as collateral security for a loan of $2,000, which the bank had made to Seaman Bros., and which was amply secured by a mortgage on $10,000 worth of real estate. The evidence shows, further, that the company, through its general agent in San Francisco, had full knowledge of the transaction and in fact ratified it. It would seem to be just and elementary that since the insurer had knowledge of the bank's interest in the policy and of Barkuloo's position in the bank, and directed its agent, Barkuloo, to have the policy made payable to the bank in case of loss that it cannot after loss question the authority of its own agent because of an act which it authorized and ratified. Under the facts disclosed, manifestly the insurance company may have cause for complaint against the agent, Barkuloo, but for his dereliction the insured, free from fault and fraud, cannot be held responsible. There is no principle of law or equity that, under such circumstances, precludes the insured from recovery. The knowledge of the second insurance acquired by Barkuloo was acquired as the agent of the insurer, and was present in his mind at the time he made the promise to the insured, and this satisfies the requirement of the rule. 6 Current Law, p. 127; Foreman v. German All. Ins. Co., 104 Va. 694, 52 S. E. 337, 3 L. R. A. (N. S.) 444, 113 Am. St. Rep. 1071. It cannot be controverted that, where there is an agency, the company is bound as to third persons dealing with the agent in good faith as to all matters within the scope of his real or apparent authority. Sellers v. Com. Fire Ins. Co., 105 Ala. 282, 16 South. 798. "A general insurance agency representing several companies with authority to act upon applications and issue policies, as well as to cancel the same in proper cases, may also act as the agent of the insured in waiving notice of cancellation and in accepting a delivery of a new policy when substituted for the one cancelled." Hamm Realty Co. v. New Hampshire Fire Ins. Co., 80 Minn. 139, 83 N. W. 41.

The cases cited by appellant are distinguishable from the one at bar in the following particulars, as substantially pointed out by respondent: In Rockford Ins. Co. v. Winfield, 57 Kan. 576, 47 Pac. 511, the banks, of which the agent of the insurance company was an officer in each, held security on the property covered by the policies of insurance and the companies had no knowledge of this and, besides, the question of forfeiture or waiver was not involved; the point being that the company had declined the risk. The decision is really based upon the ground that the condition of affairs was not disclosed to the insurance company, but it is held that the agent would be authorized to write a policy even on his own property, and the company would be bound by it if fully informed of the facts and the risk was accepted. The other cases—Ritt v. Washington

Marine & Fire Ins. Co., 41 Barb. (N. Y.) 353, Bentley v. Columbia Ins. Co., 19 Barb. (N. Y.) 595, and Spare v. Home Mutual Ins. Co., (C. C.) 19 Fed. 14—involve ownership of the property by the agent, and illustrate the rule that the agent of the insurance company cannot as such agent insure himself or the corporation of which he is an officer, shareholder or director unless all the facts are known to the company or unless such insurance is ratified after such knowledge is acquired.

There is some intimation by appellant of fraud on the part of the insured and plaintiff in regard to said second insurance, but the suggestion finds no support in the evidence. There was apparently no attempt at concealment, and the property at the time said policy was issued far exceeded in value the amount of the two policies.

3. We think there was sufficient evidence to support the allegation of the complaint that defendant disclaimed and denied all liability under the policy, and therefore the failure to furnish proof of loss was excused. One John Ehrlich was sent by defendant to adjust the loss. As to the extent of his authority he testified: "I am an independent fire adjuster and work for the Home of New York" and other companies. "As a loss comes along I am hired to adjust it. I go on the road and tell parties that I am adjusting for such and such a company, and it is accepted, and whenever I settle the loss the money is ready. I went to Anderson to adjust the loss of the Seaman Bros." Philip Seaman, among other things, testified that Ehrlich said: "You know this company is not responsible for the loss on that policy." George Seaman's testimony is that Ehrlich said: "Well, I cannot do anything with this. The company is not responsible or liable for this loss. Just before we left for home on the morning train I asked Ehrlich what he was going to do about the matter, if he was going to straighten it up, and he said, 'No; the company isn't liable.' I told him their agent at Anderson had been notified of the other insurance being taken out." Barkuloo's testimony was of the same import, and he added: "I was trying to persuade him (Ehrlich) that the company was responsible, and he insisted that they were not, and finally he said that he had a stipulation, I believe he called it, signed by the brothers, and it was to be taken up by the home office. He said I could take it up with them if I wasn't satisfied with his statements regarding it." We think the foregoing justifies the inference that Ehrlich disclaimed any liability on the part of the company, and from his statements the insured could reasonably conclude that any proof of loss would be unavailing, as the company would reject it. It would also seem that his authority was broad enough to include the matter in question. In McCollough v. Home Ins. Co., 155 Cal. 659, 663, 102 Pac. 814, 816, formal proofs of loss were not made by reason of the statements of the adjuster, and the court said: "The court was fully justified in finding from this evidence that the company had waived the requirement of written and sworn proof of loss"—citing cases. Again, within the time for presenting proofs of loss, a letter was received from the general agent at San Francisco in which expressions are found indicative of the company's purpose to resist the claim. This letter was in answer to those written by Barkuloo in which he stated his reasons for believing the company was liable for the loss. In the reply Barkuloo was charged as responsible for the condition of affairs and reference is made to "this alleged claim" and the "gross negligence" of said Barkuloo as "the obstacle in the way of an adjustment." Furthermore, it is stated that "What action he (Ehrlich) took as an adjuster would necessarily have been the action of the undersigned." While said letter is somewhat evasive, it is a fair inference from it that the company would resist the claim in any event, and it may be considered as furnishing additional assurance of the authority of Ehrlich. There is some other correspondence between the same parties tending to the same conclusion, but we deem it unnecessary to notice it. We cannot hold that there was no substantial evidence to support said allegation, and, of course, the rule is well settled that, "Where the conduct of the company is such as to render the production or correction of proofs of loss useless or unavailing, they are deemed waived." Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; 13 Am. & Eng. Ency. of Law, p. 347; Farnum v. Phœnix Ins. Co., supra; Allen v. Phœnix Ins. Co., 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903; Home Ins. Co. v. Balt. Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Civ. Code, § 3522.

This view is not inconsistent with special finding No. 11 of the jury wherein the answer, "No," was given to the following question: "Did Seaman Bros. and said plaintiff or either of them fail to furnish proofs of loss of the fire to defendant as required by the policy of insurance for the reason that said defendant within 60 days after said fire and loss denied and disclaimed all liability under said policy of insurance on account of said fire and loss and refused to adjust said loss and pay the amount of said policy?" As pointed out by respondent, the material questions as to this were: Did the company actually deny all liability, or was there a refusal to pay, and was it apparent from the conduct and statements of the company that proofs of loss would be useless and unavailing? The jury in said finding No. 11 did not answer these questions, but, in view of the testimony of Barkuloo to the effect that he thought he had furnished proofs of loss, the jury found that these other considerations were not the reason for his failure. The jury actually did find that there was a denial by the adjuster of all liability on the part of the company, and also that the general agent at San Francisco, during the 60-day period after the fire, denied liability and refused to adjust said loss and pay the same on the ground of the violation of the provision as to other insurance.

4. There is no merit in the contention that it was necessary for plaintiff to allege the waiver or estoppel by reason of the agreement of Barkuloo to make the necessary indorsement on the policy. The true rule is stated in Arnold v. American Ins. Co., 148 Cal. 668, 84 Pac. 185, 25 L. R. A. (N. S.) 6, as follows: "It is incumbent upon plaintiffs in an action upon a policy of insurance to allege the performance of conditions precedent, such as the giving of any required notice of loss, etc., and performance of all promissory warranties; but limitations, stipulations, and conditions which are in the nature of conditions subsequent, and go to defeat the liability of the insurer, must be alleged in the answer, as they were in this case. To this matter so alleged in the answer, under our system of pleading, any defense by way of replication was open to plaintiff without pleading." Here the forfeiture was set up in the answer, and it was proper in order to meet that for the plaintiff to show the waiver or estoppel. The cases cited by appellant involved conditions precedent and not subsequent.

5. It is claimed that the court erred in instructing the jury that "a provision of a fire insurance policy that it should be void if the insured procured other insurance without the consent of the insurer, and without such consent being indorsed upon or attached to the policy is waived by failure on the part of the insurer to object or cancel the policy and return the unearned premium, before loss by fire of the insured property, after said insurer had knowledge that other insurance had been procured." The contention is that the retention of premium does not waive forfeiture. It is argued that the insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against (section 2616, Civ. Code), and that the contingency upon the happening of which the insured is entitled to a return is provided for in sections 2618 and 2619 of the Civil Code, as follows: "If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums so far as that particular risk is concerned." "A person is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer, or, on account of facts, of the existence of which the insured was ignorant without his fault; or, when by any default of the insured other than fraud, the insurer never incurred any liability under the policy." The argument is that by virtue of these provisions, if appellant had canceled the policy for the reason that the insured had secured other insurance, there was no obligation to return any portion of the premium, and therefore its failure to do so could not be considered as a waiver of said stipulation in the policy. The instruction is in harmony with many decisions from other jurisdictions, but, granting that it required more of the insurer than the statute justifies, it is perfectly apparent that it could have done no injury to appellant. Under all the decisions and according to the familiar doctrine of equitable estoppel, to avoid a waiver under the circumstances mentioned the insurer must express its dissent in some way. It could be done manifestly by objecting or by canceling the policy and returning the premium. It was at least its duty to object, and, since it did not do so, it waived the said stipulation, and it is entirely without prejudice that the court exacted too much in the other alternative. In other words, while the instruction, abstractly considered, may be erroneous, when applied to the undisputed facts, it could possibly have done no harm. Besides, the instruction may be entirely disregarded for the reason already suggested that the evidence shows without conflict that the company, through its authorized agent, promised to make the proper indorsement, and this was sufficient to bind the company. The authorities probably all agree to the rule stated in Wood on Insurance, p. 1102, and quoted with approval in Kalmutz v. Insurance Co., 186 Pa. 576, 40 Atl. 817, as follows: "Where other insurance is required to be indorsed on the policy, if notice thereof is given to the insurer or its agent, and consent is not indorsed, nor the policy canceled, further compliance is treated as waived and the insurer is estopped from setting up such other insurance to defeat its liability upon the policy, and the same is true when the same agent issued both policies, although consent is not indorsed upon either policy, yet, being issued with knowledge of the facts, the insurer is treated as having waived compliance, and is estopped from setting up nonindorsement in defense. In all cases where the insurer, at the time the policy was issued, knew of other insurance, and there is no agreement for its cancellation or nonrenewal, or when notice is given that other insurance has been obtained, it is bound either to indorse consent upon the policy or cancel it, or, failing to do either, it will be treated as having assented thereto."

6. There was sufficient evidence to support all the material special findings. The answer "Yes" to the question: "Was any consent in writing to said other insurance given by defendant?" is not strictly correct, although it represents the legal effect of defendant's conduct. But it is entirely immaterial since, if answered either way, in view of the other findings as to waiver and the

undisputed evidence, the general verdict must have been for plaintiff. Many special findings were submitted to the jury, some of them complicated, and quite likely to produce confusion in the minds of the jurors. They probably answered inadvertently "No" to the following question: "Did the defendant, with knowledge of the facts relied upon by plaintiff as a waiver of the provision as to other insurance, namely, the alleged taking of a slip to Barkuloo, the alleged notification to him of the other insurance, dispense with the condition that consent to such insurance must be indorsed in writing on said policy?" But this plainly calls for a conclusion of law and should not prevail over the findings of fact.

7. The nonwaiver agreement signed by the insured Seaman Bros., cannot have the effect claimed for it by appellant. The acts upon which plaintiff relied for a waiver of the requirement to furnish proofs of loss occurred after said agreement was executed and are not included within its terms. McCollough v. Home Ins. Co., supra.

No further specific consideration of appellant's objections is considered necessary. We think the complaint is sufficient, the cause was fairly tried, the evidence supports the findings, and they, in turn, support the judgment, that no prejudicial error was committed, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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14 Cal. App. 224

PEOPLE v. TOMALTY. (Cr. 229.)

(Court of Appeal, First District, California. Sept. 12, 1910.)

1. Criminal Law (§ 1023*)—Orders Appealable.

Under Pen. Code, § 1237, authorizing appeals from a final judgment of conviction, from an order denying a new trial, and from any order made after judgment affecting the substantial rights of accused, an order denying a motion in arrest of judgment, is not appealable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2588; Dec. Dig. § 1023.*]

2. Criminal Law (§ 1134*)—Appeal—Questions Reviewable.

Under Pen. Code, § 1259, authorizing the court on appeal from a judgment to review any intermediate order involving the merits, the court on appeal from a judgment may review any error committed in denying a motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2997; Dec. Dig. § 1134.*]

3. Forgery (§ 5*)—"Falsifying Record"—Intent.

Pen. Code, §§ 113, 114, punishing falsifying any record in any public office, do not make a fraudulent purpose an ingredient of the offense, and a falsification of a public record willfully and knowingly made is an offense without regard to any purpose to defraud.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 4–6; Dec. Dig. § 5.*]

4. Forgery (§ 15*)—Falsification of Records—"Public Record."

The charter of the city and county of San Francisco, which requires the treasurer to keep the account belonging to each fund separate, and which requires the bond and warrant clerk of the police court to account for and pay to the treasurer all moneys received as bail, requires the treasurer to receive, and, on proper order pay out, bail money, and he must keep a separate and distinct account of such receipts and disbursements, and, where the accounts are kept in a ledger, the ledger is a "public record" within Pen. Code, §§ 113, 114, and falsification of an entry in the ledger is an offense under the statute.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 50; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 6, p. 5818; vol. 8, p. 7773.]

5. Forgery (§ 15*)—Falsification of Records—"Public Record."

To make an entry or record of the official acts of a public officer a public record within Pen. Code, §§ 113, 114, prohibiting the falsification of public records, it is not necessary that the record is expressly required by law to be kept, but it is sufficient if it is necessary or convenient to the discharge of official duty, and any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 50; Dec. Dig. § 15.*]

6. Forgery (§ 15*)—Falsification of Records.

The purpose of Pen. Code, §§ 113, 114, punishing the falsification of public records, is to protect the public archives, and not to affect private rights, and ledger entries constituting a public record may be falsified in violation of the statute, though the ledger entries are inadmissible as evidence of the facts therein shown.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 50; Dec. Dig. § 15.*]

7. Forgery (§ 15*)—Falsification of Records—"Filed or Deposited."

The books of account of the treasurer of the city and county of San Francisco, showing the condition of the account of bail moneys received and paid out, are "filed or deposited" within Pen. Code, §§ 113, 114, punishing the falsification of records "filed or deposited" in any public office; the quoted words being equivalent to the words "on file or on deposit."

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 50; Dec. Dig. § 15.*]

8. Forgery (§ 27*)—Alteration of Record—Indictment—Surplusage.

An allegation in an indictment charging an alteration of a public record in violation of Pen. Code, §§ 113, 114, that the alteration was fraudulently done, may be disregarded as surplusage.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 62; Dec. Dig. § 27.*]

9. Indictment and Information (§ 148*)—Uncertainty—Demurrer.

A demurrer to an indictment for uncertainty must indicate in what particular the indictment is not direct or is not certain.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 495; Dec. Dig. § 148.*]

10. Criminal Law (§ 369*)—Evidence of Other Offenses—Admissibility.

Evidence connecting accused with the commission of other crimes wholly independent of the one for which he is on trial is inadmissible; but evidence of other crimes logically tending to prove any fact necessary or pertinent to the proof of the crime charged is admissible.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

11. Criminal Law (§ 372*)—Evidence—Admissibility—Other Offenses.

On a trial for altering an entry in a ledger on file in the office of the treasurer of the city and county of San Francisco so as to increase the amount of money apparently paid by the treasurer out of a particular fund, evidence of other falsifications of accounts in the office and of the destruction of some leaves from a ledger of accounts of a special fund is admissible to show that the alteration for which accused was on trial was not a lawful alteration to correct an error in his books, but was a willful falsification as a part of a plan to conceal a shortage in the moneys in the treasury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

12. Forgery (§ 38*)—Falsification of Records—Evidence—Admissibility.

On a trial for falsifying an entry in a ledger in the office of the treasurer of the city and county of San Francisco so as to increase the amount of money apparently paid by the treasurer out of a fund, evidence of a shortage in the treasurer's office is admissible to show a motive for accused to make the falsification.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 108; Dec. Dig. § 38.*]

13. Criminal Law (§ 489*) — Opinion Evidence—Cross-Examination—Extent.

That an expert has been employed and paid by the party calling him is a proper matter for cross-examination for consideration by the jury to affect the credibility of the expert; but it is not error for the court to refuse to allow a showing of the amount paid to the expert.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1078; Dec. Dig. § 489.*]

14. Criminal Law (§ 448*)—Evidence—Opinion Evidence.

A question as to whether, during the experience of a witness in the office of the treasurer of a municipality, it was possible for a bookkeeper in the office to have access to any of the funds in the treasury, was properly excluded as calling for an opinion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035–1051; Dec. Dig. § 448.*]

15. Criminal Law (§ 534*)—Evidence—Sufficiency.

The guilt of accused cannot be proved by his confessions without other evidence or circumstances showing the commission of the crime, and unless there is other evidence the jury must acquit accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1202–1205, 1222–1224; Dec. Dig. § 534.*]

16. Criminal Law (§ 1173*)—Appeal—Harmless Error.

Where, on a trial for falsifying a record in a public office, there was evidence aside from any extrajudicial confession showing the commission of the offense, and there was evidence that accused before his indictment admitted that he had altered the public record to correct an entry therein and make it conform to the truth, and the court charged that accused was not guilty if he made the alteration in the ordinary course of business of keeping the records in the office, and also charged on the necessity of proof of guilt beyond all reasonable doubt, the refusal to charge that accused could not be convicted on his confession without other evidence of the offense was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164–3168; Dec. Dig. § 1173.*]

17. Criminal Law (§ 829*)—Instructions—Sufficiency.

Where the court charged, in the language of Code Civ. Proc. § 1847, that the presumption that a witness speaks the truth may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth or his motives, the refusal to charge that the jury in judging of the testimony of accused must presume that he told the truth, and that unless the presumption had been repelled his testimony was entitled to full credit, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

James C. Tomalty was convicted of crime, and he appeals. Affirmed.

Herbert Choynski and Costello & Costello, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. The defendant was charged by indictment with a felony under sections 113 and 114 of the Penal Code. Upon his trial he was found guilty as charged, and upon judgment being pronounced against him he appealed to this court from the judgment and the orders denying his motions in arrest of judgment and for a new trial. The order denying defendant's motion in arrest of judgment is not appealable (section 1237, Pen. Code); but this is of no consequence, for any error committed by the court in denying such motion is reviewable on appeal from the judgment (section 1259, Pen. Code). Section 113 of the Penal Code provides that "every officer having the custody of any record, map or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper or proceeding, or who permits any other person so to do, is punishable by imprisonment in the state prison not less than one year nor more than fourteen years." Section 114 of the Penal Code provides that "every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by a fine not exceeding one hundred dollars, or by both." The indictment does not charge that defendant was an officer such as is referred to in section 113, but expressly alleges that he was not such officer. The gravamen of the charge set forth in the indictment is that defendant on or about the 17th day of May, 1906, did willfully, unlawfully, feloniously, knowingly, and fraudulently alter and falsify an entry in a certain book designated as the "ledger," filed and deposited in the treasurer's office of the city and county of San Francisco, and in which were stated, kept, and entered the accounts of the various special funds of said city and county, including the police court bail money special fund. As appears from the allegations of the indictment, prior to the alteration and falsification charged against defendant, there was an entry in said ledger under date of April 17, 1906, consisting of the figures "605," indicating and intended to indicate that the sum of $605 and no more had been disbursed by the county treasurer on the 14th day of April, 1906, out of the police court bail money special fund, and in truth and in fact the sum of $605 and no more had been so disbursed by said treasurer on said day. That defendant, well knowing that said entry of the figures "605" correctly represented the amount of disbursements by the said treasurer out of said fund on said date, did on or about the said 17th day of May, 1906, willfully, unlawfully, feloniously, knowingly, and fraudulently alter and falsify said record, book, and paper, to wit, said ledger, and particularly said entry of the figures "605," by then and there inserting before said figures "605," the figure "5," so that the figures as they stood and appeared after such alteration were "5605," whereby it was made to appear by said record and book and the said entry as so altered that the amount of money paid and disbursed by said treasurer out of said fund, on the day when said $605 was disbursed, was the sum of $5,605; whereas, in truth and in fact the sum of $605 and no more was disbursed by said treasurer from said fund. It thus appears that, though it is in form charged that defendant altered and falsified the entry, the alteration charged was in fact a falsification of the entry. The trial court took this view of the indictment, and accordingly charged the jury to the effect that they must acquit the defendant unless they were fully satisfied beyond a reasonable doubt that the alteration of the entry rendered the entry false, and that defendant knew it to be false at the time of making it. The indictment is quite long, and we have not attempted to set it forth at length, but only the substance of such part as we deem necessary to an understanding of the points involved in the contentions of appellant. To the indictment the appellant filed a demurrer, which was by the court overruled, and appellant now urges that the court erred in so ruling.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is claimed that the indictment is fatally defective in not alleging that the alteration or falsification was done with intent to defraud some one. But the section under which the indictment was framed does not make a fraudulent purpose an ingredient of the offense, and it has accordingly been so held. People v. O'Brien, 96 Cal. 171, 31 Pac. 45. As was indicated in the O'Brien Case, the very wide range permitted in the punishment, which may in the discretion of the trial judge be a light fine only, indicates that the Legislature intended to cover cases involving little or no moral turpitude. We do not doubt that a falsification of a public record willfully and knowingly made is prohibited and punished under this statute without regard to the existence of any purpose to defraud. Such is clearly the rule laid lown in People v. O'Brien, supra.

It is also urged that the accounts kept in the treasurer's office of the various funds in his charge are not public records, and that any book in which such accounts are kept is not "filed or deposited in" such office. While the law does not expressly require the treasurer of the city and county of San Francisco to keep a ledger, showing the accounts with the various funds in the treasurer's office, it clearly intends that he shall keep accounts with all the different funds in his charge. In chapter 3 of article 4 of the charter of the city and county of San Francisco it is provided: "Sec. 2. The treasurer shall receive and safely keep all moneys which shall be paid into the treasury. * * * At the close of business each day he shall take an account of and enter in the proper book the exact amount of money on hand. At the end of each month he shall make out and file with the mayor and publish quarterly in the official newspaper a statement of the condition of the treasury, showing the amounts of receipts into and payments from the treasury, and on what account, and out of what fund. * * * He shall keep the account belonging to each fund separate and distinct, and shall in no case pay demands chargeable against one fund out of moneys belonging to another. * * *" The duties of the bond and warrant clerk of the police court are set forth in chapter 8 of article 5 of the charter, and in section 5 thereof it is provided that "he must account for and pay to the treasurer all moneys received as bail. * * *"

Under the law it is thus the duty of the treasurer to receive, and upon proper order pay out, bail moneys. It is clearly his duty to keep a separate and distinct account of such receipts and disbursements. So much is distinctly required of him by the state law. What particular books of account he shall keep is not specified in the statute; but it is a matter of common knowledge that a ledger is a proper and practically necessary part of any system of bookkeeping. It certainly should be a part of the system used in an office receiving and disbursing such vast amounts of money, belonging to so many different funds, as is the case in the treasurer's office of the city and county of San Francisco.

In order that an entry or record of the

official acts of a public officer shall be a public record, it is not necessary that such record be expressly required by law to be kept; but it is sufficient if it be necessary or convenient to the discharge of his official duty. "Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." Cyclopedic Law Dictionary, p. 776. Accordingly, it has been held in Michigan that certain tax sales books, made and kept by the receiver of taxes, are public records, although there was no express statutory provision requiring such books to be kept. Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73. In Coleman v. Commonwealth, 25 Grat. (Va.) 865, 23 Am. Rep. 711, the defendant was indicted for having erased the figure "1" from the figures "$18,100" in the warrant book of the sinking fund, so as to make them read "$8,100." It was contended that such warrant book was not a public record. Although the statute did not expressly require such book to be kept, the court held it to be a public record, and affirmed the judgment of conviction in the case. The court said: "Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document, a record belonging to the office and not to the officer; it is property of the state and not of the citizen, and is an no sense a private memorandum." In the case of the treasurer of the city and county of San Francisco, not only the nature of the duties to be performed by him requires that he keep accounts showing the receipts to and disbursements from the various funds in the treasury, but the statute expressly requires that he keep separate and distinct accounts of each fund. While the keeping of such accounts in a ledger is not expressly required, it is certainly an appropriate and practically necessary method of keeping such accounts. When so kept, we do not doubt that such accounts in such ledger belong to the public and are public records.

Much has been said in the brief of appellant upon the question as to whether or not the ledger entries are admissible as evidence of the facts therein shown. Whether they are or not is not important. In McInerney v. United States, 143 Fed. 729, 74 C. C. A. 655, the court was considering a statute almost identical with section 113, Pen. Code, and, in discussing what constitutes a "record" within the meaning of the statute, said: "But in a statute like the one in question, intended to protect government archives, the view is entirely different, because the word is used in a popular, or at least in a more general sense. The purpose of the statute was not to describe a record which shall conclude rights, but records to be protected from destruction, and the purpose changes entirely the point of view, and consequently the sense of the words employed." The purpose of our statute seems to be to protect the public archives from destruction, mutilation, alteration, and falsification, and not to conclude or affect private rights. This is apparent by the omission, as an ingredient of the offense of any fraudulent purpose or intent to injure any one. See People v. O'Brien, supra. We are of the opinion that the entry alleged to have been falsified is a "public record" within the meaning of the statute. But it is also contended that the treasurer's books of account, showing the receipts and disbursements of his office, are not "filed or deposited" in his office within the meaning of the statute. We cannot agree with this contention. The purpose of the statute is not to protect or safeguard the act of filing or depositing, but to protect records in the custody of a public officer as such. The words "filed or deposited" as used in this statute are equivalent to "on file or on deposit." The account books of the treasurer, as such, are constructed in the treasurer's office, the records are made in such office, but when made they become and are records of the office, and are then on file and on deposit in such office, and are in the official custody and keeping of the treasurer. In People v. O'Brien, supra, the record altered was the record of a deed contained in a record book in the recorder's office. This book was doubtless procured just as account books are procured by the treasurer. The record of the deed was entered in the book in the recorder's office. The method of putting the book and its contents on file or on deposit, or, in other words, into the official custody of the officer, is the same in either case. No one would dispute that a record of a deed in the county recorder's office is within the statute. The accounts in the treasurer's office of his official monetary transactions bear the same relation to his office as the records of deeds in the recorder's office bear to his office.

Appellant also discusses the want of particularity concerning the allegations that the alteration was fraudulently done; but, as we have already shown, a fraudulent purpose or intent is not made by the statute an ingredient of the crime charged, and such allegation may be disregarded as surplusage.

Defendant's attempt to demur for uncertainty is wholly insufficient to present any such question for review. No attempt is made in the demurrer to indicate in what particular the indictment is not direct or is not certain. This is necessary in order to raise any such question. People v. Bradbury, 155 Cal. 808, 103 Pac. 215. The indictment states a public offense, and the court neither erred in overruling the demurrer nor in denying appellant's motion in arrest of judgment.

Over the objection of defendant, the prosecution was allowed to introduce much testimony tending to prove the commission by defendant of other offenses than the one for which he was indicted. It is undoubtedly the rule that evidence connecting the defendant with the commission of other crimes wholly independent of the one for which he is on trial is inadmissible. But this does not exclude evidence of other crimes, when such evidence logically tends to prove any fact necessary or pertinent to the proof of the crime for which defendant is being tried. "If the evidence of another crime is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence simply because it involves the commission of another crime. People v. Tucker, 104 Cal. 440, 38 Pac. 195. The general tests of the admissibility of evidence in a criminal case are: (1) Is it a part of the res gestæ? (2) If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not." People v. Sanders, 114 Cal. 216, 46 Pac. 153. To the same effect, see People v. Walters, 98 Cal. 138, 32 Pac. 864; People v. Rogers, 71 Cal. 565, 12 Pac. 679; People v. Lane, 101 Cal. 513, 36 Pac. 16; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; People v. McGlade, 139 Cal. 66, 72 Pac. 600; People v. Cook, 148 Cal. 334, 83 Pac. 43; People v. Bidleman, 104 Cal. 608, 38 Pac. 502.

In the case at bar evidence was given tending to show a shortage in the money in the treasurer's office of $60,000. That besides the falsification of the ledger account charged in the indictment, evidence was given of two other false entries amounting to $15,000, and in addition evidence was given of other falsifications to the amount of $40,000. In other words, it was shown that the books kept by defendant and in his handwriting showed $60,000 of expenditures in excess of the actual expenditures. Thus did the defendant, as it is claimed by the prosecution, make his book balance with the money actually in the treasury. As to the evidence concerning the shortage in the treasurer's office, it tended to show a motive for the defendant to make the falsification for which he was indicted. All the falsifications were part of one and the same scheme to conceal and make it difficult to discover the shortage. Evidence of all the falsifications was necessary to explain and make clear the motive and object of the defendant in making the particular falsification for which he was indicted. All this evidence tended to prove that the alteration for which he was indicted was not an innocent and lawful alteration made by defendant to correct an error in his books, and to thus make them conform to the truth (Reclamation District v. Wilcox, 75 Cal. 443, 17 Pac. 241), as was claimed by him in a statement made to the Deputy Attorney General, but was a willful falsification made by him as part of a plan or scheme to conceal a shortage in the moneys in the treasury. The evidence tending to prove that defendant removed and destroyed some leaves from the ledger containing accounts of the county clerk special fund was admissible upon the same theory. It was an attempt to conceal his criminal act. The destruction of a part of the ledger accounts made it more difficult to prove the shortage in the moneys, and consequently the falsity of the alteration for which defendant was being prosecuted. Concealment of a criminal act tends to a greater or less extent to prove the willfulness of the act as well as the criminal purpose with which it was done. The court did not err in allowing, under the circumstances disclosed by the record in this case, the evidence complained of tending to prove the commission by defendant of other offenses.

Theodore Kytka was examined as an expert by the prosecution, and it is complained by the appellant that the court unduly restricted the cross-examination of the witness, in that the court sustained objections by the people to the questions: "How much of a bill have you presented the city and county of San Francisco for your work in this case?" and "How much have you been paid by the city and county of San Francisco in the past year for work done for the district attorney's office?" The court did allow appellant upon the cross-examination of the witness to show that he had been employed by the district attorney not only in this case but in other cases during the year, as well as by the police department. That an expert has been employed and paid by the party calling him is a proper matter for consideration by the jury as going to the credibility of the witness. This is as far as the cases cited by appellant go. Wrisley v. Burke, 203 Ill. 250, 67 N. E. 818; Jones v. Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437. This the court allowed appellant to do, and only refused to allow a showing as to the amount paid. Such a showing would have opened the door for a long examination as to the kind and extent of the services rendered. Under the circumstances, we do not think the court erred in the two rulings complained of.

Complaint is also made of the ruling of the court sustaining an objection to the question: "During your experience in that office, was it possible for the bookkeeper to have access to any of the funds of the treasury?" This question clearly called for the opinion of the witness, for which reason the ruling of the court was correct.

Neither did the court err in refusing to grant the motion of appellant to strike from the evidence the ledger claimed to have been falsified. This motion was urged upon the ground that such ledger was not a public record. This ground we have disposed of in discussing the demurrer to the indictment.

The defendant requested the court to instruct the jury as follows: "The guilt of the defendant cannot be proved by the confessions or statements of the defendant without other evidence or circumstances tending to show the commission of the crime, and unless there is other evidence it is your duty to acquit the defendant." The court refused this instruction, as well as one of similar import requested by defendant, and appellant now urges that error prejudicial to him was thereby committed.

The instruction above set forth is correct as an abstract proposition of law, and the court might well have given it (People v. Thrall, 50 Cal. 415); but it does not necessarily follow that prejudicial error was committed in refusing the instruction. There is abundant evidence in the record, aside from any extrajudicial admissions or confessions of defendant, tending to show the commission of the crime charged. There is no evidence in the record that defendant ever made any confession or admission of guilt. Appellant in his brief has not attempted to point out any evidence of admissions of defendant, but our examination has revealed that evidence was given to the effect that he admitted that the entry claimed to be false was made by him, but in this connection his counsel in open court admitted the entire entry to be in his handwriting. Evidence was also given to the effect that defendant before his indictment admitted that after the great conflagration of April 18, 1906, he had written the figure "5" before the figures "605"; but this was coupled with the statement that this was done to correct the entry and thus make it conform to the truth. As pertinent to this phase of the evidence, the court, at defendant's request, charged the jury that defendant was not guilty if he made the change or alteration complained of in the entry in question in the ordinary course of business of keeping the accounts of the treasurer's office, and that their verdict must be not guilty unless they were fully satisfied from the evidence beyond a reasonable doubt that the change so made rendered the entry false, and that the defendant knew it to be false at the time of making it.

The court fully charged the jury as to the necessity for proof of defendant's guilt beyond all reasonable doubt. There is in the record abundant evidence, not only of the corpus delicti, but that defendant committed the crime charged, aside from the evidence of extrajudicial admissions. Indeed, there is no evidence of any extrajudicial admissions concerning any controverted matters save the evidence to the effect that he admitted that he changed the original entry of "605" to "5605" to correct an error, and to thus make the entry conform to the truth. Upon this state of the evidence as disclosed by the record, it is beyond the realm of possible belief that the jury could have found him guilty as charged solely upon the evidence of any extrajudicial admission. Defendant never admitted that the insertion of the figure "5" before the figures "605" rendered the entry false, or that he knew such entry to be false, both of which facts the court charged the jury to be necessary to be proved beyond a reasonable doubt before a verdict of guilty could be rendered. It was not only proved outside of his extrajudicial admission, but it was admitted in open court that the entire entry in question was in defendant's handwriting. The only proof of its falsity and of his knowledge of its falsity was evidence other than evidence of his extrajudicial admissions. For these reasons it is clear to us that defendant could not have been injured by the refusal of the court to give the instruction in question.

Appellant asked for an instruction concerning the weight to be given the testimony of the defendant. This instruction was in the language of the instruction challenged by the defendant in People v. Hill, 1 Cal. App. 414, 82 Pac. 398. In that case the court held that no error was committed to the prejudice of defendant, but it does not follow that a defendant would be entitled to have such an instruction given. The instruction as requested contains the statement: "And, in judging of the defendant who has testified before you, you are in duty bound to presume that he has spoken the truth; and unless that presumption has been legally repelled his evidence is entitled to full credit." It may be seriously doubted whether or not this statement is not an invasion of the right of the jury to judge of the credibility of all the witnesses. It contains a very direct instruction that his evidence is entitled to full credit, with a somewhat vague suggestion that the presumption of its truth may be in some way, not stated, legally repelled. The court did give the correct rule as to all witnesses as set forth in section 1847, Code Civ. Proc., as follows: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility." The defendant was a witness, and this rule covered his case as well as that of other witnesses. Under it the jury would properly understand that in judging of the credibility of the evidence given by a defendant they would have a right to consider his motives, that is, his interest in the case, and for that reason refuse to give full credit to his testimony. We think that the rule as given by the court in the language of the statute, as to the powers and duty of the jury in judging of the credibility of witnesses, more clearly and fairly states the law than does the requested instruction refused by the court. And for this reason the court did not err in refusing such instruction.

The court refused to give several long instructions requested by defendant as to what constitutes a public record, and as to what is meant by filed and deposited. We do not deem it necessary to set out these instructions. Suffice it to say that they were all pointed to the proposition that such a ledger as the indictment charged to have been kept was not a public record, and was neither filed nor deposited in a public office within the meaning of sections 113 and 114 of the Penal Code. If what we have said concerning the character of the ledger and the entries therein in discussing the demurrer be correct, the instructions were properly refused.

For the same reason the court did not err in giving the following instruction: "If you find from the evidence in the case to a moral certainty and beyond a reasonable doubt that 'People's Exhibit A in evidence' is and was at all the times mentioned in the indictment a loose leaf ledger and book, and that at all of said times it was physically kept in the office of the treasurer of the city and county of San Francisco, state of California, and that also at all such times there was then and there and therein stated, kept, and entered the accounts of various special funds of the said city and county, and that one of such funds was the police court bail money special fund, and that said fund and account thereof was therein known and designated as 'special fund police court bail money,' and that in said loose leaf ledger and book and in said account therein there was then and there at all of the said times kept and entered and stated a record of the various amounts of money disbursed by said treasurer out of the police court bail money special fund, in the custody of said treasurer of said city and county of San Francisco, then I instruct you as a matter of law that the same was a public record of the city and county of San Francisco, and that as a matter of law the said 'People's Exhibit A' was a book filed and deposited in the public office of said treasurer as stated in the indictment, and within the meaning of the provisions of sections 113 and 114 of the Penal Code."

Neither did the court err in refusing appellant's instruction to the effect that the people must prove the allegation of fraud. As we have before seen, such allegation is surplusage and not an essential element of the offense under the statute.

It is claimed that the court erred in disallowing appellant's challenge to two jurors for actual bias. We think the evidence sufficient to support the ruling of the court.

Upon the whole record the defendant seems to have had a fair trial.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 180

ROBERTS v. SIERRA RY. CO. OF CALIFORNIA. (Civ. 727.)

(Court of Appeal, Third District, California. Sept. 1, 1910.)

1. CARRIERS (§ 346*) — INJURIES TO PASSENGERS—ASSUMPTION OF RISK—EVIDENCE.

In an action for injuries to a passenger on a special freight train caused by the derailment of a car loaded with dynamite exploded thereby, evidence *held* to show that the passenger assumed the risk of falling off the flat car on which he was riding, but did not assume the risk arising from the car loaded with dynamite.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 346.*]

2. CARRIERS (§ 318*) — PASSENGERS — NEGLIGENCE—EVIDENCE.

In an action for injuries to a passenger on a special freight train caused by the derailment of a car loaded with dynamite exploded thereby, evidence *held* to support a finding that the carrier was negligent in loading slabs on a flat car in front of the car loaded with dynamite, and that the slabs fell from the car and caused the derailment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

3. CARRIERS (§ 316*)—PASSENGERS—INJURIES—PRESUMPTIONS.

Where a passenger suing for injuries pleaded general and specific acts of negligence, and the cause was tried on the theory that both specific and general negligence was alleged, the presumption of the carrier's negligence arose on proof of plaintiff's injury while a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261–1294; Dec. Dig. § 316.*]

4. APPEAL AND ERROR (§ 171*)—THEORY IN TRIAL COURT—OBJECTIONS ON APPEAL.

Where the parties proceeded without objection to make a particular case by evidence not strictly within the pleadings, and the court without objection submitted the evidence to the jury, the case so made could not be assailed for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069; Dec. Dig. § 171.*]

5. NEGLIGENCE (§ 119*) — PLEADINGS — GENERAL AND SPECIFIC NEGLIGENCE.

The rule that, where general allegations of negligence are followed by an enumeration of specific acts, plaintiff will not be confined to proof of the specific acts, unless the complaint clearly indicates his intention to limit the negligence to such acts, applies where the specific acts pleaded precede the general negligence alleged.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200–216; Dec. Dig. § 119.*]

6. CARRIERS (§ 321*)—PASSENGERS—INJURIES—ISSUES—INSTRUCTIONS.

Where a passenger suing for injuries caused by the derailment of a car loaded with dynamite exploded thereby submitted evidence of the specific and general negligence alleged, and the carrier attempted to explain the cause of the derailment and to show that it was not due to any want of care, a charge that the passenger, to recover, need only prove that he was a passenger, and that while he was riding on the car provided for him he was injured by the derailment without his fault, and that the burden of proving absence of negligence was then on the carrier, was proper.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

7. CARRIERS (§ 316*) — INJURIES — PRESUMPTIONS—NEGLIGENCE.

In an action for injuries to a passenger on a special freight train caused by the derailment of a car, evidence *held* not to rebut the presumption of negligence arising from the proof that the passenger, while riding on the car provided for him, was injured by the derailment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 316.*]

8. TRIAL (§ 237*) — INSTRUCTIONS — PREPONDERANCE OF THE EVIDENCE.

An instruction that the affirmative of the issue was on plaintiff, and that, if the evidence was contradictory, the decision must be made according to a preponderance of the evidence, followed by the statement that the jury must reconcile the contradictions in the testimony, and that, where that could not be accomplished and the evidence was so equally balanced in weight that the scales of proof hung even, the verdict should be for defendant, did not violate the rule that defendant need not rebut plaintiff's case by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542–551; Dec. Dig. § 237.*]

9. CARRIERS (§ 321*)—PASSENGERS—INJURIES—INSTRUCTIONS.

A requested charge that a passenger applying for permission to ride on a special freight train on which there are no accommodations for passengers assumes the extra risks incident to the train, provided the carrier uses such care as is required on usual passenger trains consistent with the purposes for which the train is made up, is properly modified by adding, "and the highest degree of care consistent with the practical and common use of the appliances and cars on a freight train is exacted * * * of a carrier * * * in the transportation of passengers when fare is taken" therefor, where the court also charges that a carrier must furnish its passengers a suitable and safe road and safely operate its trains, and where it charges that a carrier is required to use only such care as may be consistent with the practical operation of the road.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

10. CARRIERS (§ 280*) — PASSENGERS—LIABILITY OF CARRIER.

Under Civ. Code, §§ 483, 2100, 2168, 2175, imposing on carriers of passengers for hire on freight trains the liability imposed on carriers of passengers on passenger trains, and requiring a carrier to use the utmost care for the protection of passengers, etc., a carrier accepting for reward a passenger on a special freight train must exercise the care required of a carrier of passengers for reward.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1117; Dec. Dig. § 280.*]

11. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS COVERED BY THOSE GIVEN — PASSENGERS — LIABILITY OF CARRIER.

Where, in an action for injuries to a passenger on a special freight train caused by the derailment of a car, the court charged that a carrier might, except for gross negligence, willful wrong, or fraud, require the passenger to assume the dangers, and that a passenger might not ride on such a train except on the conditions demanded by the carrier, the refusal to charge that the carrier could limit its responsibility by special contract was not erroneous because the instruction given covered the point of the instruction requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260;* Carriers, Cent. Dig. § 1407.]

12. APPEAL AND ERROR (§ 1033*)—QUESTIONS REVIEWABLE—ERRORS IN FAVOR OF PARTY COMPLAINING.

A defeated party cannot complain of an instruction too favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. § 1033.*]

13. CARRIERS (§ 331*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A passenger taking passage on a special freight train, carrying with his knowledge a car loaded with dynamite, did not take the risk of an explosion of the dynamite proximately caused by the negligence of the carrier, and he was not guilty of contributory negligence precluding a recovery for injuries caused by the derailment of the car through the negligence of the carrier and the explosion of the dynamite thereby.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1371–1382; Dec. Dig. § 331.*]

14. TRIAL (§ 253*)—PASSENGERS—INJURIES—INSTRUCTIONS IGNORING ISSUES.

Where, in an action for injuries to a passenger on a special freight train caused by the derailment of a car loaded with dynamite and the explosion thereof, the evidence showed negligence in loading and operating the train, a charge that the carrier could not be charged with negligence if it, at the time of the receipt of the car, carefully examined it without finding any defect therein, etc., was properly refused because confining the issue to the condition of the car and ignoring acts of negligence proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

15. CARRIERS (§ 321*)—PASSENGERS—INJURIES—INSTRUCTIONS.

In an action for injuries to a passenger on a special freight train caused by the derailment of a car loaded with dynamite exploded thereby, an instruction that the passenger could rely on the presumption of negligence on proof of the "derailment" of the car and the injuries, and an instruction that no presumption of negligence arose from the "explosion" of the dynamite and resulting injuries, were not contradictory, the former relating to the "derailment," and not to the "explosion" of the dynamite.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Alfred E. Roberts against the Sierra Railway Company of California. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied in Supreme Court (111 Pac. 527).

Solinsky & Wehe, for appellant. John Hancock and S. D. Woods, for respondent.

CHIPMAN, P. J. This is an action to recover for personal injuries suffered by plaintiff while a passenger upon defendant's cars. The cause was tried by a jury and plaintiff had a verdict for $5,760, on which judgment was entered accordingly. Defendant appeals from the judgment and from the order denying its motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint alleges that defendant was at the times therein mentioned operating a steam railway for the carriage of passengers and freight for hire between the town of Tuolumne and the town of Jamestown in Tuolumne county, and also between Jamestown and the town of Angels in the county of Calaveras, and during all said times defendant was and now is a common carrier of persons and freight for hire; that on June 26, 1906, defendant received plaintiff as a passenger on its said railway at the town of Tuolumne, and, in consideration of the regular fare paid by plaintiff, the said defendant agreed to transport plaintiff as a passenger over its said lines from said Tuolumne to said Angels by way of said Jamestown; that plaintiff boarded the train of defendant at Tuolumne and proceeded to Jamestown and, on his said ticket purchased at Tuolumne, again boarded the train of defendant at Jamestown, and was received as a passenger thereon by defendant for the purpose of transporting him to said town of Angels; "that the railway train upon which said defendant so received plaintiff as a passenger at Jamestown consisted of a locomotive propelled by steam and numerous cars and there was included in said train on said day a car containing a large amount, to wit, ten tons, or thereabouts, of dynamite; that said train, so constituted as aforesaid, proceeded on its way from Jamestown to Angels, with said plaintiff thereon as a passenger, while between said points aforesaid, and while within said county of Calaveras, and while plaintiff was riding thereon as such passenger, said defendant carelessly and negligently allowed its railway track upon which said train was running to become obstructed, and said defendant carelessly and negligently allowed certain obstructions to fall or become placed thereon, and so negligently and carelessly managed and operated its said locomotive and train that a portion of said train, to wit, several cars thereof, including said carload of dynamite, became and were on said day last aforesaid wholly derailed; that, by reason of the derailment of said cars and the concussion caused thereby, said car load of dynamite was instantly exploded and by reason thereof a violent explosion occurred; that said derailment and explosion occurred without any fault on the part of said plaintiff." The remaining averments of the complaint relate to the character and extent of plaintiff's said injuries "by reason of the derailment of said train and of said explosion," the destruction and loss of his clothing and baggage, expenses incurred in employing medical attendance, etc.

A general demurrer to the complaint was interposed and also a special demurrer on the ground that there is a misjoinder of actions, in that there is a cause of action for injuries to the person of plaintiff, also for damages sustained by loss of personal effects; also, that the complaint is ambiguous and uncertain in not alleging the value of said personal effects. No action seems to have been taken on the demurrer, and it is not now urged. Defendant filed an amended answer admitting the averments of the complaint as to plaintiff's purchase of ticket for passage from Tuolumne to Angels, but avers that the said transportation was to be only by way of the regular passenger trains of defendant; that the regular passenger train from Jamestown to Angels did not leave Jamestown until late in the afternoon, and plaintiff, having arrived in the forenoon and being desirous of proceeding without delay, importuned defendant to transport him by a special freight train that was then being made up, and which among other cars included one which contained 15 tons of dynamite; that defendant, by its superintendent, endeavored to dissuade plaintiff from going on that train, and informed him of the danger by reason of its having in the train said car of explosives, but finally yielded to plaintiff's solicitations after plaintiff had agreed to assume all dangers of said transportation, and it is averred that plaintiff did so agree and boarded said special train and became a passenger thereon under said agreement and not otherwise. Defendant further avers "that the said explosion occurred without any fault or negligence on its part whatsoever, and that the same was an accident beyond the control of the said defendant and which it could not with reasonable care and diligence have provided against," and that any damage suffered by plaintiff was the result of his own carelessness and negligence directly contributing thereto. Defendant also sets up as a special defense that plaintiff became a passenger upon said special freight train under an agreement that, if allowed to be transported thereupon, he would assume all the dangers connected therewith, and would relieve defendant from all liability of every kind and character connected with plaintiff's transportation upon said special freight train and the said agreement was in force at the time of said explosion.

Plaintiff was a civil engineer, and was in the pursuit of his profession when he took passage upon defendant's cars. He testified that he purchased a ticket at Tuolumne for passage to Angels; that he arrived at Jamestown in the forenoon and learned from a nearby bartender, one Reed, that the regular passenger train to Angels did not leave until late in the afternoon; that, being anxious to reach Angels and being told that a special freight train was being made up, he went to the superintendent, Mr. Blanton, whom Mr. Reed had pointed out, and, after stating his anxiety to get on in his journey, was told that he might ride on that train. The train consisted of five cars besides the engine: First, an oil car; second, a flat car loaded with a traction engine and other machinery; third, a flat car on which were one or two cords of sawmill slabs; fourth, a box car loaded with dynamite powder; and, fifth, a flat car on which plaintiff and two other men sat.

It was claimed by defendant, as disclosed in the answer, that plaintiff assumed the risks of every kind including that arising from the presence of the car loaded with powder. Bartender Reed testified that plaintiff had told him that the superintendent had called his, plaintiff's, attention to this powder car, and plaintiff said he would take any risk from that. Plaintiff testified that he made no such statement, and that he saw no placard on the car showing that it contained powder. On his cross-examination upon this point plaintiff testified: "I made one trip back to the barkeeper, and told the barkeeper that the superintendent had consented to my going, but that I would have to ride on a flat car, and that he questioned me closely as to my ability to ride on that flat car, and I assured him that I would not fall off." Then he says: "The superintendent told me then that there is more or less danger riding on a flat car, and that, if I would take the chances of it, riding on a flat car, all right I could go. Mr. Wehe: Q. Wasn't anything said at all about riding at your own risk? A. Riding on a flat car at my risk; yes. Q. He did say you must ride on that flat car at your own risk? A. Yes; in view of the fact that there was no accommodation, no caboose accommodations. Q. That is what I am trying to get at. Then he did say you must ride on that flat car at your own risk? A. Yes; risk of falling off, of course, is referred to—meant. Mr. Wehe: Q. Now you are sure, are you, Mr. Blanton didn't say anything to you about powder car? A. He certainly did not." Superintendent Blanton testified on cross-examination as follows: "Q. Now, Mr. Blanton, coming back to the matter of the conversation between yourself and Mr. Roberts at Jamestown on the morning of the accident, you said to Mr. Roberts, I understood you to say in your testimony that you had no place for him on that train, and you advised him not to go. What did you mean by saying that you had no place for him? A. We never carried passengers in all my experience on a train of that kind. There was no place where he could ride safely. Q. There was no caboose, no seat, no place where he could safely ride? A. No place I considered it was safe. Q. You considered it would not be safe for him on an open car? A. Yes, sir. Q. What you meant by your suggestion was it was not safe for any passenger to ride on any flat, open car without any regard to powder? A. Yes, sir. I was going to place him on a different car altogether. I was going to put him on the inside with the machinery. Q. It was because you feared that he would fall off that you advised him not to go on the train; that was the idea? A. That was the principal idea. Q. Did you say anything as to the powder at all? A. I think we spoke about it. I don't recollect. Q. You won't say that you did? A. No. Q. That was not the reason you advised him not to go on the train, on account of the powder? A. No; I didn't think the powder was going to explode, of course. Q. Do you, of your own knowledge, know that there was a sign on this car indicating that it was a powder car? A. Yes; I remember seeing it on one side. I don't remember whether it was on the other side or not. On the side next to the station there was a sign—the usual placard. Q. What did the train crew consist of on this morning? A. The engineer, fireman, conductor, and two brakesmen. Q. Did the conductor tell you that he had placed Mr. Roberts on the rear car? A. He told me he would do so, and I saw him there afterwards." The evidence fully justified the jury in finding that plaintiff did not, in his conversation with superintendent Blanton, assume any risk beyond what he testified to.

Conductor Hawkins testified: "Mr. Blanton was the superintendent of the railroad at that time. Received from Mr. Blanton before the train pulled out that morning instructions to take on the train Mr. Roberts, the plaintiff; directed the plaintiff to a place on the train, on the flat car in the rear of the powder car. * * * This car containing the slabs was right next forward of the car containing the powder. They were refuse of logs sawed off, of different lengths, I presume 20 inches to 2 feet, and they were lying on this flat car in front of the powder car. The car upon whch these slabs were lying had nothing on the end to protect the slabs from falling off. I wouldn't be positive about the sides. I don't think they had any on the sides. * * * The slabs were on the bottom of the flat car from one end to the other at least about two feet from the rear end. That was the position they were in when the train pulled out of Jamestown. Some of them were piled and some loose, wasn't very particularly piled, just thrown on loosely." On further cross-examination witness testified there were about two cords of slabs on the car.

Witness Demarest testified: "I saw the marks of the flanges on the ties, of the wheels there. I saw slabs on the car and on the track; saw a wheel mark on one of them; the same kind of an impression as I saw on the ties; don't know the quantity of slabs on the car; would not know how to express it in cords. The slabs were scattered over the flat car on the bottom; would not know how much it would make if they were piled up. Q. By Mr. Grant: Quite a lot were there? A. Wasn't so very many. They were covering the bottom of the flat car. Q. Some towards the end of the car? A. Yes; I think they were pretty well scattered over the bottom of the car. I didn't see any sideboards. I saw some stakes in the clips on the sides; didn't see any boards at the end of the car; looked all around, was desirous of ascertaining the cause of the accident." On cross-examination witness testified: "Could not say positively where the wheel mark was; do not remember whether it went across or lengthwise of the slab. I remember seeing the wheel marks on the slab. The marks on the ties were at the point of explosion, about there. Our going over there was purely a matter of curiosity."

Witness Monteverdi testified: "Observed an excavation caused by the explosion about 15 or 16 feet below the tracks. Wasn't between the rails, below the track on the down side of the cañon. The track was raised up from the bed a little. The ties were still attached to the rails. The ties had the appearance of the flange of a wheel jumping from one tie to another right at the point of explosion; observed slabs of wood at that point. They were outside pieces sawed off of round timber. They were kind of rounding—wedge shaped—on one side, and on the other flat. They were about three feet or so long. Some I guess were from an inch and a half to four or five inches at the half circle point. I observed the imprint of a flange of a wheel on some of these slabs that were at this point on the track; saw the plaintiff, Mr. Roberts, there at that time; had known him some time before that; did not speak to him, he did not recognize me; saw a man lying down there dead; saw a flat car there with slabs on it. The slabs were of a similar character to the slabs I saw the imprint of the wheel on. To the best of my knowledge I believe there was no tailboard to the car to restrain the slabs from falling off. The slabs were thrown on loosely. Some were near the end of the car."

From Jamestown the grade descended to the Stanislaus river, and thence it was upgrade to and beyond a point where the accident occurred called "Gee Whiz Point," an elevation of about 1,000 feet above the river crossing. The grade was ascending here, as testified by superintendent Blanton, and just before the explosion the train had rounded a curve of 12 to 16 degrees.

Conductor Hawkins was on the flat car containing the machinery. He testified: "I thought the train was going kind of slow, and I was going to step off the car and see if there was any brakes stuck, air stuck, as we usually, of course have a half dozen or dozen times over the road. I got to the front end of the machinery car and I looked down to see if the oil car was sticking first, and then I was in the act of just going to swing around and jump off and was getting in kind of a side position, with my back to the cañon, to the precipice you might call it, and I had hold of the machinery with my both hands. I happened to look back and I saw the powder car off the track. When it left the rail, it curved out to the end of the ties, and it had gone for a short distance before it dropped off the end of the ties and started to roll over, and I seen the boys on the rear car, of the flat car behind, running toward the rear end for their life, and just about the time they got to the rear end and tried to make the fatal jump to get off, the flat car had disconnected from the powder car and kind of flopped back on the track, and the box car rolled and just about the time it made a roll, only about a revolution, one revolution, it was all off. The explosion took place. It fell over on the side, just about making one turn so that the top was almost down where the bottom was before, and then the explosion occurred."

The evidence was that both of the men on the flat car with plaintiff were killed, and plaintiff's injuries were of a severe and permanent character. Other witnesses testified to the fact that the powder car left the track and turned partly over down the hillside before it exploded, and there was evidence tending to show that some of the slabs fell from the flat car next in front of the powder car and the trucks of the latter car coming in contact with them were thrown off the track and thus caused the accident. The evidence upon this point cannot be said to be conclusive, but the known facts and certain circumstances, such as the markings of the truck wheels on the slabs and that the powder car was the first to leave the track, as testified to, pointed to the falling slabs as the cause of the accident, which would have been averted had the slabs on the flat car been secured in some way from falling off, which admittedly was not done. It was gross negligence on the part of defendant to expose this powder car to such danger, and, as there was evidence tending to show that the derailing and explosion of the powder car was traceable to such negligence of the defendant, we think the plaintiff was not called upon to make clearer proof of this fact, aside from any presumption of defendant's negligence as the cause of the accident.

In an 86 page brief defendant devotes one page to the proposition that the evidence does not sufficiently show that the accident was caused by the falling of these slabs. No evidence seriously conflicting with that introduced by plaintiff is called to our attention, and no suggestion is made which leads us to doubt the sufficiency of the evidence to support the verdict upon this point.

The stress of defendant's argument for a reversal is laid upon questions of law arising out of the pleadings and alleged errors in giving and refusing instructions to the jury, and to this branch of the case we will now address ourselves. Defendant makes the concession "that in damage cases of this character the plaintiff, upon proper allegations of general negligence, is entitled to a presumption of negligence," but it is claimed that "he is not entitled to such presumption of negligence where the allegations are of acts of specific negligence." Valente v. Sierra Ry. Co., 151 Cal. 534, 91 Pac. 481, and Bonneau v. North Shore Railroad, 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68, are cited as stating the rule where general negligence is averred, but cases are cited to show that no such presumption arises where specific acts are alleged, even though general negligence is alleged. To the soundness of this latter proposition we cannot agree. If it be the rule that, where specific acts of negligence are alleged as the cause of the accident, the burden is upon the plaintiff to prove his averments, we think he satisfactorily sustained such burden, and that the evidence was sufficient to justify the inference that the acts of negligence averred and proved were the cause of the accident. Plaintiff, however, not only alleged specific acts of negligence, but he also alleged general negligence. It is true that he did not set up his alleged specific and general negligence in separate counts, as was done in Green v. Pacific Lumber Co., 130 Cal. 439, 62 Pac. 747, but there was no demurrer addressed to this feature of the complaint. The averments of the complaint were specifically denied. The evidence went in without objection touching the issues as thus presented and defendant makes no pretense of being surprised.

Inasmuch as there was an issue of general negligence presented, a presumption of negligence arose upon proof made of plaintiff's injury while a passenger on defendant's cars. And the case was tried upon the theory that both specific and general negligence was alleged, for defendant introduced evidence for the purpose, first, of showing that the powder car was not derailed by the falling slabs; and, second, by showing that the accident occurred through no preventable cause and "without any fault or negligence" on defendant's part, and "beyond the control of said defendant and which it could not with reasonable care and diligence have provided against," as alleged in the answer. "Where parties, without adhering closely to the written pleadings, proceed without objection and make a particular case by the evidence and the court allows that case without objection to go to the jury, it is a violation of all correct rules of law then to assail the case thus made for the first time by the motion for a new trial on the assignment of error in the appellate court on the ground of failure of proof. Such a procedure works fraud upon the opposite party, and there is no authority for it outside of Missouri." 6 Thompson on Negligence, § 7473. This author further says in speaking of the general rule in pleading negligence that "ultimate facts only are to be pleaded, and it is not good pleading to plead matters of evidence." Further he says: "If the pleading fairly informs the opposite party of what he is called upon to meet, and the specific acts of negligence are followed by a general statement that the acts were negligently done, or if it fails to state the acts particularly and the opposite party nevertheless fails to claim a surprise or take the necessary steps to extricate himself from the difficulty, there ought not to be much trouble about the question." Id. § 7447. It has been held, and we think rightly, that, where general allegations of negligence are followed by an enumeration of specific facts, the plaintiff will not be confined to proof of specific acts, unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts, and the rule, we think, should be equally applicable where the specific acts pleaded precede the general negligence alleged. U. S. Express Co. v. Wahl, 168 Fed. 851, 94 C. C. A. 260; Traver v. Spokane St. Ry. Co., 25 Wash. 225, 65 Pac. 284, 291.

The discussion of the question arises under instructions of the court, to which defendant objects, to the effect that plaintiff was not required to prove how or why the car containing dynamite was derailed or overturned, if he was injured by its derailment or overturning. "That the plaintiff was a passenger of the defendant and that while he was riding on the car provided for him he was injured by the derailment or overturning of a car containing dynamite, without his fault, is all the plaintiff need establish in the first instance, in order to recover for such injuries which may have been caused him thereby. When the plaintiff has done this, the presumption arises that the derailment or overturning of the car containing dynamite occurred through the negligence of defendant, and the burden of proving that there has been no negligence is cast upon the defendant." The contention that this was error for the reason that plaintiff had pleaded specific acts of negligence cannot be maintained. Plaintiff submitted evidence tending to establish his averments of specific negligence, and he was entitled to rely upon this presumption under his averments of general negligence. Defendant offered evidence to explain the cause of the derailment of the dynamite car, and to show that it was not due to any want of care or foresight or operation of the train on its part. This evidence consisted mainly of the fact that one of the truck axles of the powder car was found, some distance from the scene of the explosion, broken off at the wheel, and this, it was claimed, caused the wheel to leave the track. It appeared that this car was shattered into fragments, but few of which were ever found, and that the downward effect of the powder excavated a large hole in the mountain side below the track; the latter being but little affected thereby. It could not be stated with any degree of certainty whether the breaking of the truck axle occurred before the derailment of the car or was caused by the explosion; and it appeared that the breaking of one axle at one wheel would not necessarily cause the car to leave the track immediately, for the bearings on the truck were such as that the other wheels would support the load and hold the car on the track for some distance. There was, we think, a failure on defendant's part to show that it was free from fault, and it is not claimed that plaintiff was in any degree guilty of contributory negligence except in riding upon the train thus endangered, which is a matter later to be noticed.

The court instructed the jury: "In civil cases the affirmative of the issue must be proven. The affirmative of the issue in this case is upon the plaintiff. If the evidence is contradictory, the decision must be made according to a preponderance of the evidence." Without quoting further, defendant complains that this is in violation of the rule "that the defendant is not required to rebut plaintiff's case by a preponderance of the evidence"—citing Mitchell v. S. P. Ry. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130. But the court further instructed the jury in the same connection: "It is your duty, however, if possible, to reconcile such contradictions, if any there be, in the testimony offered in the entire case so as to make the evidence reveal the truth. If this cannot be accomplished and the evidence is so equally balanced in weight and quality that the scales of proof hang even, your verdict should be for the defendant." This is equivalent to saying that "if the evidence is equally balanced," which is the expression used in the case cited.

The court instructed the jury that "it is the duty of a carrier of passengers by rail to furnish its passengers a suitable and safe road and to safely operate its trains upon which it carries its passengers, and in the performance of these duties it is required to exercise the highest degree of care," and that, "when fare is taken by a railway company for transporting passengers on any passenger, wood, gravel, or other car, the same care must be taken and the same responsibilities assumed by the defendant corporation as for passengers on passenger cars." The court added: "The carrier, however, is not an insurer of its passengers. Its undertaking to its passengers is simply that, so far as human care and foresight can reasonably go, it will transport them safely. It is not liable if injuries happen from sheer accident or misfortune where there is no negligence or fault, or where no want of caution, foresight, or judgment would prevent the injury. But it is liable for the smallest negligence in itself or its servants." At defendant's request the court instructed the jury as follows: "A passenger who applies for permission to ride upon a special freight train upon which he is informed there are no accommodations for passengers, if he takes passage upon such train after such information, he assumes all of the extra risks necessarily incident to such train, provided thereafter the carrier uses such diligence and care as is required on usual passenger trains so far as such care is reasonably consistent with the purposes for which such train is made up" (to which the court added), "and the highest degree of care consistent with the practical and common use of the appliances and cars on a freight train is exacted and required of a common carrier of persons in the transportation of passengers when fare is taken for such transportation." When these instructions are read together, they meet every objection made by defendant. It is conceded that the law requires the exercise of the highest degree of care by the transportation company, but it is said that the instruction quoted in defendant's brief omits the condition that the carrier is required to use only such care as may be "consistent with the practical operation of the road." But the court covered this very point in its instructions seemingly overlooked by defendant.

Civ. Code, § 2100, requires that "a carrier of persons for reward must use the utmost care and diligence for their safe arrival, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." The Supreme Court said in Bonneau v. North Shore R. R. Co., 152 Cal. 406, 409, 93 Pac. 106, 107, 125 Am. St. Rep. 68: "A carrier of passengers is held to the exercise of the highest degree of care for their safety and transportation, and is liable for any injury sustained by them in the course of transportation through failure to exercise such care." That the train in question was a special freight train, and not a regular passenger train, did not affect defendant's responsibility as a carrier for hire. Green v. Pacific Lumber Co., 130 Cal. 441, 62 Pac. 747. See, also, section 483, Civ. Code, expressly covering this point.

The court refused an instruction requested by defendant which, after stating the duties and responsibilities of a common carrier engaged in carrying passengers by regular passenger or freight trains, proceeds to state that these rules "do not apply where the common carrier is not obliged by law to carry passengers, as in the case of a special freight train made up for a special purpose," and, thereafter stating that defendant was not bound to receive plaintiff as a passenger, the instruction states: "For as to said special freight train, in so far as plaintiff was concerned, the defendant was a private carrier, and the acceptance of said ticket did not change the defendant's character from a private carrier to a common carrier." Section 2168 of the Civil Code declares: "Every one who offers to the public to carry persons, property or messages, except only telegraphic messages, is a common carrier of whatever he thus offers to carry." And "a common carrier cannot be exonerated by any agreement, made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants." Civ. Code, § 2175. Furthermore, as already shown, section 483 of the same Code provides that, when fare is taken for transporting passengers on any freight train, the same responsibility is assumed as for passengers on a passenger car. We think the court very properly refused to give the instruction.

Defendant contends, under section 2174, Civ. Code, it could limit its responsibility "by special contract," criticising the apparently contrary view expressed in Pierce v. S. P. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350. It is not necessary to discuss the point for the evidence was that the only risk assumed by plaintiff had no relation to the accident causing his injury. Furthermore, the court, at defendant's request, gave an instruction under section 483 of the Civil Code to the effect that, if as a condition precedent to riding upon a car such as referred to in the Code section "the railroad demands from the passenger that he assume all dangers and release the railroad company from all liability, it has a right, except for gross negligence, willful wrong or fraud, so to do, and in no such case is a passenger entitled to ride except upon such condition demanded by the railroad company." Defendant, then, in less objectionable phrase, but quite to its purpose, got an instruction covering what it was aiming at, and, if the instruction went too far, it was in defendant's interest and cannot now be made the subject of complaint by it.

Defendant was refused the following instruction: "The plaintiff has alleged in his complaint that the said special train at said time included a car containing 10 tons of dynamite, and it is in evidence before you that said car contained 15 tons, and if you believe from the evidence that the plaintiff knew that this car was a part of said train and of the dangerous and explosive character of said dynamite and of its liability to explode without any apparent cause, or from sudden jar or jolt, if from the evidence you believe that it was so liable, he was guilty of such negligence when he undertook to ride upon such special freight train that it contributed proximately to his injuries, and he cannot recover even though you believe from the evidence that the said explosion was proximately occasioned by the negligence of the defendant; for a person cannot negligently expose himself to possible injury and recover for such injury when suffered even though the injury was occasioned by the negligence of another."

The cases cited by defendant are instances where the plaintiff contributed directly by his own act to his injury, such as alighting from a car, heedlessly standing on the street where cars or vehicles were accustomed to pass. Plaintiff may have known of the presence of the dynamite car in that train, and that "it was liable to explode without any apparent cause or from sudden jar or jolt," and may have taken the risks of an explosion from some such cause, but he certainly cannot be presumed to have taken the risk of an explosion "proximately occasioned by the neglect of defendant," as is assumed in the instruction. It is not claimed that plaintiff contributed to the derailment of the car except by his presence on the flat car and this with defendant's consent. We cannot agree with defendant's suggestion that plaintiff was guilty of contributory negligence by voluntarily riding on the train, and that he could and should have avoided his injury by remaining at Jamestown. Plaintiff, according to superintendent Blanton's testimony, was "not advised not to go on that train on account of the powder." Blanton said he "didn't think the powder was going to explode of course." In all human probability the explosion would not have occurred but for the derailment of the car, and, if this was caused by defendant's negligence, we cannot hold defendant free from liability on the ground that plaintiff's injury was caused by his alleged contributory negligence in riding on the train.

Error is claimed for refusing an instruction referring to the evidence tending to show the sudden breaking of the axle of the powder car and stating: "The defendant cannot be charged with negligence if you believe from the evidence that the defendant, at the time it received the car upon its road, carefully examined the said car, and the said axle without finding any defect in said axle, and that such defect was at the time of such examination so hidden as not to be apparent to such careful examination, then your verdict should be for the defendant." It is claimed that the rule is thus stated in McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 55 Pac. 706. Where it appears that the injury results from some latent defect in machinery, which defect was not discernible upon careful examination by the owners and operators of the machinery, the rule appears to be as claimed by defendant and stated in the case cited. But here the negligence shown was not in operating a defective car but in loading and operating the train in a negligent manner.

The instruction confines the issue to the condition of the axle of the powder car and ignores other acts of negligence, such as so loading the flat car next ahead of the powder car as to allow the slabs to fall and derail the powder car. We see no error in refusing this instruction.

It is further contended that the instructions given at the request of plaintiff that plaintiff was entitled to the presumption of negligence upon proving the derailment of the cars and the injuries to him are contradictory of the instruction given at the request of defendant as follows: "It is undisputed in this action that on the 26th day of June, 1906, while plaintiff upon his paying fare therefor was riding upon a special freight train of the defendant, made up for that occasion only, between the town of Jamestown in Tuolumne county, and the town of Angels in Calaveras county, an explosion occurred upon said train and that thereby plaintiff was thrown to the ground from said train and in some degree injured. I charge you that no presumption of negligence on the part of said defendant in any way whatsoever arises from the said explosion and any resulting injuries to the said plaintiff therefrom." We can discover no contradiction in these instructions. The presumption which the court stated plaintiff was entitled to was a presumption of negligence upon proving the "derailment of the car," not its "explosion." The distinction is obvious.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(14 Cal. App. 180)

ROBERTS v. SIERRA RY. CO. (Sac. 1,747.)

(Supreme Court of California. Nov. 1, 1910.)

In Bank. Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by Alfred W. Roberts against the Sierra Railway Company of California. Judgment for plaintiff was affirmed by the Court of Appeal (111 Pac. 519), and defendant moves for rehearing. Denied.

Solinsky & Wehe, for appellant. John Hancock and S. D. Woods, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. The trial court erred in refusing to give instruction No. 11, referred to in the opinion of the District Court of Appeal. As requested it reads as follows: "If you believe from the evidence that the explosion was occasioned from the sudden breaking of the front axle of the car containing the said dynamite, and that the said breaking was occasioned by some hidden defect in such axle, the defendant cannot be charged with negligence, if you believe from the evidence that the defendant at the time it received the car upon its road carefully examined the said car and the said axle without finding any defect in said axle, and that such defect was at the time of such examination so hidden as not to be apparent to such a careful examination, then your verdict should be for the defendant."

This instruction presented the sole and entire defense to the action, and there was evidence to sustain the hypothesis upon which it was based, viz., a careful examination of the car at the time defendant received it upon its road (which was the day before the accident). The defendant had a right to invoke a finding of the jury upon this, its sole defense on the merits, and, if the finding had been in its favor, it was entitled to a verdict. McCall v. Pacific Mail S. S. Co., 123 Cal. 42, 55 Pac. 706.

(158 Cal. 493)

Ex parte SIZELOVE.
(Cr. 1,641.)

(Supreme Court of California. Oct. 11, 1910.)

CRIMINAL LAW (§ 993*)—OFFENSES—PROBATIONARY ORDERS—MODIFICATION.

Pen. Code, § 1203, subd. 4, provides that the court shall have power, during the probation of one convicted of crime, to revoke or modify its order. *Held*, that the court has power thereunder to enlarge the probationary term at any time before it expires, and where one pleaded guilty to burglary, and was placed upon probation for two years, and within that time was charged with a violation of his parole, and the term of probation extended two years, the court had power, upon a second violation of the parole after the first two-year probationary period, to sentence him to the penitentiary.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 993.*]

In Bank. Application by one Sizelove for a writ of habeas corpus, directed against William Hammel, Sheriff of Los Angeles County. Writ denied.

Thomson & Spencer, for petitioner.

PER CURIAM. The petitioner, on July 20, 1907, pleaded guilty to a charge of burglary, and was on that date placed upon probation under the provisions of section 1203 of the Penal Code. The term of probation was fixed at two years. Within that term he was brought before the superior court, charged with a violation of his parole. This charge was dismissed, but the court at the same time made an order extending the term of probation two years from July 20, 1909. In the month of June, 1910, petitioner was again brought before the court upon another charge of violating his parole at a date subsequent to July 20, 1909. Upon this charge, and after an informal hearing of the alleged facts of violation of parole, he was sentenced to a term of imprisonment in the state prison at San Quentin, and committed to the custody of the sheriff of Los Angeles, by whom he is now detained.

It is contended that the imprisonment is illegal, for the reason that the court lost jurisdiction upon the expiration of the probationary term as originally fixed. We do not agree to this construction of the statute. The power to modify such orders, conferred upon the court by subdivision 4 of section

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1203 of the Penal Code, includes the power to enlarge the probationary term at any time before it expires.

Writ denied.

(158 Cal. 494)

Ex parte HANSEN. (Cr. 1,577.)

(Supreme Court of California. Oct. 15, 1910.)

1. Municipal Corporations (§ 122*)—Ordinances—Pleading.

The rule that municipal ordinances are recognized as private statutes and must generally be pleaded as such, either by setting forth the ordinance in full or the substance of the provision relied on, or by pleading it by title and date of passage, under Pen. Code, § 963, applies more particularly to courts of superior jurisdiction, as to which such ordinances are regarded as private statutes to be pleaded as such, and does not apply to inferior courts, established for the express purpose of enforcing such ordinances, or invested with full jurisdiction to enforce them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-283; Dec. Dig. § 122.*]

2. Justices of the Peace (§ 91*)—Pleading—County Ordinances.

As county ordinances operate throughout the county and their enforcement is necessarily brought within the territorial jurisdiction of every justice court within the county, such ordinances are the law of that forum as effectually as other subjects over which justices' courts are given jurisdiction by Pen. Code, § 1425, and, as their enforcement must be had in such courts, their existence, as pertaining to the jurisdiction of the court to enforce them, is a thing established by law, of which judicial notice must be taken by such courts under the express provision of Code Civ. Proc. § 1875, subd. 2, so that they need not be pleaded as private statutes.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 91.*]

3. Intoxicating Liquors (§ 206*)—Illegal Sale—Prosecution—Sufficiency of Complaint.

In a prosecution for violating a county ordinance relating to traffic in intoxicants, the complaint charging that accused did willfully and unlawfully encourage, abet, and assist in a violation of such ordinance by purchasing, receiving and accepting malt liquors, and intoxicating drinks, to wit, beer, and furnishing, selling, etc., and giving away, the same to divers persons, contrary to the ordinance sufficiently charged that accused himself violated the ordinance, and was not insufficient because it also charged that he aided and assisted in its violation by purchasing and accepting such liquors, without charging that he aided or assisted any person to violate the ordinance or that any one in fact violated it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 226; Dec. Dig. § 206.*]

4. Intoxicating Liquors (§ 206*)—Prosecution—Sufficiency of Complaint.

In a prosecution for violation of a county ordinance relating to traffic in intoxicants, the complaint charging that accused did willfully and unlawfully, etc., encourage, abet, and assist in a violation of the ordinance setting it forth by number and title by purchasing, receiving, and accepting malt liquors, and intoxicating liquors, to wit, beer, and furnishing, selling, distributing, delivering, and giving away the same to divers persons to complainant unknown contrary to such ordinance, sufficiently informed accused of the offense charged against him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 226; Dec. Dig. § 206.*]

In Bank. Application by one Hansen for a writ of habeas corpus directed to Mobley Meadows, Sheriff of Imperial County. Writ discharged, and petitioner remanded.

See, also, 11 Cal. App. 754, 106 Pac. 262.

M. W. Conkling and C. H. Brown, for petitioner. John M. Eshleman, Dist. Atty., and Phil. D. Swing, Deputy Dist. Atty., for respondent.

LORIGAN, J. Petitioner was convicted before a justice of the peace of Brawley township in Imperial county of a violation of an ordinance prohibiting the sale of liquor in that county outside of municipalities. He seeks a discharge from imprisonment after conviction on the ground that the complaint under which he was prosecuted and convicted does not state any offense.

The complaint charged that the defendant "did willfully and unlawfully," etc., "encourage, abet and assist in a violation of Ordinance 2 of the county of Imperial and more particularly section 4 of said ordinance entitled 'An ordinance for police regulation relating to places where spirituous, vinous, malt or mixed liquors are deposited, distributed, sold, delivered or given away in the county of Imperial, outside of municipal corporations; and making unlawful the sale or giving away of such liquors within the limits of the county of Imperial, outside of municipal corporations; providing for the sale of same by druggists under guarded restrictions; and repealing all ordinances or parts of ordinances in conflict therewith and providing for punishment for the violation thereof,' by then and there purchasing, receiving and accepting malt liquors and intoxicating drinks, to wit, beer, and furnishing, selling, distributing, and delivering and giving away the same to divers persons, to complainant unknown, * * * contrary to the Ordinance No. 2 of the said county of Imperial."

Petitioner attacks the sufficiency of the complaint upon two grounds: First, that the ordinance which he is charged with violating is not sufficiently pleaded; and, second, that, if it were so pleaded, the charge that he aided and assisted in the violation of the ordinance as set forth therein charged no offense because it failed to charge that he aided or assisted any person to violate the ordinance or that any one in fact violated it; that, unless some one violated the ordinance, it would be impossible for the petitioner to unlawfully aid or assist in such violation.

Upon the first point, it is true that ordinances of a muncipality are recognized as private statutes, and, as a general rule must be pleaded as such (Tulare v. Hevren, 126 Cal. 226,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

58 Pac. 530), either by setting forth the ordinance in full or the substance of the provision relied on, or by pleading it in the more simplified way provided under section 963 of the Penal Code, by referring to its title and date of passage, whereupon the court must take judicial notice of it. This rule, however, applies more particularly to courts of superior jurisdiction, as to which ordinances of a municipality are regarded as private statutes to be pleaded as such, and has no application, or rather should have no application to inferior courts, when such courts are either constituted for the express purpose of enforcing such ordinances, or, if not constituted expressly for that purpose, still are invested with full jurisdiction to enforce them.

In Ex parte Davis, 115 Cal. 445, 47 Pac. 258, the proceeding was in habeas corpus and involved the sufficiency of the complaint before a recorder's court for the violation of a city ordinance. The claim of the petitioner was that the ordinance was not pleaded in the complaint. After discussing the general rule as to the necessity of pleading and proving ordinances in proceedings in courts of general jurisdiction, it is said: "But when the proceeding is in a municipal court, instituted for the express purpose of enforcing the municipal ordinances, and vested with full jurisdiction for that purpose, the rule ought to be and is different. In such case the ordinances are the peculiar law of that forum, and it is bound to take notice of their existence. To such laws it holds the same relation that the superior courts hold to the laws enacted by the Legislature, and may notice their provisions because they are among the things which, as to it, are established by law [citing cases]. These cases show that the practice in municipal courts, with respect to municipal ordinances, constitutes an exception, and a proper and necessary exception, to the rule invoked by the petitioner. The complaint, therefore, was sufficient, if there was an ordinance prohibiting the acts charged, and, as to that, we must presume, in this proceeding, which raises only the question of jurisdiction, that there was such an ordinance of which the recorder's court took judicial notice." It is true that in this case the court was considering the rule of pleading with respect to a strictly municipal court constituted for the express purpose of enforcing the ordinances of the city, but we perceive no valid ground for denying the application of the same principle to justices' courts, where those courts are invested, as they are in this state, with full jurisdiction to enforce county ordinances. In fact, it appears to us that the rule should be made applicable to them for the same reasons as it is made applicable to municipal courts.

While justice courts are courts of larger jurisdiction than purely municipal courts, and are not constituted for the sole purpose of enforcing county ordinances, still they are by law invested with jurisdiction to enforce them. Such ordinances operate throughout the county, and their enforcement is necessarily brought within the territorial jurisdiction of every justice court within the county. This being true, such ordinances constitute the law of that forum just as effectually as other subjects over which justices' courts are given jurisdiction by section 1425 of the Penal Code, and, as their enforcement must be had in those courts, their existence as pertaining to the jurisdiction of the court to enforce them is a thing established by law of which, under section 1875, subd. 2, Code Civ. Proc., judicial notice must be taken by those courts. No good reason suggests itself, nor has any been advanced by petitioner, why a distinction should be made in the application of the rule between proceedings for the enforcement of ordinances in municipal courts and in justices' courts. Municipal courts are constituted for the express purpose of enforcing municipal ordinances, and it is held that as such ordinances are the peculiar law of that forum—that is, are matters over which it exercises jurisdiction and whose existence can only call for the exercise of that jurisdiction—they are therefore, as to such courts, things established by law of which they must take judicial notice. But so are the justices' courts constituted with jurisdiction, among other things, over the enforcement of county ordinances such as the one involved here. As far as their jurisdiction over them is concerned, these ordinances are the peculiar law of that forum, just as fully and effectually as are the municipal ordinances the law of the municipal forum, and they are things which, as to the exercise of the jurisdiction of such justices' courts to enforce them, are established by law. The legal conditions being similar, the same rule of judicial notice should apply, and we have no doubt that it does, and that justices' courts, like municipal courts, take judicial notice of ordinances which they are expressly invested with jurisdiction to enforce.

This was the view entertained by the District Court of Appeal in Ex parte Luening, 3 Cal. App. 76, 77, 84 Pac. 445, a habeas corpus proceeding, where the application for a writ was dismissed and the matter terminated in that court.

As to the other point made by petitioner. The ordinance makes it unlawful for any person within the county and outside municipalities therein to sell, furnish, distribute, or give away intoxicating drinks of any kind, except for certain purposes, and makes it also unlawful for any person to furnish, purchase, receive, accept, or otherwise obtain intoxicating drinks, or in any manner encourage, aid, abet, or assist in the violation of the ordinance. Selling or giving away intoxicating drinks is declared an offense, as well as to assist or aid others in doing so. The offense charged against defendant under the complaint was purchasing, receiving, and accepting a particular intoxicating drink, and furnishing, selling, distributing, and delivering the same to persons unknown. While the complaint, it is true, alleges that he was aiding and assisting in doing this, the substantive charge is that he himself violated the ordinance by selling, furnishing and giving away the liquor. Hence it would not seem to be very material in determining his guilt, whether the acts committed by him were done individually or with the view of aiding or assisting others to violate the ordinance. While the complaint is rather inartificially drawn, it sufficiently informed the petitioner of the offense which was charged against him.

The writ is discharged and the prisoner remanded.

We concur: BEATTY, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

158 Cal. 514

BASLER et ux. v. SACRAMENTO GAS & ELECTRIC CO. (Sac. 1,682.)

(Supreme Court of California. Oct. 20, 1910. Rehearing Denied Nov. 19, 1910.)

1. NEGLIGENCE (§ 89*)—INJURY TO WIFE—IMPUTATION OF HUSBAND'S NEGLIGENCE.

As affecting liability for injury to a wife, in the care and custody of her husband, his negligence is imputable to her.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 132; Dec. Dig. § 89.*]

2. NEGLIGENCE (§ 89*)—INJURY TO WIFE—HUSBAND'S RIGHTS.

Since recovery for injuries to a wife is community property under the husband's control, if his negligence contributes proximately to the injury there can be no recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 132; Dec. Dig. § 89.*]

3. NEGLIGENCE (§ 1*)—NATURE.

Negligence may be active or passive, consisting in heedlessly doing an improper thing or in heedlessly refraining from doing the proper thing.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4743–4763; vol. 8, pp. 7729–7731.]

4. NEGLIGENCE (§ 82*)—"CONTRIBUTORY NEGLIGENCE"—ESSENTIALS TO BAR RECOVERY.

Contributory negligence which will bar recovery must be such as to show that the person charged therewith by failing to use the required care proximately contributed to the injury so that but for his concurring fault it would not have happened.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112–114; Dec. Dig. § 82.*

For other definitions, see Words and Phrases, vol. 2, pp. 1540–1547; vol. 8, p. 7617.]

5. CARRIERS (§ 343*)—ALIGHTING PASSENGERS—INJURY—CONTRIBUTORY NEGLIGENCE—PLEADING—SUFFICIENCY.

On a suit for injury to a passenger caused by cars colliding while she was alighting, a plea that the motorman of the colliding car was engrossed in his personal affairs and became excited at the presence of the other car, but not stating why he became excited or whether he perceived the car sufficiently far away to have stopped his car, that the passenger's husband was standing on the ground to assist her to alight and saw the car in ample time to have given an alarm and caused the on-coming car to stop or the other car to move on, but took no steps to prevent the collision, and that the employés on the standing car failed to observe the approach of the other car because engaged in assisting alighting passengers, is insufficient to show contributory negligence of the husband imputable to the wife.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 343.*]

6. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—STRIKING PLEADED MATTER.

Striking matter from an answer, instead of sustaining a demurrer thereto, was harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4101, 4104; Dec. Dig. § 1040.*]

7. COSTS (§ 42*)—TENDER AFTER SUIT—TORTS.

Code Civ. Proc. § 997, authorizing a tender by a defendant after suit, applies to suits for tort.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 140; Dec. Dig. § 42.*]

8. TENDER (§ 22*)—AFTER SUIT—PLEADING.

A plea of tender after suit under Code Civ. Proc. § 997, should not contain explanatory or extenuating matters not affecting the defense, and such matter is properly stricken as surplusage.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 67–75; Dec. Dig. § 22.*]

9. HUSBAND AND WIFE (§ 209*)—SUIT BY WIFE—HUSBAND AS PARTY.

A husband is a necessary party to a suit for personal injuries to a wife, though it be brought solely for her injuries.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 767; Dec. Dig. § 209.*]

10. HUSBAND AND WIFE (§ 229*)—SUIT BY WIFE—PLEADING.

A complaint by a husband and wife for personal injuries to her asking compensation for "plaintiffs" is not bad as involving compensation for the husband as well as for the wife.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 229.*]

11. WITNESSES (§ 268*)—CROSS-EXAMINATION—PERSONAL INJURY.

Where defendant in a personal injury action seeks to show a previous condition of invalidism of, or malingering by, plaintiff, liberal latitude in cross-examining plaintiff should be permitted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–937; Dec. Dig. § 268.*]

12. TRIAL (§ 54*)—EVIDENCE.

In establishing a personal injury to a wife, evidence showing deterioration in her physical condition after the accident was not improperly admitted as involving compensation to the husband, where on objection the trial court and counsel expressly confined the effect of the testimony to her condition before the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 127; Dec. Dig. § 54.*]

13. DAMAGES (§ 210*)—PERSONAL INJURIES—INSTRUCTIONS.

An instruction that, if plaintiff was injured through defendant's negligence, she could recover for any physical suffering and pain and mental anguish suffered or reasonably certain to be suffered, was not improper as authorizing an award for suffering by her husband.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 210.*]

14. Carriers (§ 300*)—Injuries to Passengers—Negligence—Liability of Carrier.

A street railway company was not relieved from responsibility for injury to an alighting passenger caused by colliding cars, though its employés were skillful, if on the particular occasion they did not use due care.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 300.*]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Charles M. Basler and wife against the Sacramento Gas & Electric Company. From a judgment for plaintiffs and from an order refusing a new trial, defendant appeals. Affirmed.

Wm. B. Bosley, J. P. Coghlan, and L. T. Hatfield, for appellant. W. E. Kleinsorge, C. E. McLaughlin, and R. T. McKisick, for respondents.

HENSHAW, J. This is an action by husband and wife to recover damages for injuries sustained by the wife while a passenger upon one of defendant's street railway cars. The action was tried before a jury. Plaintiffs obtained a verdict, and from the judgment which followed and from the order of the court refusing its motion for a new trial defendant appeals.

Plaintiffs were returning from an evening entertainment. Reaching their place of debarkation, the car stopped to permit them and other passengers to alight. The husband had stepped off the car and was waiting to assist his wife therefrom, when another car of defendant heedlessly collided with the rear of the stationary car. Mrs. Basler, who was standing at the time, was thrown across a seat and to the floor of the car, receiving the injuries for which compensation was sought. The answer was, first, by way of general denial, and, for a second and special defense, contributory negligence was charged against Mrs. Basler's husband. The court struck out this special defense, and its ruling in this regard first demands attention. This special defense alleged: That Basler, debarking from the car, had reached the ground "for the purpose of assisting his wife to alight," when another car came into collision with the car upon which plaintiffs had been passengers. That the other car was fully equipped with all necessary appliances, and that the motorman thereof was of long experience and skill in operating such cars; but that when approaching the stationary car he was "temporarily engrossed in his own personal affairs, and became excited and alarmed at the presence of the car upon which plaintiff had been riding, * * * and upon the spur of the moment, and in the exercise of his judgment under the circumstances, such employé failed to take proper action to stop such other car until the same struck the car upon which plaintiffs had been riding. * * * That plaintiff, Charles M. Basler, at the time of the approach of such other car, was standing upon the ground alongside of such car upon which he and his wife had been riding and was not otherwise engaged, and saw such car approaching for a long distance and in ample time and full opportunity to have given a signal or alarm and caused such oncoming car to stop or the other car to move, but he gave no alarm or signal of any kind to the persons in charge of the car upon which he had been a passenger and took no steps whatever to prevent such collision, but stood silently and idly by and observed such other car come in contact with the car upon which he had been riding and upon which his wife still was. That the persons in charge of the car upon which plaintiffs had been passengers were engaged in seeing that the passengers thereon were enabled to alight and did not see the approach of the car that caused the collision. That plaintiff, Charles M. Basler, claims to be familiar with the operation of cars and capable of judging of the speed of cars and of the best mode of controlling the same, but he made no effort to prevent such collision nor did he do anything whatever to avoid it, although fully aware that a collision was imminent. * * * Defendant avers that if the said Bessie M. Basler received any injury of any character by reason of such collision it was because she did not exercise due care on her part to avoid injury and also by the failure of plaintiff, Charles M. Basler, to notify the persons in charge of the car in which plaintiff, Bessie M. Basler, was riding, or to notify the employés of defendant on said other car of the danger of collision, he thereby directly contributed to whatever injury may have been sustained by the said Bessie M. Basler."

Appellant's contention is that this special defense charges a complete case of contributory negligence against the plaintiff husband, and that this negligence bars the right of either and of both plaintiffs to recover: First, because the wife was in the care and custody of her husband, and consequently his negligence is imputable to her, under the doctrine of Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; McKune v. Santa Clara, etc., Co., 110 Cal. 487, 42 Pac. 980; Paine v. San Bernardino, etc., Co., 143 Cal. 658, 77 Pac. 659. And, second, regardless of the question as to whether or not the wife was so in the husband's care and custody, if his negligence contributed proximately to her injury (since under the laws of this state the recovery for her injuries is community property, in which the husband shares and over which he has control), the law will not permit him to benefit by his own wrong, and therefore a recovery will not be permitted. McFadden v.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Santa Ana, etc., Ry., 87 Cal. 468, 25 Pac. 681, 11 L. R. A. 252; Beach, Con. Neg. p. 165, note. The propositions of law here advanced by appellant are sound and accepted doctrines in this state. It is also true that negligence may be active or passive in character. It may consist in heedlessly doing an improper thing or in heedlessly refraining from doing the proper thing. Whether the circumstances call for activity or passivity, one who does not do what he should is equally chargeable with negligence with him who does what he should not. These principles are but an elaboration of the maxim, Idem est facerem et non prohibere cum possis; et qui non prohibit cum prohibere possit in culpa est (aut jubet). The questions thus resolve to the single proposition: does or does not the special defense charge contributory negligence with legal particularity and certainty; in other words, are the allegations of this defense sufficient in law as a defense?

Herein it is to be noted that the contributory negligence which will bar a recovery must be such as to establish that the person by failure to exercise the required amount of care proximately contributed to produce the injury complained of "so that but for his concurring and co-operative fault the injury would not have happened." Williams v. S. P. Co., 9 Pac. 152; Cross v. California St. R. R. Co., 102 Cal. 315, 36 Pac. 673. What does the defense aver in this respect? It declares that the motorman was "engrossed by his personal affairs"; that "he became excited and alarmed at the presence of the car upon which plaintiffs had been riding, at the place where the same had stopped." It does not say how far distant he was when he perceived the car, why he should have become excited or alarmed, or whether or not he perceived the car when it was sufficiently distant to have enabled him to have stopped his own car. The declaration in this regard is merely to the effect that, when he discovered the presence of the other car (and where his car was at the time of that discovery is not indicated), he "failed to take proper action to stop his car" and so the collision occurred. So much for the conduct of the motorman. Basler it is averred was standing upon the ground waiting to assist his wife to debark "and was not otherwise engaged." He saw the approaching car for a long distance and in ample time to have given the signal or alarm and cause such on-coming car to stop or the other car to move on but gave no alarm or signal of any kind and took no steps to prevent the collision, "and stood silently and idly by and observed such other car come in contact with the car upon which he had been riding and upon which his wife still was." The failure of the employés upon the stationary car to observe the approach of the other is then sought to be excused upon the allegation that they "were engaged in seeing that the passengers thereon were enabled to alight." But in this connection it is to be noted that the defense also avers that Basler "had reached the ground for the purpose of assisting his wife to alight." It is then charged that by the failure of Basler to notify the persons in charge of the car upon which he had been riding, or to notify the employé of the approaching car, of the danger of collision, he thereby directly contributed to Mrs. Basler's injuries. The plea is singular, in that the defendant excuses its own employés for nonobservance of the approaching car upon the ground that they were "seeing that the passengers were enabled to alight," but charges Basler with full knowledge of the approaching car, notwithstanding the fact that he was standing on the ground doing the very thing which is offered as an excuse for the conduct of defendant's employés, namely, watching and waiting for the purpose of assisting his wife to alight. However, the plea is not to be condemned for its singularity. It is to be condemned solely, if at all, for deficiency. But we think it is subject to condemnation upon this ground. To constitute a good plea of contributory negligence, it must, as has been said, be charged and made to appear that the act or omission was such that but for it the injury would not have happened. To sustain this plea it must be assumed and charged against Basler that he not only knew that the car was approaching, but knew also that its motorman was temporarily engrossed in his own personal affairs and did not know that he was nearing a collision, that when the motorman discovered that he was approaching a stationary car, although in time to avert the accident, he would become excited and alarmed and so not check the speed of his car. He must also be charged with knowing that the employés upon the stationary car, whose duty it certainly was to protect their car from accident and injury, were themselves so engaged as not to discover the approach, and it must finally be charged against Basler, as matter of law, and under all these circumstances, that, if he had notified the employé or motorman of the approaching car, the latter would not, as he did, become excited and alarmed, but with calmness and discretion would have prevented the accident. Such knowledge is not imputable to Basler, and it may not be said that there is the slightest showing that if Basler had done that, which it is alleged he failed to do, the collision would have been in any wise averted. Basler was entitled to consider, as any other person would be entitled to consider, that it was a thing not to be expected, merely because one street car was running up behind another, that the danger of accident was imminent, and that it was his duty to sound an alarm. The case is entirely different from that presented by Lawrence v. Fitchburg & L. St. Ry. Co., 201 Mass. 489, 87 N. E. 898, where upon a dark night a street car ran into an automobile, stalled alongside the track, where the occupants of the automobile had ample time to make known their position, yet sat indifferent in the car, trusting to the motorman to see them and stop, and this, when their automobile was out of the traveled highway at a place where vehicles did not run and where the presence of a vehicle was not to be expected. In that case the Supreme Court merely declared that they omitted to employ any precaution to avert the accident which an ordinarily prudent person situated as were the plaintiffs would have used. But to say that that case is authority for the proposition that one must sound a warning when he sees a street car approaching another stationary one from the rear is an extension of the doctrine of contributory negligence to which assent cannot be given.

The court's action in striking out this matter, rather than in sustaining a demurrer to it, was an irregularity without injury. The special defense was doubtless as complete as it could be made, and an amendment to cure its defects manifestly could not be pleaded.

Defendant offered to permit plaintiffs to take judgment in the sum of $2,000, and the offer was refused. It renewed its offer in its answer, with certain argumentative and exculpatory averments as to why it was made, and that it was made in reliance "solely upon the statements of plaintiffs, their attorneys, physicians, and representatives," and more to the same effect. The court struck out this argumentative matter and left the simple offer as contemplated by section 997 of the Code of Civil Procedure. We are not disposed in the least to question the right of a defendant in an action for tort to make such an offer under the Code provision. Douthitt v. Finch, 84 Cal. 215, 24 Pac. 929; Redington v. Pacific Postal Tel. Co., 107 Cal. 322, 40 Pac. 432, 48 Am. St. Rep. 132; Kaw Valley Fair Ass'n v. Miller, 42 Kan. 20, 21 Pac. 794; Hammond v. Northern Pac. R. Co., 23 Or. 157, 31 Pac. 299. But it is not in contemplation of the law that the pleading of tender shall be burdened with explanatory, apologetic, or extenuating matters in no way going to the defense of the action, and the court properly struck out such matters here alleged as mere surplusage.

Nor did the court err in overruling defendant's demurrer to the complaint. The husband was a necessary party to the action, notwithstanding that the action was solely for a recovery for damages for injuries inflicted upon the wife. The complaint sounded in damages for this reason and for this reason alone. Neither in the complaint nor in the taking of evidence is there any indication of a violation of the rule declared in Tell v. Gibson, 66 Cal. 249, 5 Pac. 233. The whole argument of appellant in this regard is that the complaint asks compensation for the "plaintiffs," and "upon such allegation it must be that two elements are involved," compensation for the husband and compensation for the wife. This position is absolutely untenable.

Much argument is indulged in to the effect that the court injuriously limited and curtailed the cross-examination of plaintiff Bessie M. Basler, and confined the defendant's inquiry into the condition of her health before the accident, to the year immediately preceding. It would be useless to answer in detail all that is urged upon this proposition, for the answer itself would consist principally of extracts and quotations from evidence actually introduced to show that the asserted grievance is ill-founded. Suffice it to say that we recognize the rule that where the defendant seeks to establish a previous condition of invalidism upon the part of plaintiff, or seeks to prove that the plaintiff is malingering, liberal latitude in cross-examination should be permitted. But that latitude was here allowed.

This same declaration will serve to answer many of the appellant's objections to the rulings of the court in the admission and rejection of testimony. Certain evidence was admitted, in establishing plaintiff's injuries, to show deterioration in her physical condition after the accident from what it had been shortly prior thereto. It is argued by appellant that the admission of this evidence was error because the evidence itself was testimony touching the ability of the plaintiff to perform physical labor, and therefore involved the question of the husband's compensation for loss of her services, which question was, of course, not involved in the action. This objection, too, is overrefined. An excerpt from the evidence, declarations of counsel, and rulings of the court will serve to illustrate this beyond argument: "Testimony of Mrs. Basler. Q. Mrs. Basler, prior to the 17th day of November, 1906, state to the jury the condition of your health and your ability to perform your household duties. A. Well, I had always been able to do my own work and look after my family, do my own sewing, and so on, general housework. Mr. Hatfield (for defendant): I understand the counsel that these questions have reference simply to her physical condition, not to any loss of time. Mr. McLaughlin (for plaintiff): Simply the physical condition. We confine it solely to show her condition before the accident. We state, your honor, that we are offering this line of testimony solely to show her physical condition and for no other purpose and to confine it to that physical condition. The Court: I understand it. Mr. Hatfield: We object on the ground that any testimony as to her ability to do work is incompetent and irrelevant under the pleadings in this case. It should be confined solely to the physical injury of the plaintiff. The Court: This testimony is to show her health, for that purpose, not for the purpose of fixing damage for loss of personal service. Mr. Hatfield: I understand the purpose, but we do not agree with the conclusion, that is what we say. We object to that as irrelevant and incompetent, not within the issues of this case; not involved in any manner, personal services. Mr. McLaughlin: Understand, your honor, our offer of this evidence of each witness along this line is confined to this one purpose. The Court: Only admitted for this one purpose, to show her physical condition, that is all. Mr. Hatfield: I move to strike out the answer. The Court: Admitted for the sole purpose, as offered."

Complaint is made of many of the instructions, that they authorized the jury to give damages for the physical and mental suffering endured by the husband; whereas, the action was limited to a recovery for such sufferings as the wife alone had endured. Instruction No. 3 will illustrate them all: "The jury is instructed that, if they find that the plaintiff Bessie M. Basler was injured through the negligence of the defendant as alleged in the complaint, in estimating the damages they will allow plaintiffs for any physical suffering and pain and mental anguish, if any, she has suffered and shown in evidence, or which it is reasonably certain she will suffer in the future in consequence of the said alleged injuries." Wherein, by this and the other like instructions, the jury is informed that it may make an award for any physical suffering or mental anguish which the husband has endured, we are utterly unable to perceive.

Exception is taken to certain other instructions actually given and to certain proposed instructions which the court refused to give. Generally speaking, appellant was contending for the proposition that, if it had used proper care in the equipment of its cars and in the furnishing of competent men to operate those cars, its responsibility was at an end, and that any other rule would make of the defendant company an absolute insurer. The court in fact instructed in these matters that the defendant was not relieved from responsibility, notwithstanding that its employé might have been skillful, if in fact upon the particular occasion in question the employé did not use due care and skill. This is the law as universally recognized in this state. Cunningham v. Los Angeles Ry., 115 Cal. 561, 47 Pac. 452; Bosqui v. Sutro Ry. Co., 131 Cal. 399, 63 Pac. 682; Harrington v. Los Angeles Ry. Co., 140 Cal. 522, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Bonneau v. North Shore R. R. Co., 152 Cal. 411, 93 Pac. 106, 125 Am. St. Rep. 68.

No other matters seem to call for specific consideration, and for the foregoing reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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158 Cal. 499

MERRILL v. LOS ANGELES GAS & ELECTRIC CO. (L. A. 2,414.)

(Supreme Court of California. Oct. 19, 1910.)

1. TRIAL (§ 351*) — INTERROGATORIES — REFUSAL.

On a suit against a gas company for injury to a restaurant patron caused by an explosion, special interrogatories, whether before the explosion defendant's employés notified the proprietor to put out all lights and fires, whether they were put out, whether an open fire was burning at the time of the explosion, if so, whether it proximately caused the explosion, and, if the explosion was not so caused, what was the proximate cause, were properly refused as being covered by a submitted interrogatory, "What was the proximate cause of the explosion?"

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 351.*]

2. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE"—NATURE OF DOCTRINE.

In law "proximate cause" refers to the person producing it, as against "proximate cause" in logic, which refers to the moving influence itself.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*

For other definitions, see Words and Phrases, vol. 6, pp. 5758–5769; vol. 8, p. 7771.]

3. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE"—NATURE OF DOCTRINE.

The legal doctrine of "proximate cause" is based on the principle that consequences which follow from an original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate, and for these the original wrongdoer is responsible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

4. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—INTERVENING CONCURRING CAUSES.

Proximate causation of injury is not always arrested by intervention of an independent concurring cause, whether the latter cause be an act of God or the wrongful act of a third person, and an independent wrongful act to constitute proximate cause by displacing the original cause must be so disconnected in time and nature as to make it plain that the damage was not a natural or probable consequence of the original wrong.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

5. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—INTERVENING CAUSES.

An original act of negligence as primary causation may be so continuous that a concurrent wrongful act will be regarded not as independent but as conjoining with the original act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

6. GAS (§ 18*)—EXPLOSIVES—DEFECTIVE GAS PIPE—PROXIMATE CAUSE.

Where an explosion of gas results from joint negligence of a gas company in discovering and repairing a leak and of another in bringing a light in contact with the gas, a third person injured may recover from either or both, they being severally and jointly the proximate cause; and hence, on a suit against a gas company for injury to a restaurant patron caused by such an explosion, it was not error to refuse to submit the company's interrogatories designed to show that an open fire caused the explosion.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 18.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. DAMAGES (§ 210*)—PERSONAL INJURY—INSTRUCTIONS—"BECAUSE OF."

The words "because of," in an instruction authorizing recovery for suffering sustained because of injury, is equivalent to the word "caused."

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 210.*]

8. DAMAGES (§ 48*) — PERSONAL INJURIES — "MENTAL SUFFERING"—ELEMENTS.

Mental worry, distress, grief, and mortification are proper elements of mental suffering for which an injured person can recover; recovery not being limited to the form of mental suffering described as physical pain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100–105; Dec. Dig. § 48.*]

Department 2. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by F. H. Merrill against the Los Angeles Gas & Electric Company. From a judgment for plaintiff and from an order refusing a new trial, defendant appeals. Affirmed.

Wm. A. Cheney, Gibson, Trask, Dunn & Crutcher, Lawler, Allen, Van Dyke & Jutten, and Leroy M. Edwards, for appellant. Ernest E. Wood, for respondent.

HENSHAW, J. This action was brought to recover damages for injuries sustained by plaintiff through defendant's alleged negligence. The charge of negligence is that defendant, engaged in the business of supplying gas, while so supplying a restaurant in the city of Los Angeles, negligently and carelessly permitted gas to escape from its pipes and collect in and about the building, and negligently and carelessly caused this gas to explode with great force and violence, whereby were inflicted upon the plaintiff the injuries complained of. The answer was a general denial of negligence. A trial was had before a jury and a verdict rendered for plaintiff in the sum of $10,000. Judgment followed the verdict. Upon motion for new trial the court made its order that it would grant the same unless plaintiff filed a written consent to a reduction of the judgment to the sum of $8,555. This plaintiff did, and from the judgment so modified and from the court's order refusing to grant its motion for a new trial defendant appeals.

The facts, in brief, are these: On arriving at his restaurant at about 6 o'clock of the morning of the explosion, Cressaty, the proprietor, noticed the smell of gas, and telephoned to defendant's office that gas was escaping and that he wished it attended to immediately. Nobody coming, he telephoned again at half past 7, saying that the smell was much stronger and that there was a dangerous leak. At 8 o'clock he telephoned again for the superintendent. "I called the gas company many times and asked for the complaint department and asked them to send some one to attend to that leak on the gas, and he said, 'All right,' and he would go and do his best to send some one at once. I told him the leak was very dangerous and the smell was getting stronger. At 9 o'clock my cashier telephoned and told him there was a strong smell of gas and send some one right away. No one telephoned after 9 o'clock. I employed a plumber to shut off the gas. He came and shut off the meter between 8 and 9 o'clock, but that didn't stop the flow of gas." Defendant's foreman of the mechanical and complaint department testified that he was first notified of the leak at Cressaty's at about 10:40 in the morning. No one had informed him about it before that time; if they had done so, he would have sent a man to repair it. The foreman sent two men to the place and shortly after followed them. He reached there about five minutes of 11, without tools. Neither of the other men had tools. They told the foreman that the service pipe was broken, that the leak was under the floor, and that the gas was gushing up with a sizzling noise. The foreman sent one of the men back to the office for a flash light and tools with which to saw the flooring, for the leak was in a dark corner of the basement, and the foreman was afraid to chop up the floor with a hatchet lest, striking a nail, he might produce a spark, causing an explosion. The foreman gave directions to Cressaty to extinguish all lights in the restaurant, and Cressaty said, "all right." One of the men remarked that he had given Cressaty the same directions before. The foreman and one employé went across the street to lunch while the third went for the tools. None of them took pains to see whether the directions to extinguish the lights had been carried out, although all knew that gas was escaping in large and dangerous quantities. There was fire in the range, and gas was burning under a large coffee urn. When the man came back with the flash light and tools, the foreman handed the flash light to Holderman, the other employé, and told him to proceed. Holderman was about ten feet in advance as they walked toward the location when the explosion occurred. Plaintiff had entered the restaurant for his lunch and was just about to sit down when the shock came. Both his legs were bruised and broken at the ankle, his knees injured, his side bruised, his eye and nose cut. Abcesses formed. It was six months before he could walk with crutches. At the time of the trial he was still visibly suffering from the results of the injuries.

Two propositions are advanced upon the appeal: The first, that the court erred in refusing to submit to the jury certain special issues requested by defendant. Second, that the court erred in an instruction which it gave.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1. The particular interrogatories requested by defendant, which the court refused to submit, were as follows: "(1) As soon as defendant's servants arrived at Cressaty's café, did they notify Mr. Cressaty to put out all lights and fires? (2) Did Mr. Cressaty put out all the lights and fires? (3) Was there an open fire burning in Mr. Cressaty's café from the time the defendant's servants first arrived at said restaurant up to the time of the explosion? (4) If you answer the last question affirmatively, was the sole proximate cause of the explosion the fact that an open fire was kept burning in the kitchen of Mr. Cressaty's café? (5) If you answer the last question in the negative, what was the proximate cause of the explosion?"

Appellant's contention in this regard is that, notwithstanding it may have been negligent, if the jury in answer to its proposed interrogatory had declared that the sole proximate cause of the explosion was an open fire kept burning in the kitchen of Cressaty's cafe, such answer would have exonerated it from liability. But there are two complete answers to this. The first is that to the jury was submitted the interrogatory, "What was the proximate cause of the explosion?" and they answered it, "Escaping gas through negligence of the defendant." The interrogatory which the court did thus submit was fair and full. It was in no way suggestive, as most obviously are defendant's proposed interrogatories 3 and 4. Moreover, the proximate cause of the law is not the proximate cause of the logician, nor even always in strictness the proximate cause in fact, and a jury may easily be confused and misled by overniceties in these abstractions. In actions involving negligence, when the law regards the proximate cause, it is always in reference to the person producing it. When the logician is considering the proximate cause, he has in contemplation the moving influence itself, and not at all the person by whom the impetus was given. Thus, if an explosion should occur upon a vessel, forcing open its seams and admitting sea water which damaged goods, the law having regard, as has been said, to the person, would declare the explosion to have been the proximate cause, and the person causing it, if culpable, to be liable in damages for the goods injured by the water. But, to the logician the proximate cause, the causa causans of the damage would be sea water. The cause of the admission of the sea water would be the forcing apart of the ship's seams, and the cause of forcing apart the ship's seams would be the explosion. So that, to the logician, the explosion would be the cause third removed, and it, with the second cause, would be causa causæ causantis. The legal concept of the proximate cause is quite distinct. It is based on the principle that consequences which follow from the original wrong in unbroken sequence, without an intervening sufficient independent cause, are natural and proximate and for these the original wrongdoer is responsible. Wells, Poll. Torts, 36. We are not unmindful of the rule expressed by Judge Ray in "Negligence of Imposed Duties to Passengers" (669, 670), a rule which he states in the following language: "Where the concurring cause is the independent wrongful act of a responsible person, such act arrests causation, being regarded as the proximate cause of the injury; the original negligence being considered merely as its remote cause. As in the law it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly causes the injury." But unless the rule as stated be taken with one or two very important modifications, it is not justified by the law. One of these modifications is that the original wrongdoer is not relieved, that the proximate causation is not always arrested by the intervention of an independent concurring cause, whether that independent concurring cause may be classified as an act of God, or the wrongful act of a third person. If, to illustrate, a railroad company negligently left a car of dynamite within a city and at a place prohibited by law, and by the explosion of the car injury was occasioned, "causation would not be arrested," and the railroad company relieved from liability, whether the explosion was occasioned by a stroke of lightning or by the act of some wrongdoer making a target of the car for rifle practice. The cases serve to illustrate the true rule, which is that the independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission. Thus, a car carrying crude petroleum had no valve regulating the outflow of the oil. This was negligence chargeable to the consignor. The consignee, with the knowledge that the car was leaking, attempted to draw off the oil near the plaintiff's mill, the engine room of which mill was lower than the railroad track. In the absence of a valve to control the flow, the oil ran out so rapidly that it reached plaintiff's engine room, exploded, and destroyed the mill. It was held that the defendant consignor was not liable therefor, in that the injury was not a natural or probable consequence of the original negligent act in sending out the oil car without a suitable control valve. Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583. So in Lockridge v. Fesler (Ky.) 37 S. W. 65, where plaintiff had consigned his horse for keeping to a livery stable, the horse, being improperly tied, escaped through the door of the stable to the public street, where it fell and killed itself. The defendant sought to prove that, notwithstanding the horse might have been negligently fastened and by reason of the negligence have so escaped to the street, yet that its death was occasioned through fright caused by the noise and hullabaloo made by persons on the street. It was held error to refuse to admit the testimony, since if it were believed by the jury, it would establish that the injury was occasioned by an intervening, independent, and sufficient wrongful cause. But upon the other hand, in such cases as Pastene v. Adams, 49 Cal. 87, and numerous cases hereinafter to be referred to enunciating the same principle, the concurring cause was not regarded as so independent in character as to relieve the first wrongdoer from responsibility. Pastene v. Adams was an action brought to recover damages caused by the falling of lumber carelessly piled by the defendant a long time before the injury. It was urged by the defendant that the lumber was caused to fall by the negligence of a stranger. It was held that this did not constitute a defense, for the negligence of the defendant merely concurred with the negligence of the stranger, and together they constituted the direct primary cause. And so Judge Ray's definition is not to be accepted in its fullness, nor to be accepted at all, without the important further modification that the original act of negligence, the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result. And this brings us to the second answer to appellant's proposition.

The second answer is that if these interrogatories had been submitted, and the jury in answer to them had found that the sole proximate cause was the ignition of the gas by a fire in the restaurant, this finding, under the circumstances of this case, would not have controlled a general verdict favorable to plaintiff. We say under the circumstances of this case, because here admittedly the plaintiff was but a patron of the restaurant, owing no duty to either the gas company or the restaurant keeper, and not charged with negligence in any respect so far as the explosion is concerned. A very different case would be that presented were the restaurateur himself suing for damages and the answer of the gas company charged him with negligence in failing to extinguish the lights in his house upon its demand. In such a case the proposed interrogatories would be pertinent and proper, not for the purpose of establishing that the fire was the sole proximate cause of the explosion (for except in the logician's sense and not within the meaning of the law this could not be), but for the purpose of showing that there was concurrent negligence upon the part of the plaintiff and that he should be forbidden a recovery under the maxim which denies one the right to take advantage of his own wrong. But saving in such cases, and this is not one of them, the English as well as the American rule of decision is uniform to the effect that where an explosion of gas causing damage to a person results from the joint negligence of the gas company in discovering and repairing a leak in its pipes and of another in bringing a light in contact with the gas, whereby it explodes, a person damaged may recover from either or both at his election, each is and both are the proximate cause of the injury. Shearman & Redfield on Negligence (3d Ed.) § 338a; 14 Am. & Eng. Ency. of Law, 938; 20 Cyc. p. 1170, and the cases there collated. Haley v. Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956, relied on by appellant, is not at variance with this reasoning, nor in conflict with these authorities. There a workman was injured upon a logging train owned by defendant. The accident occurred by the breaking of a chain and the falling off of logs on one of the cars. These cars were loaded by an independent contractor. Special interrogatories were submitted to the jury touching the negligence of the defendant. It was possible, in the view of the Supreme Court of Wisconsin, that the accident might have occurred singly and solely by reason of the negligence of the independent contractor in loading the cars, and it was held error to refuse special interrogatories covering this point. In the case which we have under consideration, however, it is indisputable that the negligent act of Cressaty in permitting his lights to burn, conceding such to be a fact and conceding further that such burning of the lights actually ignited the gas which exploded, constituted but one of two concurrent causes of the accident. The legal result of the jury's so finding could not have been to relieve the defendant company from liability, but merely to declare that the company and Cressaty were joint tort-feasors. Pastene v. Adams, 49 Cal. 87; Barrett v. S. P. Co., 91 Cal. 303, 27 Pac. 666, 25 Am. St. Rep. 186; Lewis v. Terry, 111 Cal. 45, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; Muller v. Hale, 138 Cal. 168, 71 Pac. 81; Herr v. City of Lebanon, 149 Pa. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603.

2. The court instructed the jury as follows: "If, on the other hand, from such consideration, and in view of these instructions, you should conclude that the plaintiff ought to recover, then you will award him damages in such amount as, in your judgment, will fairly compensate him for the injuries which he has sustained; and, in estimating such damages, you may consider what, before the accident, was his health and physical ability, the extent and nature of his wounds, hurts, bruises and broken limbs he received, also the extent to which, if at all, the injuries he received are permanent in their character, as well as the physical suffering *and mental worry* which he has endured or will suffer in the future *because of* the injuries, if any, also the loss, if any, which plaintiff has sustained or will hereafter sustain by reason of

abatement of ability to follow business pursuits or engage in business employments as the direct results of the injuries he received. The law prescribes no measure by which such damages can be estimated, but leaves it to the sound discretion of the jury to fix the amount thereof in such sum as, under all the circumstances, may be deemed just and proper. The law does not require that the plaintiff present any direct evidence to show the amount of damages which he has sustained, or the amount of money which would compensate him for the injuries he has received. All that is necessary is to show to the jury the extent of the injuries, and then it is for the jury to determine, in the manner I have indicated, the amount of damages which ought to be awarded. In determining the amount of damages, if any, which should be awarded to the plaintiff as compensation for the injuries he has sustained, you can add nothing by reason of sympathy, nor as punishment for the defendant."

The language of the instruction which is complained of is found in the italicized words. The complaint is twofold. First, that the recovery must be limited to compensation for the physical pain and mental anguish caused by the injuries, and that this is very different from a recovery for the physical pain and mental anguish which the plaintiff might have suffered because of the injuries. Second, that the instruction permitted a recovery for mental worry entirely disconnected from his physical pain, while the law contemplates a recovery for the physical pain and for the mental anguish or suffering only as a part of or as growing out of that physical pain. And it is argued that to tell the jury that plaintiff can recover for mental worry is to tell them that they may give him as damages compensation for such anxiety as he may have undergone, or recompense him for worrying over future inability to work, the possible duration of his injuries, or the thousand other subjects disconnected from his physical pain, over which the average man when idle and injured may brood and grieve.

To trace an injurious distinction from the use of the phrase "because of," instead of the phrase "caused by" is mere logomachy. Even this court in laying down the rule declares that plaintiff is entitled to a recovery for "the physical and mental suffering he has sustained by reason of the injury." Malone v. Hawley, 46 Cal. 409. If thus "by reason of the injury" is a fair equivalent to "caused by the injury," certainly no just complaint can be lodged against the phrase "physical and mental suffering he has sustained because of the injury."

The more important objection to the instruction, however, is that found in the argument of the appellant above adverted to, namely, that the court, by its language, permitted the jury to consider as an element of damage not alone the mental suffering which plaintiff had sustained by reason of his injuries, and growing out of the physical suffering occasioned thereby, but allowed the jury to consider generally the "mental worry" which he had endured and would in the future suffer caused by or because of or by reason of these injuries. It is said that such worry, being remote, speculative, and incapable of anything like exact ascertainment, is not within the contemplation of the law permitting recovery for physical pain and mental suffering.

The courts of the land have divided upon this question, and, as it is new to this state, it merits somewhat detailed consideration. The Supreme Court of Oregon lays down the rule that mental distress or anguish resulting from the realization of physical inability because of the injury to properly care for those dependent on plaintiff for support and education is not an element of consequential damages to be recovered in an action for personal injuries. Maynard v. Oregon R. & N. Co., 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477. In Linn v. Duquesne Borough, 204 Pa. 551, 54 Atl. 341, 93 Am. St. Rep. 800, the Supreme Court of Pennsylvania, perhaps as fully as any other, sets forth the reasoning of the rule adopted by that court and contended for here by appellant. It is as follows: "While in this state it is a well-settled rule of law that damages may be allowed in cases like this, for the pain and anguish of mind caused by the personal injury, yet we are not aware of any case holding that anguish of mind, wholly sentimental, arising from a contemplation of a disfigurement of person, can be considered for the purpose of swelling such damages. The words 'pain and anguish of mind' are used in a popular sense to denote such as may arise from any cause, and are not necessarily restricted to that arising from personal injury. But the legal meaning of such words found in the reports of decided cases in this state, as will plainly appear from their reading, confines such meaning of the words to such pain and anguish of mind as occur necessarily and spontaneously from any injury of or shock to the nerves of sensation or such pain and anguish as remain during the continuance of the original and exciting cause and arising therefrom. But, where the injury only comes about by reflection or contemplation, then, in the legal sense, it is not caused by the injury, but arises and is produced by a combination of causes other than the injury."

In Southern Pacific Co. v. Hetzer, 135 Fed. 274, 68 C. C. A. 26, 28, 1 L. R. A. (N. S.) 288, the court laid down its rule as follows: "The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and mental pain which are inseparable and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a case."

Without further multiplying quotations, suffice it to refer to the following cases as either wholly or partially embodying the principle for which appellant contends: Chicago, R. I. & P. Ry. Co. v. Caulfield, 63 Fed. 396, 11 C. C. A. 552; Johnson v. Wells, Fargo & Co. Express, 6 Nev. 224, 3 Am. Rep. 245; Planters' Oil Co. v. Mansell (Tex. Civ. App.) 43 S. W. 913; Indianapolis & St. Louis R. Co. v. Stables, 62 Ill. 313; Augusta R. Co. v. Randall, 85 Ga. 297, 11 S. E. 706; Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545; Railroad Co. v. Chance, 57 Kan. 41, 45 Pac. 60, and Railway v. Douglass, 69 Tex. 694, 7 S. W. 77.

The other view may, in turn, be presented by the following quotations: Thus, the Supreme Court of Washington, in Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206, declares: "The objection urged to instruction No. 9 is that it indorsed the doctrine of compensation for mental suffering and distress of mind for disfigurement. On this subject the authorities are somewhat divided, though the decided weight of authority, we think, is to the effect that compensation can be recovered for such damages. We also think that such damages are sustained by the better reasoning. Some of the cases cited by appellant, while permitting compensation for mental suffering induced by physical pain, distinguish such mental suffering from suffering arising from causes other than physical pain, viz., such suffering as arises from the contemplation of a maimed body or deformed face; and the reason assigned is that this element of damage is too vague and indefinite to be susceptible of proof. But we think this discrimination cannot be maintained in sound reasoning, and that mental suffering which is induced by the relations of mind and body is as difficult to measure as mental suffering induced by mortification and disfigurement. Not all people suffer equally from the same bodily injury. In practice mental suffering is always an element considered by juries in slander and libel cases, in actions for false imprisonment and breach of promise, and many other cases of their character, and it ought to be. A wound to one's sensibility is none the less painful when one's character is slandered. The law ought not to grant redress alone to the business man who sustains commercial damage and refuse redress to others who have sustained a more poignant affliction. And he who negligently causes injury to another who is faultless, which makes the latter an object of pity and abhorrence to his fellow men, and an object of ridicule to the thoughtless and unfeeling, and deprives him of the comforts and companionship of his fellows, ought to respond in damages for the injury sustained."

And the Supreme Court of Wisconsin, in Heddles v. Chicago, etc., R. R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106, declares: "The first error assigned is the instructions of the court to the jury on the question of damages. The instruction objected to reads as follows: 'The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future by reason of his injuries; also, for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows.' The learned counsel for the appellant take exceptions to the use of the words, 'for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body, and the fact that he may become an object of curiosity and ridicule among his fellows.' It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs will naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to. For authorities sustaining the instructions, see the following cases cited by the counsel for the respondent: Wilson v. Young, 31 Wis. 574; Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 677 [17 Am. Rep. 504]; Power v. Harlow, 57 Mich. 107 [23 N. W. 606]; The Oriflamme, 3 Sawy. 397 [Fed. Cas. No. 10,572]; Atlanta & R. A. L. R. R. Co. v. Wood, 48 Ga. 565; Toledo W. & W. Ry. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Ballou v. Farnum, 11 Allen [Mass.] 73; Western & A. R. R. Co. v. Young, 81 Ga. 397 [7 S. E. 912], 12 Am. St. Rep. 320; McMahon v. Northern, etc., R. R. Co., 39 Md. 438."

A reference may also be made to Sedgwick, Measure of Damages, p. 31; Webb v. Railroad Co., 51 App. Div. 194, 64 N. Y. Supp. 491; Sherwood v. Chicago R. R. Co., 46 N. W. 776;[1] Railway Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; Schmitz v. Railroad Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Galveston R. R. Co. v. Clark, 21 Tex. Civ. App. 167, 51 S. W. 276.

Upon mature consideration of these and other cases, we express the views: First, that the grief, anxiety, worry, mortification, and humiliation which one suffers by reason of physical injuries are component parts of the "mental suffering" for which, admittedly, damages may be awarded. If this be not so, then "mental suffering" is a meaningless phrase, and, when the laws says that recovery may be had for physical pain and mental suffering, it means only that recovery may be had for physical pain. Second, we think that the question is largely of academic, and to a very trifling extent, of practical, importance, since always and inevitably and against any instruction which a court may present the jury will take into consideration these very elements of mental suffering. Physical pain is a meaningless phrase if it is sought to dissociate it from mental suffering. Physical pain is but one of many forms of mental suffering. If the law contemplated an award of damages solely for physical pain, it is meaningless to say that recovery may also be had for mental suffering. It is equally meaningless to say that the mental suffering must be that occasioned by the physical pain, for then the latter phrase would alone be sufficient to convey the full meaning of the law. Therefore, when the law says that a recovery may be had for mental suffering, it means a recovery for something more than that form of mental suffering described as physical pain. What more does it mean? To mean anything it must include the numerous forms and phases which mental suffering may take, which will vary in every case with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, the nature of his injuries, whether permanent or temporary, disfiguring and humiliating, and so through a long category, the enumeration of which it is unnecessary here even to attempt. Worry and anxiety over the future of his family would be a great element of mental suffering to a man dependent upon his own exertions for his and their support. It would not constitute any element of suffering to a man of abundant means and wealth, identically injured. A woman's mental suffering would be much increased by knowledge of facial disfigurements—a man's naturally not so much so. Shall a jury be not permitted to consider these matters in estimating mental suffering, and is it an answer to say that they are too remote or "too delicate to be weighed by any scales which the law has yet invented?" They are not remote. They are direct and consequential. They differ in degree with individuals, with their sex, circumstances, and positions in life. But so do men differ in sensing physical pain; so do they differ in the mental suffering occasioned by physical pain alone. No one would pretend to say that the actual physical suffering of a crushed leg is the same in the case of a sodden, phlegmatic tramp as it would be with a high-strung, nervous, active man of affairs. Yet the law has scales by which it measures the compensation for suffering of this kind, and measures it, of course, in terms of money. Why should it be supposed that those scales would break down and prove inadequate when other legitimate elements of mental suffering are cast into their balance? In truth the admeasurement of suffering in terms of money is a most clumsy device; but it is the best device which the law knows, and it is a device which the law will employ until some better is discovered. To forbid the consideration of these other elements of mental suffering, because the scales are not sufficiently delicate for their admeasurement, is equally to condemn the use of the scales, in the very cases and for the very purposes now admittedly sanctioned by the law.

We think, therefore, that mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages.

But, as we have said, we think the whole matter possesses more academic than practical significance. Conceive the case of a plaintiff before a jury with a face shockingly mutilated and distorted. He testifies that he endured mental suffering caused by his injuries. He is asked of what the mental suffering consists. He replies, physical pain, anxiety for fear his injuries may prove so permanent and disabling as to render him incapable of supporting his family, grief as he reviews the whole situation lest his disfigurement may humiliate him and make him an object of ridicule to his fellows. At the suggestion of defendant's counsel, the jury is instructed to disregard all the elements of mental suffering excepting that arising solely from the physical pain. Can the jury do it? Will the jury do it? It is mere self-stultification to believe that it will do other than to make up its verdict under the rule which, while not one at law, is one of well-nigh universal human conduct the rule of, "Put yourself in his place." Each juror will consider how he would feel under like circumstances, and he will not narrow his contemplation to the mere matter of physical suffering under the direction of any court. So that in fact verdicts always have and always will be rendered from this point of view.

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[1] 82 Mich. 374.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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158 Cal. 525

BROWNING v. McNEAR. (S. F. 5,295.)

(Supreme Court of California. Oct. 20, 1910. Rehearing Denied Nov. 19, 1910.)

1. Customs and Usages (§ 14*)—Contracts—Construction.

The trade or commercial meaning of the phrases "payable against shipping receipts," "payable when shipped," "payable f. o. b.," is controlled by the express contract of the parties.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. § 14.*]

2. Sales (§ 218½*)—Executed Contract—Evidence.

In an action for the price of barley sold and delivered, evidence *held* to justify a finding that the contract of sale was an executed one, so as to pass title to the buyer under Civ. Code, § 1140, declaring that title to personalty sold passes to the buyer when the parties agree on a transfer and the thing itself is identified, and hence the risk of accident to the property vested in the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

3. Principal and Agent (§ 116*)—Power of Agent—Secret Limitations—Effect.

Limitations privately placed by a principal on the general authority of his agent, not communicated to a third person dealing with the agent, are not binding on the third person.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by J. W. Browning against G. W. McNear. From a judgment for plaintiff. Defendant appeals. Affirmed.

Chickering & Gregory, for appellant. Adams & Adams and Thomas Rutledge, for respondent.

HENSHAW, J. This is a second appeal after the second trial. The decision of this court upon the former appeal is reported in 145 Cal. 272, 78 Pac. 722. The pleadings are the same. The findings of the court declare an executed sale upon October 9, 1899, without any warranty express or implied, and declare also that the sale was not by sample. In the opinion rendered upon the former appeal it was said: "Whether or not the parties, plaintiff and Hickok, representing defendant, then agreed upon a present transfer of the barley, is a question of fact, the determination of which may well be left to the superior court upon another trial. It is proper to say, however, that the mere fact that payment for the grain was expressly deferred to the time of shipment, and was to be made only as against shipping receipts, does not exclusively establish that the purchase was against shipping receipts only, or that there was no agreement for a present transfer of the property."

If the court's findings of an executed sale upon October 9th, with delivery postponed at the purchaser's risk, is supported by the evidence, there is an end of the controversy between the parties on this appeal. The evidence touching this matter was the same upon the former trial as upon this. The court's finding upon the former trial was that the sale was executory. Concerning that finding this court declared: "There is some doubt as to whether the evidence supports the finding of the court." Clearly, therefore, if there was doubt whether the evidence supported the finding of an executory contract, it must be that there was substantial evidence to support a finding of an executed contract, which is the finding upon the present appeal. "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Section 1140, Civ. Code. "When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer." 2 Kent's Com. p. 492; Mechem on Sales, § 483. The facts established in support of the court's findings are the following: The barley in question was stacked along the river bank in the grainyard owned and operated by plaintiff as a warehouseman in connection with a warehouse situated in the yard. It was weighed and ready for sale and shipment. Plaintiff held the warehouse receipts commonly called "yard receipts" for the barley. These receipts showed the quantity and weight. Upon the day of the sale plaintiff was hauling the barley from the yard into the warehouse. Eight hundred and thirty-two sacks had so been hauled; but, upon the completion of the transaction with Hickok, defendant's agent, no more was hauled. Upon that day Hickok inquired what Browning would take for the barley, and Browning stated that his rice was 81¼ cents per hundred pounds. Hickok conferred with his principal by telephone. What that conversation was was not reported to Mr. Browning, but later in the day Hickok told Browning that he would take the barley at that price, and that defendant would send a boat for it and take it from the river bank and warehouse and would pay for it as soon as it was shipped. Browning demurred, desiring payment at the time, but finally agreed that he would accept payment as the barley was shipped. The yard receipts for the barley, as indicia of ownership, were delivered to Hickok and accepted by him, and Hickok drew his draft for $3,000 in part payment of the barley. Browning testifies to the delivery by him to Hickok and the acceptance by the latter of the yard receipts, and Mr. Hickok's testimony is as follows: "Q. What do you say, Mr. Hickok, then, in regard to the delivery of the barley on that day as between you and Mr. Browning? A. Mr. Browning delivered the yard receipts. Q. It is a fact that you did accept those receipts? A. I took them, yes, and accepted them."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Whatever may be the general trade meaning of the phrase "payable against shipping receipts," or "payable when shipped," or "payable f. o. b," the fact remains that such trade or commercial meaning is always controlled by the express contract of the parties, and in this case the evidence substantiates the finding, not that the sale was to be complete when the barley was shipped, but merely that the payments were to be made when the barley was shipped. Such was Browning's testimony; Mr. Hickok again corroborating it, in the following language: "Q. Wasn't the statement that you made to Mr. Browning that you would pay Mr. Browning for this barley as soon as it was shipped? A. Yes, sir; I probably made that statement to Mr. Browning. Q. Payable when shipped, or against shipping receipts. Which is it? Which did you tell him? A. I could not say positively which I told him, but it means one and the same thing."

As further evidencing that the sale was complete and executed, there was direct testimony concerning the party to the sale on whom the loss should fall in the event that the grain was injured by rain before it was taken on to the steamer or barge by defendant. It appears, first, that the time of its removal was wholly a concern of defendant, with which plaintiff had nothing to do, and that with the actual transportation from the yard and warehouse to the barge or steamer plaintiff likewise had no responsibility or concern. At the time of the sale, and in the presence of Mr. Harrington, the cashier of the bank with whom the draft and yard receipts were deposited, Mr. Browning stated, "If the grain got wet, got rained on, it was their (defendant's) loss and not mine," and that Mr. Hickok so understood and agreed. The witness Harrington corroborates this and testifies to Mr. Hickok's assent thereto. Mr. Hickok wrote a letter to his principal to the following effect: "Note what you say about Mr. Browning. There was no memorandums passed between us at the time except the draft I gave him for $3,000, the same to be paid when the barley was shipped. (Elements not considered.) At the time I purchased this barley, Mr. Browning was hauling it off the river bank and putting it in the warehouse, and after selling it to me stopped hauling, expecting it would be shipped at once, and thus save all this labor, as it was my understanding that steamer would be after it soon, and I so informed him to that effect." Mr. Hickok explains the meaning of the phrase used in his letter "elements not considered" as follows: "Q. You mean to say by that that it was purchased regardless of whether or not there would be any damage by rain? Is that what you mean? A. Yes, sir. Q. Did you so testify? A. Yes, sir. Q. That is what you meant, was it not, when you said damage by the elements not considered? A. Yes, sir."

The finding is thus abundantly supported. Nor can there, we think, be any doubt as to the power of the agent, Hickok, to bind his principal, for Hickok had general authority to buy grain in the vicinity of Colusa, and was the general agent of McNear for such purpose, and any limitation upon his authority not communicated could not, of course, affect a seller in dealing with him as such agent. The new evidence introduced by defendant, which was in the form of a telegram to the agent, was a communication after the completed sale, and therefore of no operative force. The telegram was dated November 4th, and advised that the Browning barley was at Port Costa on the barge and, "as transportation company insists upon discharge, will have to be stored for account of Browning. We absolutely refuse to accept it as it is damaged throughout." The same principle applies to the private letter written by McNear to Hickok after the sale was made, to the effect that, if the barley was rained upon, Hickok was not to pay Browning for it. It is not contended that any of these instructions antedated the executed sale, and, as said by this court upon the former appeal: "In the determination of the question as to what the agreement actually was, limitations as to the general transaction privately placed by defendant upon the general authority of the agent, and not communicated to plaintiff, cannot, under the circumstances of this case, play any part." Whitton v. Sullivan, 96 Cal. 480, 31 Pac. 1115; Stockton Combined Harvester Works v. Glen Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; Ruggles v. Am. Central Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; Mechem on Agency, § 283.

What has been said answers appellant's contention as to the 832 sacks of barley which were never delivered from the warehouse. The transaction being a completed sale, defendant was liable for the agreed price.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

158 Cal. 530

PEOPLE v. WILKINS. (Cr. 1,531.)

(Supreme Court of California. Oct. 25, 1910.)

1. Criminal Law (§ 485*)—Evidence—Opinion Evidence—Hypothetical Question.

In a prosecution for the murder of a woman, a physician who testified to a few simple facts concerning the condition of the body at the time of the autopsy was then asked a hypothetical question based on these facts, but which did not re-enumerate them. *Held* that, by allowing the question, the court did not commit error, because the facts were few and simple.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

2. Criminal Law (§ 485*)—Evidence—Opinion Evidence—Hypothetical Question.

The objection that the language of a hypothetical question, "If there should have been between a third and a half grain of strychnine," did not embody any fact in evidence, and was purely speculative, is overrefined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. Criminal Law (§ 519*)—Evidence—Confession.

Upon discovering the body of a missing woman in his barn, the defendant was brought there handcuffed. He admitted burying the body, stating the woman committed suicide. *Held* that, as this was not a confession of murder, the fact of duress would not make it inadmissible, and the fact that the secret burying of a body is a crime was immaterial, as the defendant was not on trial for that, but for murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1167–1171; Dec. Dig. § 519.*]

4. Criminal Law (§ 480*)—Cross-Examination.

In the preliminary examination to qualify as an expert witness a chemist who had analyzed the vitals of the deceased, the defense cannot cross-examine him as to what he did with such vitals; that being matter for his examination in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1069; Dec. Dig. § 480.*]

5. Criminal Law (§ 404*)—Evidence.

In a prosecution for murder by means of strychnine, it was not error to admit in evidence a bottle containing that drug, which was found in the home of defendant and fully identified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891–893; Dec. Dig. § 404.*]

6. Criminal Law (§ 680*)—Evidence—Order of Proof.

In a prosecution for murder, where circumstantial evidence is relied on, the facts may be given as they come, without proving the corpus delicti before connecting the defendant with the crime; this being a question of order of proof, which rests in the discretion of the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1610; Dec. Dig. § 680.*]

7. Criminal Law (§ 761*)—Trial—Province of Court and Jury—Instructions.

An instruction that, to make the killing murder, the party must die within a year and a day after "the" stroke was received, etc., is not objectionable in assuming a killing against defendant's contention that death was by suicide, as this manifestly was and would be understood as an abstract proposition of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754–1771; Dec. Dig. § 761;* Homicide, Cent. Dig. §§ 582, 599, 607.]

8. Criminal Law (§ 759*)—Trial—Instructions.

In a prosecution for homicide, the refusal of an instruction that the absence of motive was a circumstance in favor of innocence, was proper, that being a matter of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1737; Dec. Dig. § 759.*]

9. Criminal Law (§§ 763, 764*)—Trial—Instruction—Credibility of Witnesses—Experts.

It was not error to refuse an instruction that opinion and expert evidence should be scrutinized with the utmost care.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1745; Dec. Dig. §§ 763, 764.*]

In Bank. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Mark A. Wilkins was convicted of murder, and he appeals. Affirmed.

Hugh J. McIsaac, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Everett J. Brown, Dist. Atty., for the People.

HENSHAW, J. The defendant was tried and found guilty of murder in the first degree. The death penalty was imposed. He appeals from the judgment and from the order denying his motion for a new trial. The victim of defendant was a married woman, who had been intrusted by her husband with money arising from the sale of their business in an eastern state. She came to California with defendant, and they lived together as husband and wife. They purchased a place in Elmhurst in Alameda county, where they resided. Mrs. Wilkins, as she was known, was well advanced in pregnancy and looked forward to her confinement in October. Upon a Sunday afternoon of July she was last seen sitting upon the front porch of her residence. Following her disappearance inquiries were made by the neighbors, to whom Wilkins represented that his wife had gone to her mother in Kansas City to await her confinement. About the middle of October he told a neighbor that he had received a telegram from Doctor James in Kansas City calling him there at once. He disappeared for about 10 days. Upon his return he announced that he was the father of a baby boy. He represented at first that his wife would return to him in a short time, and later that she was not strong and would not return until the following spring. In truth, the defendant did not go to Kansas City, but went to San Francisco. While in San Francisco he formed the acquaintance of a man named Anderson. Anderson and his wife became guests of Wilkins at his Elmhurst home. To the Andersons he said that he had just returned from Kansas City, where he had taken his wife to bury her, she having died in childbirth. To another he represented that his wife had died in Hong Kong and that he had brought the body over with him on the steamer. Wilkins then made the proposition to Mrs. Anderson that she personate his wife in the acknowledgment of a deed to the Elmhurst property in order that he might sell it. When asked by Mrs. Anderson why he did not get a death certificate he made no answer. Suspicion was aroused against Wilkins, a little boy in the neighborhood relating that in July he had peeked through a knothole in a barn or shed upon the Wilkins place, and had seen there a hole like a grave with the earth thrown up on one side. Wilkins was arrested on the 25th day of November, 1907, and taken to the county jail of Alameda county. There he was interrogated by the district attorney and the sheriff, who told him that they were investigating the reported disappearance of his wife. They asked where his wife was. He said that he had not had a wife for 20 years, that the woman with whom he had been living was not his wife, and that he "supposed she was in the East somewhere." They asked when she went away, and he replied that he had nothing to say. They told him that they were simply investigating the matter of her reported disappearance, and that he should be able to aid them a great deal. He still replied that he had nothing to say. Meantime a search of the Elmhurst place was in progress, and about 8 o'clock in the evening the body of the woman was found in a grave dug in the shed as described by the boy. The defendant was taken to the place handcuffed, and shown the body in the grave, with the interrogatory, "Well, what have you got to say now?" or "What do you think about it?" to which he replied, "Well, I buried her." Asked "Did you kill her?" or "Didn't you kill her?" he replied that he had not, that she had committed suicide by taking strychnine. This, of course, was before a post mortem examination of the body was made. An analytical examination of the contents of the stomach and other organs disclosed the presence of strychnine in more than sufficient quantity to cause death. The body itself, where decomposition had not destroyed the evidence, gave indications of death in convulsions. The right hand was clenched and the tongue protruded from the mouth. These and other matters of suspicion pointing to a death by murder and to the defendant as the criminal were shown before the jury. The defendant's appeal presents the following matters charged as error:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1. Doctor Hamlin performed the autopsy, but not the chemical examination of the organs which resulted in the discovery of strychnine. He had previously testified to the protruding tongue and the clenched hand, as being evidence that the woman had died in convulsions, whether caused by criminal means or not of course he did not know. He had also testified to other matters, such as the discovery of the fœtus and its probable age. Evidence had then been introduced touching the presence of strychnine in the organs analyzed. Subsequently he was asked: "If in addition to the facts that you found at the time of performing the autopsy upon this body there was between a third— there should have been between a third and a half grain of strychnine either in the stomach, in the kidneys, in part of the kidneys that you brought to Mr. Benzinger, or in part of the intestines that you brought to Mr. Benzinger or any or all three of these, or in any two of the three, could you then state the cause of death?" The court overruled the objection to the question and permitted the witness to answer: "Yes, I can. The cause of death under those conditions was strychnine poisoning." The contention is here made that the form of question was improper under the intimations of the Le Doux Case (People v. Le Doux, 155 Cal. 535, 102 Pac. 517); that it was error to have permitted the witness to answer the hypothetical question upon "the facts that you found at the time of performing the autopsy" without re-enumerating those facts. But this is precisely such a condition as that referred to in the Le Doux Case, where the facts touching the cause of death, from the outward appearance of the body, were few and simple, and a repetition of them, under the very language of the Le Doux Case was not necessary. Appellant objects to the language employed in the question "if there *should have been* between a third and a half grain of strychnine" as not embodying any fact in evidence, and thus making the question purely conjectural and speculative, that the language should have been "if there *was* between a third and a half grain of strychnine." The objection is overrefined. Nobody in reading the language could conceive it to have any other meaning than that which the other phrase conveys.

2. It is urged that the duress and menace involved in taking the defendant handcuffed to his home and there confronting him with the body in the grave were such as to forbid the admission of the statements which he at that time made. Those statements were not confessions, and did not therefore come within the rule established in this state, distinguishing between the admissibility of confessions and other statements in the nature of admissions not amounting to confession. People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; People v. Le Roy, 65 Cal. 613, 4 Pac. 649; People v. Hickman, 113 Cal. 87, 45 Pac. 175; People v. Miller, 122 Cal. 87, 54 Pac. 523; People v. Weber, 149 Cal. 325, 86 Pac. 671. The fact that his admission that he buried the body is a confession of another crime, since under our law the secret burying of the body of a human being is an offense (St. 1905, p. 115), has no bearing on the matter. He was not charged with the crime of secretly burying the body, and his admission that he buried it was not a confession that he committed murder. To the contrary, at that time and in that conversation he denied this crime, stating that the woman had committed suicide by taking strychnine.

3. Upon his preliminary examination Richard Benzinger, who made the analysis of the dead woman's organs and discovered therein strychnine, qualified himself as an analytical chemist, and was given over to the defense for cross-examination touching these qualifications. In the course of that cross-examination he was asked: "State what you received and exactly what you did with it?" ("it" meaning the organs of the dead woman). Objection was interposed and sustained. It is insisted that this unduly curtailed the cross-examination, in that there might have been disclosed by the witness' description of the methods which he employed, his lack of knowledge and skill as an expert.

The complaint is not just. The defendant was allowed to carry the witness through an elaborate cross-examination touching the general methods, their number and kind, for the discovery of strychnine, and he was examined particularly as to the methods which he employed for this purpose. What he did in the particular instance was matter for his examination in chief after the foundation of his qualifications as an expert had been laid. If his examination in chief upon this matter disclosed lack of skill or inefficiency, which in the opinion of defendant's counsel established that he was not qualified as an expert, the defense could have interposed its objection and taken the witness for further cross-examination before the final question going to his expert judgment of the results of his analysis was asked. People v. Hawes, 98 Cal. 651, 33 Pac. 791.

4. A bottle, proved to contain strychnine, was found in the home of the defendant, and produced in evidence. Its identity and integrity were both sufficiently established to justify its admission in evidence.

5. Complaint is made that admissions and facts tending to connect the defendant with the alleged crime were admitted without proof of the corpus delicti. This is a complaint which goes rather to the order of proof than to the sufficiency, and in a case such as this, the order of proof being within the sound discretion of the court, the evidence by which it is sought to prove the crime being circumstantial, and the facts interwoven, made it not only proper, but even necessary that the proof should be given as it was. "The order of proof, however, is of no consequence, if the facts appear in evidence in the case." People v. Jones, 31 Cal. 565; People v. Simonsen, 107 Cal. 345, 40 Pac. 440; People v. Ward, 141 Cal. 628, 75 Pac. 306; People v. Donnolly, 143 Cal. 398, 77 Pac. 177. And as to the sufficiency of the proof in this case it is needful only to cite People v. Simonsen, 107 Cal. 346, 40 Pac. 440; People v. Alviso, 55 Cal. 233; Carroll v. People, 136 Ill. 463, 27 N. E. 18; People v. Harris, 136 N. Y. 428, 33 N. E. 65, and 3 Rice on Evi. 465, 466, where it is said: "Nor is it necessary that the corpus delicti should be proved by direct and positive evidence. It would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd."

6. Complaint is made of a general instruction beginning: "Gentlemen of the jury, I instruct you that to make the killing murder, it is requisite that the party die within a year and a day after the stroke is received," etc. It is said that the use of article "the" vitiates this instruction, since it tells the jury that there was a killing—against the defense that the death was by suicide. Manifestly the instruction was meant, and would be understood by the jury, to be but a declaration of a principle of abstract law. Like complaint, that the instruction assumed the corpus delicti, was made in People v. Ramirez, supra, People v. Chun Heong, 86 Cal. 333, 24 Pac. 1021, and in People v. Besold, 154 Cal. 363, 97 Pac. 874, and in each of those cases the criticism was declared unwarranted. It is so here.

7. The court refused to give an instruction to the effect that the absence of motive was a "circumstance in favor of innocence and should be so considered by you." In People v. Glaze, 139 Cal. 163, 72 Pac. 965, the trial court refused to give a similar instruction, and this court declared that its refusal was justified in that it was an instruction with respect to a matter of evidence, and "as such the court was not bound to give it. While an instruction of this character may be and usually is harmless if given, it is not error to refuse it."

8. The court likewise refused to give an instruction proposed by the defense, admonishing the jury "to scrutinize opinion evidence or expert evidence with the utmost care." The refusal was not error. People v. Smith, 106 Cal. 73, 39 Pac. 40; Estate of Blake, 136 Cal. 311, 68 Pac. 827, 89 Am. St. Rep. 135; Nelson v. Nelson-Bennett Co., 31 Wash. 116, 71 Pac. 749.

No other asserted errors are called to our attention on this appeal. For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

14 Cal. App. 261

In re BALFOUR & GARRETTE. (Civ. 718.)

(Court of Appeal, Third District, California. Sept. 19, 1910. Rehearing Denied by Supreme Court Nov. 10, 1910.)

1. Corporations (§ 610*)—Proceedings for Voluntary Dissolution — Burden of Proof.

Code Civ. Proc. § 1228, prescribes the essential averments of a petition for a voluntary dissolution of a corporation; among them the fact that all claims and demands against the corporation have been satisfied and discharged. *Held*, that the facts required to be stated in the petition must be proved to give the court jurisdiction to decree a dissolution, and the burden of proving such facts is on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2424–2430; Dec. Dig. § 610.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Brokers (§ 43*) — Contract of Employment—Written Memorandum.

Code Civ. Proc. § 1973, subd. 6, provides that an agreement employing an agent to purchase or sell realty for a commission is invalid unless the agreement or some memorandum thereof be in writing subscribed by the party to be charged. *Held* that, where a corporation agreed with an agent orally to pay him a certain commission for selling land, a letter written to the agent after execution by him of the oral agreement, signed by the corporation, stating the sales made, the terms thereof with which the agent was familiar, and that the corporation had agreed to pay him a commission of 2½ per cent. when the contracts had been complied with, followed by a list of the names of purchasers with the respective amounts, which they were obligated to pay to the corporation, and concluding with a request that the agent "check this up, and if any errors exist report them to us," which defined the terms of the oral agreement, took the agreement out of the statute of frauds.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43;* Frauds, Statute of, Cent. Dig. § 131.]

3. Frauds, Statute of (§ 104*)—Operation and Effect — Subsequent Reduction to Writing.

Though the statute of frauds declares that the contracts with which it deals are invalid unless reduced to writing in some form, its provisions affect the remedy only, and not the validity of the agreement, its purpose being to require contracting parties to commit to writing and thus put in unquestionable form, as evidence thereof, the terms of their agreement upon subjects to which the contracts affected by the statute relate, and a reduction of the agreement to writing, even after performance, is sufficient.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 209; Dec. Dig. § 104.*]

4. Appeal and Error (§ 204*) — Review — Necessity for Objection in Lower Court.

Where a corporation, applying for a voluntary dissolution, did not on the contest thereof object to the admission of a letter offered as a written memorandum by the corporation of an oral agreement to pay an objector commissions for sale of land on the ground that the letter was not, and appeared not to have been, authorized by the corporation, it could not urge such objection on appeal from an adverse judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258–1280; Dec. Dig. § 204.*]

5. Corporations (§ 610*)—Voluntary Dissolution—Objections—Amendment.

Upon contest of an application by a corporation for voluntary dissolution, where the original objections alleged that the corporation was indebted to the objector in excess of $300 for commissions, and the evidence showed that the commissions to which he would be entitled would become due only when the installments on the sums for which certain lands were sold by him were paid to the corporation, an amendment to the original objections of the allegation that the commissions would become due when payments for the lands were made to the corporation by its purchasers, to make the original objections conform to the proof, was not objectionable as stating a new and different cause of opposition.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2430; Dec. Dig. § 610.*]

6. Corporations (§ 607*) — Voluntary Dissolution—Demands of Objectors.

Under Code Civ. Proc. § 1228, prescribing the essential averments of a petition by a corporation for a voluntary dissolution, among them that all claims and demands against the corporation have been satisfied and discharged, a liability of the corporation to an agent for commissions on sales made by him will prevent such voluntary dissolution, though the liability be contingent upon the discharge by the purchasers of their obligations under their contracts of sale, where such contracts fixed definite times at which all payments should be made, and therefore definitely fixed the times at which such contracts might become functus officio, whether their terms were complied with or not; the gist of the opposition being that there existed a valid claim, and the form of such claim being immaterial.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2415; Dec. Dig. § 607.*]

7. Corporations (§ 610*) — Voluntary Dissolution—Right of Creditors to Object.

Code Civ. Proc. § 1228, prescribes the essential averments of a petition for voluntary dissolution of a corporation, and among them the fact that all claims against the corporation have been satisfied. Section 1231 provides that, at any time before the expiration of the time of publication of notice of the application, any person may file his objections to the application. Civ. Code, § 400, provides that, unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved and have full power to settle the affairs of the corporation. *Held*, that the remedies prescribed by the Civil Code and the Code of Civil Procedure do not conflict, the one authorizing the creditor after dissolution of the corporation to proceed if necessary against the directors or other persons appointed by the court as trustees of the corporation, and the other reserving to such creditor the right to proceed directly against the corporation, and the Civil Code provision does not prevent such creditor from objecting to the corporation's application for voluntary dissolution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2430; Dec. Dig. § 610.*]

8. Appeal and Error (§ 1057*) — Harmless Error—Exclusion of Evidence.

On the trial of a contest of a corporation's application for voluntary dissolution under Code Civ. Proc. § 1227 et seq., providing that the petition shall aver that all claims and demands against the corporation have been satisfied, where the alleged creditor's claim was not only properly proved, but admitted by the corporation's officers to exist against the corporation, errors, if any, in excluding evidence as to whether the alleged creditor knew at a certain time that he was a creditor of the corporation and testimony as to the details of the transactions between the corporation and the alleged creditor and of an officer of the corporation, explaining why he gave the alleged creditor the commission which was the basis of the claim, were immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4197; Dec. Dig. § 1057.*]

9. Appeal and Error (§ 1050*)—Harmless Error—Admissibility of Evidence.

The creditor's claim against the corporation resting upon an oral agreement for commissions, evidenced by a written memorandum, error, if any, in the admission of parol testimony, as to the terms and conditions of the agreement as originally made, was not prejudicial, where it in no wise changed or varied the terms and conditions as evidenced by the writing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Application for the voluntary dissolution of Balfour & Garrette, a corporation, to which contestant, T. C. Worley, filed objections. From a judgment disallowing the petition and denying a new trial, the corporation appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

E. E. Gaddis, for appellant. Arthur C. Huston, for respondent.

HART, J. This is an application on the part of the above-named corporation for its voluntary dissolution. The proceeding is authorized by the provisions of section 1227 to 1233, inclusive, of the Code of Civil Procedure. Before the expiration of the time of the publication of the notice of said application as prescribed by section 1230 of said Code, the contestant, T. C. Worley, filed objections to said application. Section 1231, Code Civ. Proc. The ground upon which said opposition is interposed is that said corporation "is indebted to the said T. C. Worley in a sum exceeding $300 for commissions due to the said Worley for acting as the agent of the said corporation for selling certain lands in the county of Colusa, state of California," etc. An answer to said opposition was in due time filed by the corporation, in which it denied that it was indebted to said Worley in any sum or that it was a creditor of said Worley. Upon the issues thus framed, the contest was tried, and a judgment rendered and entered disallowing the prayer of the petitioner. Thereafter the corporation moved for a new trial, which was denied. This appeal is from the judgment and the order denying the corporation a new trial. In this connection, it may be suggested that the claim of the respondent that a "motion for a new trial cannot be made in a proceeding of this kind," and that therefore the "appeal from the order" denying the same is abortive, cannot, even if tenable, avail anything here, since there is also an appeal from the judgment on a bill of exceptions, on which appeal many of the important alleged errors of law occurring at the trial of the contest may be reviewed. But, as the judgment here must be against appellant, we shall treat the appeal from the order, so far as we may feel required to consider it, as having been properly taken.

Section 1228 of the Code of Civil Procedure prescribes the essential averments of a petition for a voluntary dissolution of a corporation, and, among these, the fact that "all claims and demands against the corporation have been satisfied and discharged" must be alleged. Obviously, the facts thus required to be stated in the petition must be proved, otherwise the court would be without the power or jurisdiction to decree a dissolution. And the burden of proving all the facts required to be set forth in the petition is, of course, on the corporation.

It appears from the evidence that in the year 1907 Worley was employed by the corporation to sell certain lands owned by said corporation and situated in Colusa county. These lands consisted of two large ranches, which were subdivided into small tracts by the corporation and thus placed on the market for sale. Worley sold a large number of said tracts of land, and for the services thus rendered the corporation agreed that he should receive, in addition to a salary of $100 per month, commissions at the rate of 2½ per cent. on the total amounts realized on all such sales. The terms upon which these sales were made consisted of the payment of a certain amount of the purchase price in cash on the execution of the contract of sale and the balance in installments. Worley's commissions were to be paid as the purchasers paid in these installments to the corporation. The agreement thus entered into between the parties was not originally reduced to writing.

It is first contended by the appellant that the alleged claim of Worley did not constitute a valid demand against the corporation for the alleged reason that it is based upon and grows out of an unwritten or oral agreement which, to be valid, is required by the statute of frauds to be committed to writing. It is further insisted that the court, by permitting the contestant to "amend" his opposition after all the testimony had been received, committed a fatal error, in that the alleged amendment involved the statement of an entirely new and substantive cause of opposition, different and distinct from that alleged in the original opposition. The first point was urged before the trial court on objections to the proof of the alleged contract and on a motion for a nonsuit presented at the close of the case for the contestant.

1. Section 1973, subd. 6, of the Code of Civil Procedure, provides that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid, "unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged," etc.

The evidence discloses that the original agreement between the corporation and Worley was oral, or unwritten, and, manifestly, if this were all the testimony received showing or tending to prove such agreement, it would be insufficient to establish a valid contract between the parties, and, necessarily, failure to disclose such a claim or demand against the corporation as would justify the court in denying it the right to be dissolved would follow. But, after certain sales were made, the corporation, by a memorandum in writing, signed by it, expressed the terms and conditions of the contract, thus admitting the making of the oral agreement, and, we think, this writing is sufficient to relieve the transaction from the operation of the statute. This memorandum consisted of a letter addressed to Worley, dated "March 4, 1908," and, as stated, signed by the corporation in its corporate name. This letter, in part, reads as follows: "E.

& O. E. following sales of the Redington & Hornlein ranches have been made on varied and divers terms with which you are familiar, and we have agreed to pay you a commission of 2½ per cent. on same due and payable when the terms and conditions of the various contracts have been complied with, viz." Then follows a list of the names of purchasers of the lands, together with the several and respective amounts which they were obligated to pay to the corporation by reason of said sales. The letter concludes with a request that Worley "check this up, and if any errors exist report them to us."

The foregoing letter clearly defines the terms of the oral agreement previously entered into between the parties. It is definite and certain, and leaves no ground for conjecture as to its meaning or the intention of the parties, or the terms and conditions upon which Worley's employment rested. And we think it is clearly sufficient to satisfy the requirements of the statute, notwithstanding the fact that it was not written until after the execution of the terms of the agreement on Worley's part.

There appears to have been in the early cases an apparent diversity of views among the courts concerning the nature and effect of the statute of frauds, some of the decisions appearing to treat such statutes, which, like ours, declare without qualification that the contracts to which they relate are invalid unless put in writing in some form, not as promulgating mere rules of evidence, but as going to the very vitality of the contracts themselves. We have not had our attention directed by counsel to any California cases which have passed directly upon this precise question. Of course, it will be admitted that contracts which are required to be in writing by the statute are in themselves perfectly valid; that is to say, there could be nothing, abstractly speaking, urged against their validity if the statute did not compel them to be in writing. However, should we feel required to view the statute as it reads in this state as affecting such contracts themselves, or, in other words, as constituting the writing as an essential element of the contracts themselves, we can even then perceive no sound or just reason in principle why, if originally fatally defective in the respect referred to, they could not be made valid by a subsequent writing, sufficiently clear and definite to disclose the terms and conditions of the agreement, somewhat in analogy to the principle which sustains a transaction in which an agent has performed some act in excess of his authority as such and in which the principal has subsequently ratified such act.

But the statute of frauds, in its original conception, was, as the purpose expressed in its title or preamble clearly implies (that is, to prevent frauds and perjuries), undoubtedly intended to establish mere rules of evidence for the preservation, in the highest and most unquestionable form, of the evidence of the terms of contracts relating to subjects involving the gravest concern to contracting parties. In other words, the original object of the statute was unquestionably to lay down in express terms certain rules by which, only, certain contracts, in themselves perfectly legal and valid, could be proved. The provisions of the statute, in other words, affected the remedy; that is, in effect deprived the party seeking to enforce a contract coming within their purview of his right of action if such contract were not in writing. And, we think, no more can be said of the purpose and effect of our statute, although it declares, as seen, without qualification, that the contracts with which it deals are invalid unless reduced to writing in some form. Its evident purpose, like that of the English statute (29 Car. II, c. 3), is to require contracting parties to commit to writing and thus put in enduring and unquestionable form, as evidence thereof, the terms of their agreements upon subjects to which the contracts affected by the statute relate. This is the view of statutes of frauds, phrased as ours is, expressed by courts of other jurisdictions, and in our opinion it is the correct view.

In Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571, a verbal contract had been made by the defendant with the plaintiffs for the purchase of a quantity of ice, to be delivered by immediate shipment to the defendant. The latter prevented the plaintiffs from performing the contract on their part "according to the preparations made by them for the purpose." On a date subsequently to the making of the oral agreement, the parties put said agreement into writing. In an action for a breach of said contract, the question presented was, stating it in the language of the opinion, "whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it? We incline to the latter view." The court then proceeds to sustain its conclusion by reasoning which we regard as conclusive. Among other things, the court says: "A distinction is attempted to be set up between the meaning to be given to Rev. St. c. 111, § 4, where it is provided that no unwritten contract for the sale of goods 'shall be valid,' and that to be given to the several preceding sections where it is provided that upon certain other kinds of unwritten contracts 'no action shall be maintained'; the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all." See Townsend v. Hargraves, 118 Mass. 325; Browne on St. of Frauds, §§ 115, 136; Benjamin on Sales, § 114; Coles v. Bowne, 10 Paige, 526.

But it is contended that the subscription of the mere corporate name of the corporation to the letter is not of itself sufficient to disclose the authenticity of said writing. In other words, the claim is that, in order to show that the letter was written and addressed to Worley by authority of the corporation itself, there must not only have been subscribed to the letter the corporate name and signature of the corporation, but, in addition, it must have been made to appear from the letter itself that the document was the result of the corporate act of the corporation, and to that end, and in order to bind the corporation, should have contained "the signature and official station of the official authorized to execute the same."

In answer to this contention it is first to be observed that counsel for appellant made no objection to the admission of the letter in evidence on the ground that the same was not, nor appeared not to have been, authorized by the corporation itself. Moreover, it appears that Mr. Garrette, a member and president of the corporation, wrote and mailed the letter to Worley, and it was expressly admitted by counsel for the appellant, during the hearing of the contest, that Garrette was authorized to represent the corporation in the transaction; that, to use counsel's own language, "whenever Garrette spoke, it was the corporation." And, in this connection, it may be added that Garrette admitted that the terms of the oral contract were expressed and embraced in said letter.

2. There is no merit in the point that the amended objections state a new, distinct, and different cause of opposition from that set up in the original. The latter alleged that the corporation was indebted to Worley in a sum exceeding $300 "for commissions due to the said Worley," etc. The evidence disclosed that the commissions to which Worley would be entitled would become due and payable only when the installments on the sums for which the tracts of land were sold by him were paid to the corporation. The contestant was allowed to amend his opposition so that it would conform to this proof, and it was, therefore, alleged, in addition to the allegations of the original, that the commissions would become due and payable when payments for the lands were made to the corporation by the purchasers.

The gist of an opposition to the dissolution of a corporation lies in the fact that there exists against such corporation a valid claim or demand, and, therefore, it is manifest that the form or character of such claim or demand is immaterial. Here the original opposition charged that the contestant has an unconditional, vested claim against the corporation. The evidence, admitted without objection, except in so far as it affected the question of the statute of frauds, disclosed a contingent claim and liability; that is, that the corporation's indebtedness to Worley was contingent upon the payment of the unpaid balances to become due on the purchase prices of the tracts of land sold by Worley. If such a liability constitutes a valid claim against the corporation, within the meaning of section 1228 of the Code of Civil Procedure, then the amended objections do not, obviously, state a new or different opposition from that set forth in the original. The amendment, in fact, does not, so far as the essential gist of the objections is concerned, go any further than the original opposition; the allegations as to the nature of the claim, with regard to the time at which it would become a vested and a present enforceable right, being, as declared, unnecessary and immaterial, and therefore surplusage.

That the liability existing in favor of Worley against the corporation constitutes a claim or demand which will interrupt the voluntary dissolution of a corporation under the provisions of section 1228 of the Code of Civil Procedure, we can perceive no sound reason for doubting. The liability, although contingent, will crystallize into an unconditional, enforceable right if the purchasers discharge their obligations to the corporation. And it is no argument against this view to say that the corporation could thus, against its will, be perpetuated as such indefinitely; for the contracts between it and the purchasers of the lands sold by Worley fix definite and certain times at which all payments, including the final payments, shall be made, and therefore definitely fix the times at which such contracts may become functus officio, whether their terms are complied with or not. If the terms of the contracts are fully performed by the purchasers, Worley would be entitled to his commissions, and, if paid, there would thus, of course, cease to exist any claim or demand against the corporation, so far as Worley was concerned. If the purchasers fail to make their payments when due, the contracts would lapse, and the corporation's liability to Worley would thereupon cease.

But it is argued with apparent earnestness that creditors have no right to object to the voluntary dissolution of a corporation. Manifestly, this argument flies squarely in the face of the statute, and to sustain it the plain language and obvious purpose of the law must be arbitrarily ignored. The contention appears to be founded on the fact that section 400 of the Civil Code makes provision for the protection of the rights of creditors of corporations that have been dissolved. But there is nothing in this provision which in any wise conflicts with the right given a creditor by section 1231 of the Code of Civil Procedure to object to the application by a corporation to be dissolved, nor with the provisions of section 1228 of said Code requiring a corporation making such application to allege and prove, before the court is authorized to declare the dissolution, that all claims and demands against it have been satisfied and discharged. The remedy afforded creditors by section 400 of the Civil Code is only cumulative or in addition to that afforded by the proceedings authorized by section 1227 et seq. of the Code of Civil Procedure. If a creditor should fail to object to the dissolution of a corporation, it would, nevertheless, as before stated, still be incumbent upon the corporation to prove the essential averments of the petition for a dissolution, among which is the averment that all claims and demands against it have been satisfied and discharged, and, on failure of such proof, the court would be as powerless to declare it dissolved as it would be if legal objections by some person had been made against its dissolution and sustained by the proofs. In other words, a private corporation can only be dissolved in the manner pointed out by the Legislature and by a compliance with the terms and conditions imposed by the statute. State I. & I. Co. v. San Francisco, 101 Cal. 135, 35 Pac. 549. And if dissolved by the court's judgment, still having creditors who had not objected to the dissolution in the proceeding for that purpose, section 400 of the Civil Code would still afford such creditors a remedy for the protection and judicial assertion of their claims against the corporation. As stated, the two remedies in no way conflict. The one is to preserve to the creditor the right to proceed directly against the corporation; the other authorizes him, after the corporation has been dissolved, to proceed, if necessary, against the directors or other persons appointed by the court as trustees of such corporation. Havemeyer v. Superior Court, 84 Cal. 365 et seq., 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; Crossman v. V. W. Co., 150 Cal. 580, 89 Pac. 335.

3. There are, as before stated, some other rulings of which complaint is made. To these we do not feel required to give extended attention. They relate to the exclusion and admission of certain testimony other than that bearing upon the question of the validity of the contract or whether said contract is within the statute of frauds, which question we have already disposed of. The claim of Worley against the corporation having been proved by competent evidence and, in fact, admitted, the rulings now referred to, conceding them to be erroneous, are manifestly harmless.

The purpose of the opposition was not to secure a judgment in favor of Worley for the amount of his claim. The purpose was, as we have shown, to show that "all claims and demands against the corporation" had not been "satisfied and discharged," and thus prevent a decree of the court declaring it dissolved. This was the only issue involved and, obviously, the only question that could be submitted for trial in this proceeding, aside from those other necessary facts which the first subdivision of section 1228 of the Code provides must be set out in the petition. Since the claim of Worley was not only properly proved, but admitted by its officers to exist against the corporation, such errors, if errors they be, as are involved in the rulings excluding an answer to the question whether Worley knew "at this time" he was a "creditor of the corporation," in striking out the testimony of Garrette relating to the details of the transactions between the corporation and Worley, refusing to permit Garrette to explain why he "gave Worley 2½ per cent. commission in addition to the $100 salary," and other alleged errors of a like nature, are immaterial. The oral testimony leading up to the execution of the written contract, or, speaking more accurately, leading up to the writing of the letter embracing the terms of the oral contract, was intended only as explanatory of the circumstances under which the contract was made and as introductory to the proof of the letter. Necessarily, the terms of the oral agreement had to be shown; but this testimony as to the terms and conditions of the agreement as originally made in no manner or degree changed or varied or differed from the terms and conditions of the contract as evidenced by the writing. The parol testimony, having agreed in all substantial particulars with the terms and conditions of the contract as disclosed by the letter, cannot be held to have been prejudicial.

Some of the findings are challenged on various grounds. The essential finding that a claim against the corporation has not been satisfied and discharged is of itself sufficient to support the judgment.

We have found no errors in the rulings of the court, either upon objections to evidence or the motion for a nonsuit, or anything with regard to the findings, which would justly warrant a reversal.

The order and judgment are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 201

PEOPLE v. VAUGHN. (Cr. 130.)

(Court of Appeal, Third District, California. Sept. 10, 1910.)

1. HOMICIDE (§ 131*)—ASSAULT WITH INTENT TO MURDER—INFORMATION—"MURDER."

An information alleging that accused on a specified date did willfully, unlawfully, and feloniously and with malice aforethought assault S.. with intent then and there to kill and murder her, was not fatally defective for failure to allege that S. was a human being, the term "murder" being defined as the unlawful killing of a human being with malice aforethought, under Pen. Code, § 950, subd. 2, providing that an information shall contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 204; Dec. Dig. § 131.*

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727.]

2. JURY (§ 82*)—SUMMONING—PREJUDICE OF OFFICERS—SHERIFF.

Where accused on the day before a jury was summoned to try him stated that he had no objection to the sheriff serving summons on veniremen, and that he believed the sheriff would be fair in the matter, and thereafter, when he attempted to challenge the panel, stated that he believed the sheriff was an absolutely fair and square man, the court did not err in refusing defendant's offer to prove in support of the challenge that the sheriff summoned the special venire entirely from M. where the feeling and prejudice against defendant was strong, the time being too short to summon jurors from any other place, as the fact, if proved, would not be indicative of bias on the part of the officer.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 307; Dec. Dig. § 82.*]

3. WITNESSES (§ 372*)—INTEREST—EVIDENCE.

Where a witness had testified that he had considerable interest in defendant's prosecution, and that the family to which he belonged had hired and were to pay counsel to assist in prosecuting accused, the court did not err in sustaining an objection to a question asked witness on cross-examination as to how much he paid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

4. CRIMINAL LAW (§ 464*)—EVIDENCE—INSANITY.

Where accused, in a prosecution for assault on S. with intent to murder, claimed that he was insane on the topic of his love for S., the court properly excluded a question asked of a witness as to whether accused with reference to that topic could reason and did reason with witness as a sane man concerning the same; such question not being in the form authorized by the Code to prove insanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1056; Dec. Dig. § 464.*]

5. CRIMINAL LAW (§ 1170*)—RULINGS ON EVIDENCE—CURING ERROR.

Where accused claimed he was insanely in love with the prosecutrix at the time he committed the alleged assault on her with intent to murder, he was not prejudiced by the exclusion of testimony as to whether witness observed anything peculiar and unnatural with reference to accused, the witness having afterwards testified that from what he noticed of defendant he believed he was irrational and insane, relating accused's conduct and statements forming the basis of his belief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

6. CRIMINAL LAW (§ 452*)—INSANITY—EVIDENCE.

Where accused in a prosecution for assault with intent to murder pleaded insanity, and the sheriff testified that he had had accused in his custody for three months, had seen him twice a day at least, and had heard conversations between him and others, had observed his actions and conduct during the entire period, he was properly permitted to testify as to his opinion concerning defendant's sanity, though he had no previous acquaintance with him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1054; Dec. Dig. § 452.*]

7. CRIMINAL LAW (§ 1153*)—APPEAL—RULINGS ON EVIDENCE—DISCRETION.

Whether witnesses testifying to opinions as to the sanity of accused were intimate acquaintances so as to qualify them was for the determination of the trial court in the exercise of discretion, which could not be interfered with on appeal, in the absence of abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3062; Dec. Dig. § 1153.*]

8. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—INSANITY—ABSTRACT STATEMENTS.

Where accused pleaded insanity, a provision of the charge calling the jury's attention to the fact that such defense was sometimes simulated and interposed because the facts rendered hopeless all others means of avoiding punishment was a mere abstract statement, and not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3159; Dec. Dig. § 1172.*]

9. CRIMINAL LAW (§ 829*)—REFUSAL OF REQUESTS—INSTRUCTIONS GIVEN.

Where every principle of law necessary for the intelligent guidance of the jury was contained in the court's charge, the refusal of requests to charge was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

H. W. Vaughn was convicted of assault with intent to murder, and he appeals. Affirmed.

A. B. Reynolds, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, and M. T. Brittan, for the People.

BURNETT, J. Defendant was convicted of the crime of assault with intent to commit murder and sentenced to the penitentiary for a period of 14 years. The prosecutrix was very seriously injured by a gunshot wound, and there is no doubt it was inflicted without any justification by defendant, but his defense is based upon the claim of insanity.

The first point made by appellant for a reversal is that the demurrer to the information should have been sustained for the reason that it is not alleged therein that "the Celia Skehan, upon whom the alleged assault was committed, is a human being." The charging part of said information is as follows: "The said H. W. Vaughn on or about the second day of October, nineteen hundred and nine, at the county of Yuba, in the state of California, then and there being, did willfully, unlawfully, and feloniously, and with malice aforethought, assault one Celia Skehan with intent then and there to kill and murder said Celia Skehan." It is difficult to treat seriously such an extremely technical objection. The Court of Appeals of New York in People v. Gilbert, 92 N E. 85, has recently considered a similar contention as follows: "The objection is purely technical, and technical objections are no longer regarded as serious unless they are so thoroughly supported by authority that they cannot well be disregarded, even under the latitude of the statute relating to the subject. The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was so severe as in many cases to shock the moral sense of lawyers, judges, and the public generally. When stealing a handkerchief worth one penny was punished by death, and there were nearly 200 different capital offenses, it was to the credit of humanity that technicalities should be invoked in order to prevent the cruelty of a strict and literal enforcement of the law. Those times have passed, for the criminal law is no longer harsh or inhumane, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Indeed, the information before us would seem to satisfy the requirement of the Code that it must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 950, subd. 2, Pen. Code. The information is not required to be drawn in accordance with any antiquated and arbitrary notion of the rules of technical pleading, but a simple and sufficient test is prescribed which can leave no doubt as to the correctness of the court's ruling. We venture to assert that no person "of common understanding" would or could fail to know that the district attorney intended to charge the defendant with making the assault upon a human being. The name itself very clearly indicates that, but used in connection with the term "murder," there is no room whatever for controversy. "Murder" has a well-defined meaning, and that meaning is, "the unlawful killing of a human being with malice aforethought." The decisions also are entirely opposed to appellant's position. Some of them are cited in the Gilbert Case, supra. The cases invoked by appellant are not in point. It is true that in the case of People v. Lee Look, 137 Cal. 590, 70 Pac. 660, the Supreme Court has virtually held that a "person of common understanding" would be in doubt whether "Lee Wing" was a human being unless some qualifying expression were used, still it is said: "It will be noticed that in this information the thing killed, Lee Wing, is not averred to have been a human being; that the crime for which he is sought to be charged is not stated to be 'murder'; that there is no averment that he did 'kill and murder' Lee Wing; that the word 'murder' nowhere appears in the document, nor does the latter contain any other language which necessarily implied that the appellant killed a human being." Whereas, here, as we have seen, the term "murder" is used, which necessarily implies a human being.

There is no merit in the point that the court erred in overruling defendant's motion to be permitted to present evidence to show bias on the part of the officer who summoned the panel. The offer of the defendant was to prove that the sheriff summoned the special venire "entirely from the city of Marysville, where the feeling and prejudice against the defendant was strong." From this he proposed to contend that "there must have been prejudice and bias on the part of the officer." The conclusion would not be warranted from the circumstance relied upon. Besides, the defendant had stated the day before that he had no objection to the sheriff serving the summons, believing that he would be fair in the matter. When the purported challenge was made, he had not changed his mind as to the officer, for he stated: "I believe Mr. Voss is an absolutely fair and square man." It may be said, further, that it appears the time was too short for the jurors to be summoned from any point outside of the city of Marysville, and, upon an examination of said jurors, the required number was found who had no prejudice against the defendant. It is manifest, therefore, that appellant has no cause for complaint as to the challenge of the panel.

The witness Poole, brother-in-law of the prosecuting witness, was asked on cross-examination: "How much do you pay?"—referring to the employment by his family of counsel to assist in the prosecution of defendant. An objection was sustained to the question. The ruling was without prejudice as the witness had already admitted that he "certainly had considerable interest in the case," and had testified that he had not directly employed Mr. Brittan, but that the family had and the family was to pay for the services. The exact amount to be paid by the family or any member of it would add nothing to the testimony already given.

An objection of the prosecution was sustained to the following question asked of a certain witness: "Could he in reference to this particular topic (his love for Miss Skehan) reason and did he reason with you as a sane man in reference to this particular topic?" This is not the form of question as to sanity authorized by the Code and decisions, and we can see no error in the court's ruling. But the matter was entirely covered by the testimony of the witness who was allowed to state that she believed that the defendant was insane on the subject, that he acted in an irrational manner, and she gives at great length her reasons for the belief including the way in which he talked about the prosecuting witness. A similar suggestion is applicable to the ruling sustaining an objection of the prosecution to the following question asked of another witness: "Did you observe anything peculiar and unnatural in reference to this defendant?" The witness afterwards testified that from what he noticed of the defendant he believed him to be irrational and insane, and he proceeded to relate in elaborate detail the defendant's conduct and statements.

Mr. Lydon, the undersheriff of the county, was called as a witness in rebuttal, and after stating that the defendant had been in the custody of the witness since October 15, 1909—a period of three months—and that he had seen him twice a day at least and had heard conversations between him and other persons and had observed the actions and conduct of defendant during the entire period, he was asked this question by the district attorney: "I will ask you, Mr. Lydon, if you formed any opinion as to the sanity or insanity of the defendant?" Defendant's objection to the question was overruled. The situation is almost identical with that presented in the case of the witness Weise, set forth in People v. McCarthy, 115 Cal. 260, 46 Pac. 1074, where it is said: "The witness Weise, the jailer who received defendant at the county jail, on the day of his arrest, was permitted to testify that defendant appeared 'rational' at that time. The witness had had no previous acquaintance with the defendant, and it is contended that the evidence was incompetent. But under the rule declared in People v. Lavelle, 71 Cal. 352, 12 Pac. 226, and Holland v. Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231, the evidence was unobjectionable. It is there held that the question of the mere manner or appearance of a person at a particular time does not fall within the rule which requires the witness to be an 'intimate acquaintance' in order to be competent to testify. Moreover, we think the opinion of the witness is to be regarded as having been formed more upon his subsequent acquaintance with and knowledge of defendant acquired during the months that the latter remained under his charge in the county jail than upon the mere appearance of defendant when first brought to the jail. The evidence shows that the witness had a very excellent opportunity, of which he availed himself, to acquire an intimate knowledge and form an intelligent judgment of defendant's manner and mental condition, and we think upon this ground, that the evidence was admissible." It was also held that the evidence was proper rebuttal to meet the testimony in behalf of defendant.

It is contended that the testimony of certain witnesses that in their opinion the defendant was sane was improperly admitted, for the reason that said witnesses were not "intimate acquaintances" within the rule permitting such testimony. It is well settled, however, that "the question as to whether one has been shown to be an intimate acquaintance, and therefore qualified to express an opinion as to the sanity of a person, is from its nature peculiarly one that is addressed to the discretion of the trial court, and that the appellate court will not interpose unless an abuse of that discretion is clearly apparent." People v. Manoogian, 141 Cal. 598, 75 Pac. 179. In the case of none of said witnesses here can it be said that the evidence was insufficient to justify the ruling, nor that the court abused its discretion in any manner.

Appellant criticises a portion of the charge on insanity in which the jury's attention is directed to the fact that this defense is sometimes simulated and interposed because the facts render hopeless all other means of avoiding punishment. The admonition probably might well have been omitted, but a sufficient answer to appellant's contention is found in People v. Methever, 132 Cal. 236, 64 Pac. 481, as follows: "And, while we see no legal reason why the information therein contained should be given to the jury in the court's charge, yet upon an examination of these statements, we find them made purely and entirely in the abstract. They are not directed toward the defendant and his case, and, assuming the jury to be an intelligent body of men, the instruction could have done him no prejudice." In the later case of People v. Manoogian, supra, it is also said: "It has been given in several cases, and, while this court has frequently said that it would be better if this instruction were omitted altogether, it has also been said that it has been given so often in the past and approved by this court that it will not now be held prejudicially erroneous." In this connection it should be said that the court fully and accurately instructed the jury as to insanity and declared to them that "this defense must be considered and weighed fully, fairly and justly; and, when proved, it must recommend itself to the sense of humanity and justice of the jury."

There was no error committed in refusing any instruction proposed by the defendant. Every principle of law necessary for the intelligent guidance of the jury in reaching a correct conclusion from the facts was contained in the clear and elaborate charge of the court.

Indeed, the whole trial seems to have been conducted with the utmost care that no right of the defendant should be invaded, and we find nothing in the record to justify a reversal.

The judgment and order appealed from are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

14 Cal. App. 273

PEOPLE v. HERGES. (Cr. 260.)

(Court of Appeal, First District, California. Sept. 21, 1910.)

1. HOMICIDE (§ 342*)—MANSLAUGHTER — SUFFICIENCY OF EVIDENCE.

If the evidence justified a verdict of murder, accused cannot complain of a verdict of manslaughter as it would also be sufficient to sustain the latter verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 342.*]

2. HOMICIDE (§ 338*)—TRIAL—RECEPTION OF EVIDENCE—ACTION OF TRIAL COURT.

Any error in a murder case, in admitting evidence that decedent, shortly after the injury, stated in accused's presence that accused stabbed him without cause, and in refusing to permit accused to make a preliminary examination as to the circumstances under which such statement was made, was cured by the action of the court, after full cross-examination of such witness by accused, and before the introduction of accused's testimony, in striking out such evidence, and pointedly directing the jury to utterly disregard any evidence that had been admitted, and afterwards stricken out by order of the court.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 338.*]

3. WITNESSES (§ 345*)—CREDIBILITY—FORMER CONVICTION.

Under Code Civ. Proc. § 2051, permitting a witness to be impeached by showing that he has been convicted of a felony, and section 2065, requiring a witness to answer to the fact of his previous conviction for felony, evidence was admissible on the question of accused's credibility as a witness that he had previously been convicted of a felony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126–1128; Dec. Dig. § 345.*]

4. HOMICIDE (§ 116*)—SELF-DEFENSE—APPREHENSION OF DANGER.

Accused's apprehension of danger or death must have been such as any reasonable man would conceive to be imminent under the circumstances in order to justify the killing as in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158–163; Dec. Dig. § 116.*]

5. HOMICIDE (§ 300*) — INSTRUCTIONS — SELF-DEFENSE.

The court should instruct that, to justify the killing as in self-defense, accused must not only have believed himself to be in imminent peril at the time, but as a reasonable man he must have had sufficient grounds for such belief.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614–632; Dec. Dig. § 300.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

William Herges was convicted of manslaughter, and from the judgment of conviction, and an order denying his motion for new trial, he appeals. Affirmed.

Robert Borland and John D. Willard, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

HALL, J. Defendant was charged with the crime of murder, and also with having suffered a prior conviction of the crime of burglary. Upon his arraignment he admitted the charge of prior conviction to be true, and upon trial was found guilty of manslaughter. This is his appeal from the judgment and order denying his motion for a new trial.

The first point presented in appellant's brief is that the evidence was insufficient to justify the verdict of guilty of manslaughter. Upon this point appellant states his position as follows: "It is the contention of the appellant that the evidence presented cannot justify the verdict of manslaughter. That upon the evidence produced for the state the defendant should either have been convicted of murder or have been acquitted, and that the defenses of either self-defense or insanity, if believed by the jury, should have produced an acquittal. If not believed, the verdict should have been murder." In other words, appellant concedes that the evidence for the prosecution would have justified a verdict of guilty of murder. If so, it necessarily follows that the same evidence was not only sufficient, but more than sufficient, to support a verdict for manslaughter. People v. Muhlner, 115 Cal. 303, 47 Pac. 128.

The appellant also complains of the action of the court in permitting the introduction of evidence to the effect that decedent shortly after the injury stated in the presence of defendant that defendant stabbed him (decedent) without cause, and in refusing to defendant the right to conduct a preliminary examination as to the circumstances under which such statement was made, and the condition of defendant and the circumstances surrounding him when such statement was made. Subsequently, however, after full cross-examination of the witness by defendant, and before the introduction of any testimony for the defense, the court struck out the testimony objected to, and in pointed and explicit terms directed the jury to totally disregard it. The court again, in pointed and explicit terms, in its charge to the jury told them to "absolutely and completely and utterly" ignore and disregard any evidence that may have been admitted and afterwards by order of court stricken out. Under these circumstances any error, if any, committed by the court in admitting the evidence in question, or in ruling on defendant's application to be allowed to cross-examine the witness preliminary to his giving his testimony, was cured by the subsequent action of the court. People v. Hoy Yen, 34 Cal. 176; People v. Borda, 105 Cal. 636, 38 Pac. 1110; People v. Prather, 134 Cal. 436, 66 Pac. 589, 863.

Appellant in his brief makes the point that the court erred in allowing the district attorney to prove, upon cross-examination of defendant, who voluntarily became a witness for himself, that he had been convicted of a felony. This point, however, appellant very properly abandoned at the oral argument. People v. Soeder, 150 Cal. 12, 87 Pac. 1016; Code Civ. Proc. §§ 2051, 2065.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The very common complaint is made that the district attorney was guilty of misconduct in his argument to the jury in referring to the fact of defendant's previous conviction for a felony. The record discloses that the references to defendant's previous conviction were made by the district attorney in connection with and as a part of his discussion of evidence that had been given on behalf of defendant as to his general reputation for peace and quietness. Several references of this kind were made without objection, but finally counsel for defendant did object, whereupon the court directed the district attorney to omit such references, and directed the jury to ignore what the district attorney had said with reference to defendant's conviction for felony "in so far as he might have attempted to make that bear on the question of this man's reputation for peace and quiet." The court thus sustained the contention of appellant, and by its instruction to the jury protected defendant from any injury that might otherwise have resulted from the course of the district attorney. The evidence in question was of course proper to be considered by the jury upon the question as to the credibility of defendant as a witness in the case. People v. Soeder, supra; Code Civ. Proc. §§ 2051, 2065.

The only remaining point arises out of certain modifications that the court made to certain instructions given at the request of the defendant concerning the right of the defendant under the law of self-defense to act upon appearances, that is, apparent necessity. One of the modifications was to the effect simply that the apprehension of injury or death must be such as any reasonable man would conceive to be imminent under the circumstances. This certainly was not erroneous, and is clearly supported by People v. Glover, 141 Cal. 233, 74 Pac. 745.

The other modification was of similar import. As was said in People v. Glover, supra: "It was the duty of the court to so formulate the instructions as to obviate any danger of the law being misunderstood, and as clearly as possible inform the jury that, in order to justify the defendant under his plea of self-defense, it must appear not only that defendant actually believed himself in deadly peril, but that as a reasonable man he had sufficient grounds for his belief." This was the effect of the modifications complained of, and the court committed no error in so modifying the instruction. People v. Glover, supra.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 240

SOUTHERN PAC. MILLING CO. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR COUNTY OF LOS ANGELES. (Civ. 855.)

(Court of Appeal, Second District, California. Sept. 13, 1910.)

1. Prohibition (§ 10*)—Jurisdiction of Superior Court—Amendment to Defective Petition.

The insolvency law confers jurisdiction upon the superior court to adjudicate one an insolvent when five or more resident creditors whose claims aggregate $500 or more petition the court therefor, and provides that the petition must be verified by at least three petitioning creditors, must set forth certain requisite facts, and that it may be amended and corrected to conform to the facts, and that such amendment shall relate back to, and as embraced in, the original petition, and that the filing of a petition by or against the debtor upon which or an amendment of which an order of adjudication of insolvency may be made shall be deemed to be the commencement of proceedings in insolvency, and authorizes an appeal from the order granting or refusing an adjudication of insolvency. *Held* that, while a petition in conformity with the statute is essential to confer jurisdiction upon the court, such jurisdiction may be conferred by amendments to a defective petition which by relation are taken as embraced in the original, the amendments, however, being confined to the facts stated in the petition, which presupposes that a petition signed by authority of the requisite number of creditors, properly verified has been filed, and hence, where such amendments are properly made, prohibition will not lie to restrain the proceedings on the ground of want of jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37, 54, 55; Dec. Dig. § 10.*]

2. Insolvency (§ 32*) — Petition — Officers Authorized to Affix Corporate Names.

The insolvency law being silent as to the character or class of officers authorized to affix the corporate name to the petition, where a corporation is petitioner for the adjudication of another as an insolvent, it may be signed or verified by any one of the corporation's officers or agents in its behalf.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 38; Dec. Dig. § 32.*]

3. Prohibition (§ 10*)—Grounds—Insolvency Proceedings—Petition for Adjudication—Authority of Persons to Sign.

Assuming that any one other than the insolvent may question before adjudication the authority of persons to sign the petition for adjudication, or that such petition has been altered after the signatures were attached, such authority or the change in the petition are questions of fact for the superior court to determine, and its ruling thereon cannot be interfered with by prohibition on the ground that it is proceeding without jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 54; Dec. Dig. § 10.*]

4. Prohibition (§ 10*)—Amendment to Petition—Questions of Law.

What amendments are permissible amendments of fact in such case in order to confer jurisdiction and the effect which should be given amendments to the petition remain questions of law cognizable on prohibition after the trial court has determined the facts.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 54; Dec. Dig. § 10.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. PROHIBITION (§ 3*)—GROUNDS—ADEQUATE REMEDY BY APPEAL.

The statute providing an adequate remedy by appeal if a proper party to the proceedings is prejudiced by error of the trial court in connection with the judgment of adjudication, prohibition will not lie, as one not a proper party would not be interested in the proceedings, and hence not entitled to prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

Prohibition by the Southern Pacific Milling Company against the Superior Court of the State of California in and for the County of Los Angeles. Writ denied.

Grant Jackson and E. W. Squier, for petitioner. E. S. Williams, for respondent.

PER CURIAM. Petitioner represents: That heretofore, on March 24, 1910, a petition purporting to be signed by four California corporations, together with an individual, all claiming to be creditors of a contracting company each in an amount exceeding $500 on account of debts contracted within this state, and alleging acts of insolvency as defined by the insolvent laws of this state, was verified by each person so signing in behalf of the respective corporations to the effect that the person so signing was an officer or agent of the petitioning corporation, and that the facts stated therein were true. This petition so verified was filed in the superior court of Los Angeles county, bearing number 73,780. That in said action and proceeding the contracting company appeared and filed its demurrer, which being sustained, leave was given to amend. That an amended petition was filed sufficient in form and substance, to which the contracting company duly filed its answer. That when the original petition was filed a bond as required by the statute was also filed, and subsequently when the amended petition was filed it was accompanied by another bond. That, when the amended petition was filed, a second order to appear and show cause was issued. It is not made to appear that the issues presented by the answer of the contracting company have ever been tried. Petitioner herein, pending the hearing upon the issues presented by the answer of the alleged insolvent, asserting that as an attaching creditor it had acquired a lien upon the property of the alleged insolvent within 30 days preceding the filing of the original petition, but more than 30 days preceding the filing of the amended petition, by leave of court moved to dismiss the original petition and proceedings connected therewith upon the grounds that the court had no jurisdiction over the subject-matter, because of defects in the petition and bonds, and that the corporate names to the same were signed without authority of the corporations affected thereby. Upon the hearing of said motion, petitioner herein and the moving party tendered proof not only of want of authority, but of interlineations and corrections in the petition for adjudication made therein after the signing and before the filing thereof. The court below refused to admit such evidence and denied the motion to dismiss. Petitioner now comes, and by this proceeding seeks to prohibit the superior court from making any order of adjudication of insolvency based upon or connected with the original cause filed in 73,891. The insolvency law confers jurisdiction upon the superior court to adjudicate one an insolvent when five or more resident creditors whose claims aggregate $500 or more petition the court therefor. This petition must be verified by at least three petitioning creditors, and must set forth certain requisite facts. The petition may be amended and corrected so that the same shall conform to the facts, and such amendments relate back to, and as embraced in, the original petition, and the filing of a petition by or against the debtor upon which, or an amendment of which, an order of adjudication of insolvency may be made, shall be deemed to be the commencement of proceedings in insolvency. An appeal is authorized from the order granting or refusing an adjudication of insolvency. While it is true that a petition in conformity with the statute is essential in conferring jurisdiction upon the superior court in cases of this character, yet, under the statute as now existing, such jurisdiction may be conferred by amendments to a defective petition which by relation are taken as embraced in the original, such amendments, however, being confined to the facts stated in the petition, which presupposes, of course, that a petition signed by authority of the requisite number of creditors properly verified has been filed.

The insolvent law is silent as to the character or class of officers authorized to affix the corporate name. When so silent, the same may be signed or verified by any one of its officers or agents in its behalf. Old Settlers' Investment Co. v. White, 110 Pac. 922. Reading the original petition and its verification together, we find that four of the corporate signatures were affixed by officers or agents of such corporations. As to the signature of the fifth creditor, an individual, no question is raised. Assuming for the purpose of this decision, without so deciding, that any one other than the insolvent may question, before adjudication, the authority of the parties to sign the petition for adjudication, or that such petition has been altered or changed after the signatures thereto were attached, the matter of such authority or the change in the petition still remain questions of fact for the superior court to hear and determine. Upon their face the petition and verification were sufficient in form and substance. What amendments are comprehended within the term amendment of facts, and the effect which should be given amendments to the petition, remains a question of law after the trial court has determined the facts. In the event that a proper party to the proceedings is prejudiced by error of the trial court in connection with the judgment of adjudication an adequate remedy is provided by an appeal. Prohibition will not lie when such adequate remedy exists. Cross v. Superior Court, 2 Cal. App. 342, 83 Pac. 816, and cases cited. If, upon the other hand, petitioner is not a proper party who may so appeal, it must follow that he is not interested in the proceeding, and cannot be heard in an application to arrest the order of court in a case to which he is a stranger.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Viewing the case in any light, we are satisfied that the writ should be denied, and it is so ordered.

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14 Cal. App. 280

PEOPLE v. AH HIM et al. (Cr. 280.)

(Court of Appeal, First District, California. Sept. 21, 1910.)

1. FISH (§ 15*) — CRIMINAL PROSECUTION — SUFFICIENCY OF EVIDENCE.

In a prosecution for using Chinese shrimp or bag nets for the purpose of catching fish, evidence *held* to justify a finding that defendant used a net for the purpose of catching fish as well as shrimps.

[Ed. Note.—For other cases, see Fish, Dec. Dig. § 15.*]

2. CRIMINAL LAW (§ 674*) — ADMISSION OF EVIDENCE—RULINGS—EXCLUSION.

Where, in a prosecution for using Chinese shrimp nets to catch fish, it appeared that, when accused was asked by his counsel as to where he was fishing on the day of the alleged offense, the court stated that it did not intend to prevent any traverse of the people's testimony as to where the alleged act was committed, and afterwards overruled an objection to a similar question with the statement that the evidence was in traverse of the state's testimony, and the court would allow the defense to cover the point, the court did not sustain the objection to the first question asked, though it was not answered.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 674.*]

3. CRIMINAL LAW (§ 404*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution for using Chinese shrimp or bag nets to catch fish, in violation of statute, samples of the fish caught by accused on the day alleged and taken from his boat by the officers were properly admitted in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 872–877; Dec. Dig. § 404.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Ah Him and others were convicted of catching fish in violation of statute, and, from judgments of conviction and orders denying motions for new trials, they appeal. Affirmed.

Wm. R. Twamley, for appellants. Attorney General Webb, C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., for the People.

HALL, J. The defendants were convicted of using Chinese shrimp or bag nets for the purpose of catching fish in the waters of the state of California in violation of section 636 of the Penal Code. They have appealed to this court from the several judgments and orders denying their motions for new trials.

The principal point urged for a reversal is that the evidence is insufficient to support the verdict, in this, that it shows that they were fishing for shrimp and not for fish.

They were certainly using Chinese shrimp or bag nets, and the evidence clearly shows that upon the day upon which the charge is laid they in fact caught in their bag nets both shrimps and fish. In fact, the evidence shows that they caught and kept more fish than shrimps. The fish were all food fish of different varieties, and for the greater part very small. The fish as well as the shrimps (about four tons) were taken from their nets, placed in their boat, and were being taken by defendants to the shore when they were overhauled by the officers. One of the officers on the day in question visited the camp of defendants at Hunter's Point and found there freshly caught fish as well as shrimps in process of drying. From these facts the jury were justified in believing that defendants used the nets for the purpose of catching fish as well as shrimps. If they were using Chinese shrimp nets for the purpose of catching fish, they were guilty under the statute, though they were using the same nets for catching shrimps also. It was under the evidence peculiarly the province of the jury to determine the purpose with which defendants used the nets. The evidence is sufficient to support the verdict.

Appellants also contend that the court erred in sustaining an objection to the question asked by defendant's counsel of one of the defendants as follows: "Would you just state to the jury how far from Hunter's Point you were fishing on the 8th day of April of this year?" But an examination of the record discloses that the court did not sustain the objection. The court did make some observations as to the effect of section 781 of the Penal Code, but also stated that the court did not intend to prevent any traverse of the testimony for the people as to where the alleged act was committed. The question was, however, not answered, but that the court never ruled or intended to rule that such question should not be answered is made perfectly clear by its ruling on a similar question later put to the same witness, "How far from the Alameda county line were you fishing on the 8th day of April of this year?" The district attorney objected to the question, but the court overruled the objection, and in doing so stated that the evidence was in traverse of the testimony of the prosecution, and that the court would allow the defense to cover the point.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The only other point relied on is that the court allowed samples of fish taken from defendants' boat by the officers on the day in question to be introduced as evidence. These were a part of the fish caught by defendants in the shrimp nets, and their introduction was clearly proper.

The judgments and orders are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

14 Cal. App. 256

BUDD v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 884.)

(Court of Appeal, Second District, California. Sept. 19, 1910.)

1. Appeal and Error (§ 1094*)—Findings of Court—Conclusiveness—Rulings of Intermediate Court.

The ruling of the superior court, based on the conflicting affidavits of the parties on a motion to dismiss an appeal from the magistrate's court, is not reviewable on appeal so far as the facts are concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4322; Dec. Dig. § 1094.*]

2. Undertakings (§ 1*)—Surety—Justification—Waiver.

The justification of sureties on undertakings may be waived by the failure of the excepting party to appear at the time set therefor.

[Ed. Note.—For other cases, see Undertakings, Dec. Dig. § 1.*]

3. Prohibition (§ 20*)—Petition.

Plaintiff in a justice's court, having unsuccessfully moved to dismiss the appeal to the superior court for want of due justification of the surety on the appeal bond, applied to the District Court of Appeal for a writ of prohibition. His petition stated that on a specified date the surety appeared before the justice to qualify on the undertaking on appeal seven days after service of plaintiff's notice of exception. In his brief it was stated that the justification of the surety occurred, according to the record, on the same specified date, seven days after the acceptance of service by the attorney for the defendant. *Held*, that these statements warranted the assumption that the justification on the date mentioned was regular and on due notice, and, if made in time, was sufficient.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 69; Dec. Dig. § 20.*]

4. Justices of the Peace (§ 159*)—Sureties on Appeal Bond—Filing of Notice of Objection—Necessity for.

Under Code Civ. Proc. § 978a, providing that the respondent in an appeal from a magistrate may except to the sufficiency of the sureties on the appeal bond within five days after the filing of the bond, and that the appeal shall be of no avail if the sureties do not justify within five days thereafter, the exception is not complete till filed, so where a surety justified seven days after notice of exception, but within five days from the filing thereof with the justice, it was sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. § 159.*]

5. Justices of the Peace (§ 164*)—Appeal—Return—Time to Make.

Since by Code Civ. Proc. § 978a, the justification of a surety on a bond on appeal from a justice's court must be before the justice, section 977, requiring the justice to transmit all papers to the superior court within five days after the perfecting of the appeal, should be construed to require the justice to hold the papers for five days more, if necessary to allow justification of sureties on an appeal bond, where the surety is excepted to.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 620; Dec. Dig. § 164.*]

Petition by Harold Budd against the Superior Court of Los Angeles County for a writ of prohibition. Writ denied.

Willis S. Mitchell, for petitioner.

PER CURIAM. By this proceeding it is sought to have a writ issued prohibiting the superior court from taking further action in a certain cause entitled Harold Budd, Plaintiff, v. M. F. Schmitt, Defendant, other than to dismiss the appeal taken by the defendant to said superior court from a judgment entered in the justice's court of Los Angeles township.

Petitioner was awarded a judgment against Schmitt in the justice's court in April, 1910. Schmitt in due time gave notice of appeal and filed the necessary undertaking which was furnished by a surety company. On May 16, 1910, petitioner served on the attorneys for Schmitt a notice, excepting to the sufficiency of the surety company as surety on the undertaking on appeal. This notice of the exception was not filed with the justice until May 18, 1910. On May 17th, however, counsel for Schmitt gave notice to the attorney for Budd that the surety would justify on May 18, 1910, at 9:30 o'clock a. m. before the justice. At the time the last-mentioned notice was served, Budd's counsel announced that he would not accept service thereof and would not be present in court on the following day. When the case reached the superior court, a motion was made to dismiss the appeal on the ground that the surety on the undertaking on appeal had not justified within five days after service of the notice of exception to its sufficiency. At the hearing on this motion affidavits were submitted and the court made an order denying the motion. There was a conflict of evidence on the point as to whether or not the surety on the undertaking on appeal had appeared in the justice's court to justify on May 18th; but it appears reasonably certain from the affidavits that Budd made no appearance on that day in the justice's court for the purpose of examining the surety. It was for the judge of the superior court to determine, on the hearing of the motion to dismiss the appeal, whether there had been a justification by the surety, or, if not, whether such justification had been waived. In so far as that determination depended upon a conclusion of fact to be drawn from the conflicting evidence presented by the affidavits, the finding of the court cannot, of course, be reviewed. Bank of Escondido v. Superior Court, 106 Cal. 47, 39 Pac. 211; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8. The justification of sureties on undertakings may be waived by the failure of the party excepting to appear at the time set for the justification. From the opinion in the case of Bank of Escondido v. Superior Court, supra, we quote: "The justification, then, is a right accorded to the adverse party which he may either waive expressly, or be debarred from asserting under well-settled rules of estoppel. * * * But while the waiver may be express, as in Blair v. Hamilton, 32 Cal. 53, it may also arise through laches. The rule here is thus laid down: 'In case of nonappearance on the part of the exceptant, the party giving the undertaking may either rest on the default as a waiver of the exception, or he may produce his sureties and take a formal approval.' 1 Abbott's New Practice, 485." Therefore, if the superior court found from the evidence before it that there had been a failure of Budd to appear at the time fixed for justification, and that the surety did appear, the order denying the motion to dismiss the appeal was properly made.

But in addition to the justification noticed to be had on May 18, 1910, it seems that there was an appearance on May 23d, by the surety before the justice for the purpose of justifying. Just how it came about, and upon what form of notice this second appearance by the surety was made is left, by the record and proof submitted here, to conjecture. A justification on May 23d would have been seven days after service of the notice of exception to the sufficiency of the surety, but within five days after that notice had been filed with the justice. Petitioner seems to admit that there was a complete justification on the 23d day of May, for in his petition he alleges "that thereafter, to wit, on the 23d day of May, 1910, said sureties appeared before Hon. R. A. Ling, justice of the peace, to qualify on said undertaking on appeal, and seven days after the service of the notice by plaintiff of his objection and exception to the sufficiency of the surety on the said undertaking on appeal." In petitioner's brief on the same subject he further states: "The justification of the sureties occurred, according to the record, on May 23, 1910, or seven days after the acceptance of service by the attorneys for the defendant." These statements of the petitioner and his counsel warrant the assumption that the justification made on May 23d was regular, and had under proper notice, and if made in time that it was sufficient.

The question then presented is one with which the decisions of our own state have not directly dealt. In all of our statutes referring to the taking of exception to sufficiency of sureties on undertakings on appeal, it is nowhere declared how that exception shall be taken. Section 978a, Code Civ. Proc., contains the provision as to exceptions taken to undertakings on appeal from justices' courts. It reads: "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking and unless they or other sureties justify before the justice or (police) judge within five days thereafter, upon notice to the adverse party, * * * the appeal must be regarded as if no such undertaking had been given." Construing the several provisions of the Code relating to justices' courts and the practice therein together, we are of the opinion that a party excepting to the sufficiency of sureties on an undertaking on appeal must file his notice of exception with the justice, and that no such exception will be deemed to be complete until such notice is filed. It will be observed that under the provisions of section 977, Code Civ. Proc., the justice or (police) judge is required within five days after the perfecting of an appeal, to transmit all papers to the superior court, including the undertaking on appeal. When these papers have once been properly filed in the superior court, the justice has no power to recall them for any purpose; neither would the superior court possess authority in such a case to cause the papers to be returned to the justice. Where justification of sureties on the undertaking on appeal is had, it must be had before the justice, for section 978a so requires. An exception to the sufficiency of the sureties might, perchance, be taken on the fifth day after the appeal had been perfected. The adverse party then would have five days within which to cause his sureties to justify. It would be the justice's duty to send the papers to the superior court on the sixth day, unless the notice excepting to the sufficiency of the sureties had been filed with him. Where such a notice is filed, the section should be construed as requiring the justice to hold the papers for a further period of five days to allow justification to be made.

In Idaho the statute relating to the taking of exceptions to sureties on undertakings on appeal is practically identical with our statute. The Supreme Court of that state, in the case of Holcomb v. Reed, 5 Idaho, 60, 46 Pac. 1019, used the following expression: "Under the provisions of section 4842, Rev. St., the adverse party may except to the sufficiency of the sureties on an undertaking on appeal. Said section does not in terms require notice of the filing of such exception to be served on appellant or his attorney. But professional courtesy and the better practice require such notice to be served."

Our conclusion is that a notice of exception to the sufficiency of the sureties on an undertaking on appeal from a justice's court, to be effective at all, must be filed with the justice; and that the adverse party is allowed five days after the filing of such notice of exception within which to submit his sureties before the justice for the purpose of having them justify. In this case the justification of the surety, if incomplete on May 18, 1910, was within time when made on May 23d.

The writ is denied.

14 Cal. App. 278

PEOPLE v. ONG GIT. (Cr. 266.)

(Court of Appeal, First District, California. Sept. 21, 1910.)

LARCENY (§ 65*)—GRAND LARCENY—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for grand larceny, evidence *held* insufficient to support a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 160; Dec. Dig. § 65.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Ong Git was convicted of grand larceny, and he appeals. Reversed.

Robert Ferral, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., for the People.

COOPER, P. J. The defendant prosecutes this appeal from the judgment finding him guilty of grand larceny and sentencing him to a term of four years in the state prison.

His claim that the evidence is insufficient to support the verdict must be sustained.

The evidence shows that about 10 o'clock on the night of February 15, 1910, at Waverly place in the city and county of San Francisco, some one grabbed from the head of Lee Shin Gin, a Chinese woman, three ornaments which she then had in her hair, of the value of about $80. The thief immediately ran off with the ornaments. She did not pretend to identify the defendant, did not see his face, but said that the size, dress, and general appearance of the thief were about the same as defendant; that the thief was quite tall. At the time the crime was committed Gin Shee, the sister-in-law of the woman, who was robbed, was with her. She did not see the thief's face, and could not identify defendant as the thief. She testified that the person who grabbed the ornaments had on dark clothes and a dark hat, but she could not say how they compared with the clothes of defendant; that the figure of the thief was about medium. The witness Dolan testified that he was on Dupont street at the time, and hearing some one scream he looked and saw a Chinaman turn the corner from Sacramento street into Dupont street, run across Dupont street, turning down Commercial street, where he disappeared from the sight of the witness; that he could not identify the defendant as the man he saw running for the reason that the man was dressed and looked like the ordinary Chinaman; that some two or three minutes after seeing the Chinaman run into Commercial street he saw a police officer, and informed such officer that the Chinaman had run down Commercial street. Larkin, the police officer, testified that Dolan informed him of seeing the Chinaman run, and after some two or three minutes he went down Commercial street, about 10 or half past 10 o'clock p. m., saw a Chinaman standing over an iron trapdoor in front of No. 710 Commercial street; and that he then and there went up to the Chinaman and arrested him, the same being the defendant. The witness, Brady, a police officer, testified that he went on duty near midnight of the evening of the robbery; that a little after midnight he examined the trapdoor at 710 Commercial street, and found the stolen ornaments under the door.

We thus have nothing but the facts that the thief ran down Commercial street; that defendant was arrested two or three minutes afterwards in front of 710 Commercial street; and that the ornaments were found some two hours afterwards under the trapdoor where defendant was standing when arrested. The stolen property was not found upon defendant; he was not seen hiding it or touching it. No one identified him as the thief. He made no admission or statement. The facts that he was standing near the trapdoor when arrested, and that the property was found some two hours afterwards under the trapdoor, are circumstances and might very well be considered as material circumstances if supported by other facts tending to identify the defendant and connecting him with the commission of the crime. But the evidence is entirely consistent with defendant's innocence. Some one else may have placed the property there after defendant was arrested. Defendant may have walked there and stopped after the real thief had passed on. It may have been placed there after his arrest in order to create suspicion against him by the real thief who took it. In fact, it hardly seems that a person of ordinary intelligence would have, after having committed a robbery, and after having run two blocks, hid the property under a trapdoor and then stood over the door until the police officer came up and arrested him. It seems that no person of ordinary intelligence could say from the evidence in this case that he is satisfied beyond a reasonable doubt that defendant is guilty.

The evidence as matter of law is not sufficient to support the verdict, and the judgment is reversed.

We concur: KERRIGAN, J.; HALL, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

14 Cal. App. 250

PEOPLE ex rel. MERRILL v. NELLIS et al., Supervisors. (Civ. 886.)

(Court of Appeal, Second District, California. Sept. 14, 1910.)

1. COUNTIES (§ 120*)—PURCHASES—BIDS.

The supervisors of a county advertised for bids for the furnishing of the hall of records, the call requiring bidders to furnish their own plans after consultation with the officials to use the furniture, to submit samples, and to indemnify against infringement of patents. The accepted bid was many thousand dollars above that rejected for the same articles. *Held*, that the board being entitled to purchase furnishings for public buildings, not part of the structure, in the open market, the call for bids, obviously showing on its face an intent so to purchase, did not impose on the board the same obligations as where the purchase was under sealed bids.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 191; Dec. Dig. § 120.*]

2. COUNTIES (§ 196*)—COUNTY BOARD OF SUPERVISORS—PURCHASES—FRAUD—RELIEF.

Where the acceptance by a county board of supervisors of the higher of two bids for the furnishings of a building is tainted with fraud or favoritism, relief by injunction against use of public money may be had, but, in the absence of such fraud, the discretion of the board in making the purchase will not be disturbed.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 196.*]

3. PROHIBITION (§ 6*)—ACTS OF PUBLIC OFFICERS—DISCRETION.

The act of a public board in the exercise of its discretion given it by law is not reviewable on a petition for a writ of prohibition, in the absence of a showing that it has been abused.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 31-33; Dec. Dig. § 6.*]

Action by the People of the state of California, on the relation of Leonard Merrill, against C. J. Nellis and others. On petition for a writ of prohibition. Writ denied.

Elon G. Galusha, for petitioner. The District Attorney and J. W. McKinley, for respondents.

PER CURIAM. This is an application to this court for an original writ of prohibition restrainng the supervisors of Los Angeles county from entering into a certain contract for the purchase of furnishings for the hall of records. Respondent demurs to the petition.

It is averred that the supervisors advertised for bids; that the same were received; that one bidder offered to supply the needed furnishings for $150,000, while another bid therefor $247,700; that the goods so to be furnished under such respective bids were in quality, texture, and workmanship the same. It is further averred that the notice given soliciting such bids, and the specifications in said notice referred to and made part thereof, were uncertain in their terms, and provided no data upon which intelligent bids could be made; that it was required of the bidders that they furnish their own plans, and in addition give bonds indemnifying the county against all damages for infringement of patents caused by suit or otherwise, all of which it is averred increased the cost of material and furnishings; that when said bids were received the board awarded the contract to the highest bidder.

It is not contended by respondents, nor can it well be, that the advertisement for bids and the plans and specifications made part thereof are such as are contemplated by law when purchases are sought to be made under sealed bids. An examination of such advertisement and specifications, and the character of requirements thereunder, would indicate that the expressed intention to purchase by bid was but a pretense. The language and provisions of the advertisement and plans indicate as the real intention upon the part of the board to purchase in the open market, and in lieu of personal examination by the board at the respective places of business the dealer was required to present samples of materials and workmanship, with prices, after the officials were consulted who were expected to use the furnishings, and these officials were expected to indicate the quantity and arrangement of movable furniture as well as of counters, desks, filing cases, etc. We are not therefore confronted with a question as to the duty of the board after having elected to proceed in a particular way, which election it is claimed precludes them from making purchases in a different way. That the board of supervisors may in their discretion go into the open market and purchase furnishings for a public building where such furnishings form no part of the structure is not disputed. Their authority so to do is determined in Sarver v. County of Los Angeles, 156 Cal. 188, 103 Pac. 917; Riverside v. Yawman-Erbe Mfg. Co., 3 Cal. App. 691, 86 Pac. 900.

The alleged disparity between the bids submitted, if unexplained, were fraud, or favoritism amounting thereto, charged, might be urged in equity as a reason why an injunction would lie to prevent public officers from wasting the funds under their charge. Fraud is not averred, but, on the contrary, counsel for petitioner disclaims any intent to charge the same. In the absence of fraud even a court of equity would not interfere with the discretion given by the statute to the board of supervisors in relation to such purchases. The great difference in the price between the offers of the dealers may be occasioned on account of perfectly legitimate reasons, and such as would warrant the payment of the higher price. Where jurisdiction and authority is given a public board to exercise its discretion, and no facts appear showing an abuse thereof, it is not within the province of courts to review such discretion in a proceeding of this character.

Writ denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

158 Cal. 537

O'DOWD v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,495.)

(Supreme Court of California. Oct. 28, 1910.)

1. Elections (§ 280*)—Contests—Citation.

Code Civ. Proc. § 1119, relating to election contests, provides that the citation for the person whose right to the office is contested must be served by the sheriff at least five days before the time specified. Section 1121 provides that the court must meet to determine such contested election, and may continue the trial for any time not exceeding 20 days for good cause shown, etc. *Held*, that service within the five days prior to the hearing is not a limitation on the jurisdiction of the court over the party, and hence the failure of the sheriff to make service did not, where the party appeared specially and moved for the quashing of the citation and the dismissal of the proceedings, preclude the court from continuing the hearing and ordering the issue of another citation.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 280.*]

2. Prohibition (§ 28*) — Matters Reviewable.

The appellate court may not review, under a writ of prohibition, any action of the trial court taken subsequent to the application for the writ.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 28.*]

In Bank. Petition by Thomas P. O'Dowd for writ of prohibition against the Superior Court of the State of California in and for the City and County of San Francisco and the Honorable F. J. Murasky, Judge. Application denied.

John P. Allen, Marshall B. Woodworth, John J. Gallagher, and Edward Lande, for petitioner. Edwin F. McMurray, for respondents.

LORIGAN, J. This is an application for a writ of prohibition.

On December 6, 1909, Fred L. Hilmer and others who had been candidates for the office of supervisor of said city and county at a municipal election held November 2, 1909, instituted a contest, contesting the election of petitioner and the other 17 candidates declared elected, on the ground that they did not receive the highest number of votes cast. Thereafter on December 23, 1909, as required by law, the presiding judge of the superior court of said city and county ordered a special session of department 2 of said court to be held on January 3, 1910, for the purpose of hearing and determining said contest. On December 27, 1909, the county clerk of said city and county, as directed by law, issued a citation to the petitioner and the other contestees named in said election contest to be and appear in the said superior court at the time and place named in the order for holding said special session of said court. This citation was delivered to the sheriff of said city and county for service upon petitioner and the others, but the sheriff did not serve said citation upon petitioner either personally or by leaving a copy at the house where he last resided (Code Civ. Proc. § 1119), but left a copy of the citation at the premises adjoining petitioner's place of business on the 28th day of December, 1909. On the 3d day of January, 1910—the day set for the hearing—when the matter of the contest was called in the superior court, the petitioner appearing specially for that purpose, moved to quash the said citation and the attempted service thereof, and for an order dismissing the proceedings against him on the ground that as he had not been served with any citation prior to the day fixed for hearing, as required by law, the court acquired no jurisdiction and thereafter could obtain no jurisdiction to proceed in the matter of the contest as against him; that service of the citation before the day fixed for the hearing was a limitation on the jurisdiction of the court to proceed against him and failure of such service ousted the court of jurisdiction to entertain the contest as far as he was concerned. The court denied the motion and held that it had jurisdiction of the person of the petitioner to proceed with the contest upon his appearance in court, notwithstanding such appearance was specially made.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

After such ruling by the superior court petitioner applied to the District Court of Appeal for a writ prohibiting said court from proceeding further in the matter against petitioner, which writ was granted, said court holding that by the failure of service of the citation upon petitioner prior to the day set for the hearing of the contest, the court lost jurisdiction to proceed to try said contest as far as it involved the right and title of petitioner to said office.

After such decision a further hearing on the matter was ordered before this court.

The provisions relating to election contests are embraced in sections 1111 to 1127 inclusive of the Code of Civil Procedure. They provide that any elector may file a statement contesting the right to an office of any person declared elected within 30 days after the result of an election is declared by the canvassing board (section 1115); that the county clerk within five days after the end of the time for filing such statements must notify the superior court of all statements filed, and that thereupon the superior court shall order a special session of court to be held, not less than 10 nor more than 20 days from the date of such order, for the hearing of said contest, and shall continue in special session until the matter is disposed of. Section 1118.

As to the issuance of a citation to any contestee named in the statement and its service, it is provided that the clerk shall thereupon (on the making of the order of court for a special session) issue a citation for the person whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff and served either upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified. Section 1119.

It is further provided that "the court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended and may also continue the trial before its commencement, for any time not exceeding twenty days, for good cause shown shown by either party upon affidavit, at the costs of the party applying for such continuance." Section 1121.

It must be conceded, of course, that neither personal service nor constructive service upon the petitioner was had, and the court had therefore acquired no jurisdiction over his person at the time fixed for the hearing of the contest. It is further plain that the view of the trial court that the personal appearance of the respondent in court, although made specially for the purpose of questioning the jurisdiction, nevertheless was sufficient to confer jurisdiction over him, is not tenable. In this respect the trial court, as disclosed by the answer of respondent, was of the opinion that as the citation required to be issued and served simply directed the petitioner "to appear at the time and place specified in the order," and no default could be taken against him for failure to do so (Keller v. Chapman, 34 Cal. 635), that as no pleading on the part of the person cited was provided for and in the pending contest the only thing to be done was to count the ballots "in the presence of the parties" as directed by section 1118, the presence of the petitioner in court on the day set for the hearing, no matter for what purpose he appeared, was a sufficient appearance to give the court jurisdiction to proceed with the contest against him. We cannot agree with this reasoning. Petitioner could only be brought within the jurisdiction of the court by service of a citation in the manner required by law or by a voluntary general appearance in the proceeding. He had never been served with the citation and his appearance in court on the day set for the hearing of the contest was special and solely for the purpose of questioning the jurisdiction of the court, and he had a right to limit his appearance to that purpose. So that if the provisions of the Code are to be construed to the effect that service upon the petitioner, at least five days before the day fixed for the hearing of the contest, was a jurisdictional limitation on the right of the court to entertain the contest, as far as petitioner is concerned, the view of the District Court of Appeal would be correct and the writ of prohibition was properly issued by it. We are of the opinion, however, that a reasonable construction of the provisions relative to contests of election require the conclusion that mere failure of the sheriff to serve the citation on the party whose office is contested in due form or at all before the day fixed for the hearing did not affect the jurisdiction of the court to further entertain the contest against the petitioner.

It is true that an election contest is purely a statutory creation, and its provisions contemplate a speedy adjustment of the question as to who is legally entitled to an office, but the speedy determination which the Legislature had in view is not to dominate the construction of these provisions so as to defeat altogether the right to have a contested election settled on its merits unless such construction is imperative. A determination on the merits is what the statute mainly has in view. The proceedings are not of an ordinary adversary character such as is maintained between individuals asserting personal rights or interests. The statute does not confer the right of contest upon the assumption that the personal rights of contending individuals to the office is of particular public moment. The right is given to an elector solely (section 1111, Code Civ. Proc.), and involves the right of the people to have the fact as to who had been duly elected by them judicially declared. As said in Minor v. Kidder, 43 Cal. 236: "It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. * * * When such a statement is presented by an elector to the tribunal whose duty it is to investigate its merits, it should not be received in a spirit of captiousness, nor put aside upon mere technical objections designed to defeat the very search after truth which the statute intended to invite. * * * The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case." Also, Sweeny v. Adams, 141 Cal. 562, 75 Pac. 182.

As the obvious purpose of the statute is to have these contests determined on their merits, no construction should be given to any of its provisions which will defeat that end, unless their language imperatively commands it. The construction which petitioner seeks to have given to section 1119 is that the jurisdiction of the person of the petitioner can only be obtained by service of the citation within the time fixed before the day of hearing; that this is the exclusive method by which jurisdiction over the person of petitioner could be obtained; that if such service is not made before the time fixed for the hearing the court is ousted of jurisdiction and is without power thereafter to obtain jurisdiction over petitioner so as to proceed with the pending contest and can only, if there is enough time to do so, call another special session and set another day for hearing under which a new citation may be issued and served. We do not think that there is anything in the statutory provisions governing election contests which requires such a construction, but that, as far as section 1119 in question is concerned, its provisions, instead of being mandatory and a limitation on the jurisdiction of the court, are simply directory, and that under the provisions of section 1121, giving the court power to adjourn the trial before its commencement for good cause shown, the court had power, when it appeared that there had been a failure to serve the citation within the five days required without any fault on the part of the elector inaugurating the contest, to continue the hearing for a period not further than 20 days, and order another citation to issue for service on petitioner.

Several citations are made by petitioner in support of his claim that, under the statute, service on petitioner before the hearing was essential to and a limitation on the jurisdiction of the court to proceed with a hearing of the contest. Carlson v. Burt, 111 Cal. 129, 43 Pac. 583; Freshour v. Howard, 142 Cal. 501, 77 Pac. 1101; McCrary on Elections (4th Ed.) § 427; Batman v. Megowan, 58 Ky. 533; Castello v. St. Louis Circuit Court, 28 Mo. 259; Bowen v. Hixon, 45 Mo. 340; Seeley v. Killoran, 53 Minn. 290, 55 N. W. 132. But all these cases involve the question of jurisdiction of the subject-matter of the contest itself, and not jurisdiction of the person against whom the contest was directed. Under the statutes of our sister states, whose decisions are referred to, an election contest was not inaugurated by filing a petition or statement and then giving notice, but it was provided that when a contest was contemplated, the party contemplating it should, within a given time, serve notice on the contestee of his intention to contest, or his intention to appeal from the findings of an election commissioner to the courts. The proposed contestants in those cases failed to serve their notice of intention within the time prescribed, and, of course, the court never acquired any jurisdiction of the subject-matter. It was held that the requirement as to time was peremptory and essential in order to vest jurisdiction in the courts to entertain the contest. In those cases the service of the notice of intention to contest within a given time was a limitation on the jurisdiction of the court. It went directly to the jurisdiction of the subject-matter of the controversy. A similar view was taken by our court (Carlson v. Burt, supra), where the statement was filed after the 40 days within which it was required it should be filed. And in principle this was what was held in Freshour v. Howard, supra. Under our statute, however, the superior court in the election proceeding here under consideration had acquired jurisdiction of the subject-matter of the contest, as the statement of contest was filed within the time, and as the cases immediately referred to involved the question of the jurisdiction of the subject-matter only and not of the person, they are not in point as to the latter proposition.

There is, however, on the other hand, authority to the effect that a provision for the service of a citation by a sheriff, a given number of days before the hearing, is not peremptory but simply directory, and the court has power, where good cause is shown for the failure to make service before the hearing, to continue such hearing so as to permit service to be made within a further given time.

A statute of Indiana (Burns' Ann. St 1908, § 7012) provided that after a contest filed, the auditor should issue notice which must be delivered to the sheriff, who shall serve it five days before the hearing. This provision is similar to that of section 1119 of our Code. In construing this provision of the Indiana statute, the Supreme Court of that state, in Hadley v. Gutridge, 58 Ind. 302, says: "It is very clear to our minds that the eighteenth section, in so far as it prescribes either the time within which, or the mode in which, the service shall be made, is purely directory to the sheriff of the time and manner in which he shall discharge his duties in such cases. It was never intended by this section, as we construe it, that the right of any one to a public office to which he was eligible and had been lawfully elected should be made dependent in any wise upon the good faith, diligence or intelligence of the sheriff of the county, it might be, of a personal or political opponent. The statute points out to the sheriff the time and the manner in which service may be made; but, in our opinion, it will not do to say, in the absence of a positive provision to that effect, that service after the time, or in some other recognized mode, would not be sufficient service."

In Napier v. Cornett (Ky.) 68 S. W. 1076, after the contest was filed the clerk issued a summons which was void because it directed the contestee to answer at a time different from that required by law. The summons was quashed and a new summons was issued by the trial court. The Supreme Court held that the motion of the contestee to dismiss the contest in the trial court on the ground that the court had lost jurisdiction because the last summons was issued after the time for filing the contest had expired, was properly denied, saying: "The court overruled the motion to dismiss the petition and we think properly. The plaintiff was not in fault as to the issuance of the summons. All that was necessary for him to do was to file his petition and ask that summons be issued thereon; and if the summons was in fact invalid the misfeasance of the clerk did not avail to defeat the right which the plaintiff had secured by doing all that was required of him."

There is nothing in our code provisions which expressly declares that a court shall not be vested with jurisdiction to entertain an election contest unless the citation required to be issued shall be served before the day fixed for the hearing; that such service is a jurisdictional limitation on the court.

The matter is not to be tested by the rule which applies to the issuance and service of a summons or other process which is, in a large measure, under the control of the party to a civil action. A summons as process to acquire jurisdiction of a party in an ordinary civil action is within the control of the plaintiff; he may have it issued at any time within a year and have it served by any person he may select and at any time as long as it is served within three years. It is not required to be served by the sheriff. There is no provision of law whereby any relief can be granted for failure to have the summons issued within the year or served within the time limited. The citation provided for in section 1119, both as to its issuance and service, is governed by entirely different provisions from those that apply to a summons. Its service, like the service of summons, is to give the court jurisdiction of the person, but the party inaugurating the contest has no control over it as has the party at whose instance the summons is issued. This lack of control over the citation, of course, would make no difference as far as the want of jurisdiction of the court over the person to be served is concerned if no statutory provision existed which could be construed as authorizing the court to provide for a service, where it had not been had within the time limit prescribed by the law. But we think this want of control over the process by the contesting elector, and the possible failure of the officer specially charged by law to make it, was within the mind of the Legislature when it vested the court with the general power given in section 1121. Under the special election proceeding provided for, when the elector has filed his contest he has done all that the law permits him to do, as far as bringing the contestee into court is concerned. The issuance of the citation and its service are committed by law to the public officers over whose action in respect to either the contestant had nothing to say. This was doubtless in order to procure a speedy determination of the contest by taking the control of the matter of the citation out of the hands of the elector. But in view of the provisions of section 1121 it was not intended, or at least there is no room for construing the section as to service as contemplating, that service within the five days prior to the day fixed for the hearing was a limitation upon the jurisdiction of the court over the party upon whom the sheriff had failed to make proper service. On the contrary, we think that the provision of section 1119 as to service was simply, as held in Hadley v. Gutridge, supra, directory to the sheriff as to the time within which and the method whereby he should make the service; that failure on his part in either of these particulars did not oust the court of jurisdiction to further provide for such service, but only precluded the court from proceeding with the hearing against a contestee until service was made upon him by order of the court and by virtue of the power vested in it to do so under section 1121.

Under section 1121 the court trying the contest is given all the "powers necessary" to a complete determination of the questions presented in the contest with the additional power to continue the hearing thereof before its commencement for good cause shown by either party and for any time not exceeding 20 days. This is a general power, and within it, we think, that where it appears on the day set for the hearing that the service of the citation has been ineffectual to give the court jurisdiction to proceed with it against all the parties required to be served because the sheriff has failed to make proper service upon one of them, the court is vested with power on a proper showing to order a continuance of a hearing and direct the issuance and service of an alias citation to be made upon the one who has not been served, such service to be made within the time designated in section 1119 prior to the adjourned hearing, and within the 20 days to which it is provided such adjournment may be made.

We are the more constrained to this view because there is nothing in any of the provisions pertaining to election contests which declares that service within five days prior to the date fixed for hearing is a limitation on the jurisdiction of the court, and, because further, such construction tends to effect the purpose of the law that these cases, particularly on account of the public interest involved, should be tried upon their merits. Under this view no delay is occasioned except for some period within the 20 days to which the court is expressly empowered to adjourn before proceeding with the hearing, and the conclusion reached is what must have been the fair purpose of the Legislature, namely, to empower the court under section 1121, when an elector has done all that the law required him to do, to protect him from having his contest dismissed without any neglect or fault on his part.

It was stated on the argument that the court on the day fixed for the hearing of the contest made no order of continuance nor did it direct the issuance of an alias citation, or take any other measures for the service of a further citation on petitioner. Likewise it is claimed that when the writ of prohibition was ordered issued out of the District Court of Appeal and before the bringing of the matter to this court for further hearing, the superior court before which the contest was pending dismissed such proceeding as to petitioner.

We have nothing to do with these matters, assuming that they occurred. There is nothing in the election contest provision which requires the court, where the sheriff has failed to make service before the day fixed for the hearing, to order an alias summons to issue for service on that date. Nor can we review under this writ any action of the trial court taken subsequent to the application for it.

Within the view we have expressed, as it appears that when the petition for this writ was applied for the superior court had jurisdiction of the subject-matter of the contest, and jurisdiction, notwithstanding the failure of service of the citation upon the petition by sheriff, to order an alias citation to be issued and served, this application for a writ is necessarily denied.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.

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14 Cal. App. 249

UNITED STATES PROTECTIVE ASS'N v. BOARD OF POLICE COM'RS et al.

(Civ. 745.)

(Court of Appeal, First District, California. Sept. 13, 1910. Rehearing Denied by Supreme Court Nov. 10, 1910.)

MANDAMUS (§ 87*)—PURPOSES OF RELIEF—EXERCISE OF OFFICIAL DUTY.

The writ of mandate issuing only where it is the duty of an inferior board by reason of its office to do some act, it will not issue to compel a board of police commissioners to issue permits to certain persons to carry weapons, where the statute under which the right is claimed makes the issuance of such permit discretionary with the commissioners, and nothing else appears to show that it was their duty to issue the permit.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 189–194; Dec. Dig. § 87.*]

Appeal from Superior Court, City and County of San Francisco.

Application by the United States Protective Association for a writ of mandate against the Board of Police Commissioners and others. From a judgment denying the writ, plaintiff appeals. Affirmed.

Frank Schilling, for appellant. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., for respondents

COOPER, J. This being an application for a writ of mandate to compel the board of police commissioners to issue permits to certain persons described in the petition to carry weapons, and the statute to which our attention is called making it entirely discretionary with the board of police commissioners, and there being nothing to show that it was the duty of such board of police commissioners to issue such permit, and the writ of mandate being a prerogative writ, which issues only in cases where it is made the duty of any inferior tribunal, board, or person, by reason of their office, to do some act, and there being no such duty imposed upon this board, the judgment is affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig Key No. Series & Rep'r Indexes

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14 Cal. App. 285

GONDOUIN v. GONDOUIN. (Civ. 740.)

(Court of Appeal, First District, California. Sept. 26, 1910.)

1. MARRIAGE (§ 58*)—ANNULMENT—PREGNANCY AT TIME OF MARRIAGE.

A man who marries a woman believing her to be virtuous may sue to annul the marriage on finding that she was pregnant by another man at the time of the marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 119; Dec. Dig. § 58.*]

2. MARRIAGE (§ 58*)—ANNULMENT—GROUNDS.

A man who has been having illicit intercourse with a woman prior to his marriage with her cannot have the marriage annulled on the ground that it was brought about by the woman falsely representing that she was pregnant by him.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 122; Dec. Dig. § 58.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action to annul the marriage by A. L. Gondouin against Gertrude Gondouin. Judgment for defendant, and plaintiff appeals. Affirmed.

Louis Ferrari, for appellant. Marc Anthony, for respondent.

COOPER, P. J. Action to annul a marriage on the ground of fraud. The fraud alleged and relied upon is that defendant falsely stated to plaintiff that she was pregnant by him, and that plaintiff, believing and relying upon such false representation, was induced to and did marry the defendant.

The facts appearing of record, and upon which we must presume the judgment is based, are substantially as follows: Plaintiff met defendant, who was then a young woman, in the year 1904 at the home of a mutual friend. The result of the meeting was that plaintiff became very devoted to defendant, and so marked in his attentions that he spent several evenings of each week in her company and at her home. He took her for walks and to the theater on many occasions. During a period of time while he was absent in Portland, Or., he wrote to her as often as three times a week. Finally in February, 1906, under promise of marriage, plaintiff succeeded in having sexual intercourse with the defendant. This sexual intercourse continued from time to time as occasion and opportunity offered until August, 1906, when defendant went to Oakland and stayed all night with plaintiff in a room in a public hotel. As the result of the night with plaintiff defendant became ill, and on the following evening plaintiff went to see her at her home in San Francisco, and it was then that defendant first informed the plaintiff that she had been to consult a physician, and that the physician thought that she was pregnant. Defendant further told plaintiff that she believed the doctor and that she was pregnant. Plaintiff again told defendant that he would marry her, and after having intercourse with her left, promising to send her some pills or medicine to procure a miscarriage. He continued to have sexual intercourse with her two or three times a week, but seems to have made no further effort to find out as to whether or not she was pregnant, or to have her examined by a physician. In October, 1906, defendant again told the plaintiff that she was pregnant. About the 19th of the same month plaintiff procured a marriage license, which he showed to defendant, telling her that he was going to marry her, and again had sexual intercourse with her. Finally on November 22, 1906, plaintiff took defendant to a Catholic church—as both parties were Catholics—where the marriage ceremony was performed by the priest in charge. The parties did not openly assume the relations of husband and wife after the marriage for the reason that the plaintiff requested that the marriage be kept secret for a time. Plaintiff, however, continued to visit the defendant and to have sexual intercourse with her at every meeting as had been his habit before the marriage. This continued until the early part of January, 1907, when he ceased his visits, and commenced this suit to annul the marriage.

Plaintiff's contention is that having done all these things under promise of marriage, having continued in his immoral conduct with the defendant until finally told by her that she was pregnant he married her because of such statement, and that he can now come into a court of justice and have a decree of court freeing him from the marriage vows.

We cannot for a moment sanction such claim. It would be a blot upon a court of justice if in the face of plaintiff's conduct it would lend its aid to free him from his marriage, even if it was finally brought about as the result of defendant's statement that she was pregnant. Whether she was in such condition or not was at most a matter of conjecture; and plaintiff might well believe that by reason of his own immoral conduct he had brought about such condition. The fact that he waited for a long time before getting the marriage license, and then delayed the marriage for more than a month before having the ceremony performed, shows that he did not act hastily. He may have concluded in the meantime that the pills he had furnished defendant had had their effect. He did not discover his wrongs until the early part of January, 1907. By his marriage to defendant plaintiff took her for better or for worse. He assumed all liabilities as to her condition, and, if he believed she was pregnant, he believed it not only from her statements, but from his knowledge of his own guilty conduct.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Where a man believes a woman to be virtuous, and where he has had no improper relations with her himself, and after marriage to her under such circumstances he discovers that at the time of the marriage she was pregnant by a stranger, the court will uphold an action to annul the marriage, and this for the reason that one of the very objects and considerations of marriage is children. The husband has the right to have no children except his own, born under his roof, by the wife whom he has promised to love and cherish. To compel him to live with a wife after she had brought forth a bastard, begotten before marriage by a stranger, and then to care for and support such bastard, would shock the moral sense of every right-minded person. But, while such is the law, it is equally well settled that a man who has been having illicit intercourse with the woman prior to the marriage cannot have the marriage annulled on the ground that it was brought about by the woman falsely representing that she was pregnant. 2 Nelson on Divorce and Separation, § 610; Bishop on Marriage, Divorce and Separation, § 503; Hoffman v. Hoffman, 30 Pa. 417; Todd v. Todd, 149 Pa. 60, 24 Atl. 128, 17 L. R. A. 320; Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 Atl. 426; Tait v. Tait, 3 Misc. Rep. 218, 23 N. Y. Supp. 597; Franke v. Franke (Cal.) 31 Pac. 571, 18 L. R. A. 375.

Counsel for appellant relies upon the case of Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609. It is not necessary for us to sanction or disapprove the doctrine laid down in that case, but it is sufficient to say that the facts are very different from the case at bar. In that case the plaintiff, after having had sexual intercourse with the defendant, was absent from the state for a period of time after such intercourse. Upon his return the defendant stated to him that the result of such intercourse was that she had become pregnant, and given birth to a male child of which he was the father, at the same time exhibiting the child to him, and stating to him that the child was the result of such intercourse; and he, believing her, and believing the child to be his, married her. The statement made by the woman was not only false as to the child being his, but the fact was that she had never given birth to a child, and it was the child of another woman that she had exhibited to him. It is at once apparent that this is quite different from a statement as to a condition or belief that the defendant was pregnant.

The judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

14 Cal. App. 309

SNOWDEN v. DERRICK et al. (Civ. 772.)

(Court of Appeal, First District, California. Sept. 30, 1910.)

1. Vendor and Purchaser (§ 341*)—Default of Vendor—Acts of Purchaser.

A purchaser in a contract for sale of real estate, where there is no valid objection to the title, cannot, in an action by him to recover the price paid, put the vendor in default without alleging that he is ready, willing, and able to pay the amount agreed on, and that he has offered to pay the price and has demanded a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1011; Dec. Dig. § 341.*]

2. Vendor and Purchaser (§ 341*)—Default of Vendor—Acts of Purchaser.

Where a contract for sale of real estate provided for the return of the deposit made by the purchaser as part payment of the price if the title proved defective and could not be perfected within a reasonable time, and defects in the title, on objection thereto by the purchaser, were not removed within a reasonable time, the purchaser, suing for the deposit, need not allege that he was ready, willing, and able to pay the price, and had offered to do so, and had demanded a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1011; Dec. Dig. § 341.*]

3. Vendor and Purchaser (§ 138*)—Title of Vendor—Rights of Purchaser.

A purchaser in a written contract for sale of real estate, which stipulates for a good title subject to an outstanding lease, but without excepting easements on the land in favor of a third person, may insist on a good title freed from the easements, though he had knowledge of their existence at the time of making the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 261; Dec. Dig. § 138;* Specific Performance, Cent. Dig. § 276.]

4. Vendor and Purchaser (§ 144*)—Tender of Performance by Vendor—Defects in Title.

A vendor offering in writing to convey a good title, while expressly admitting an incumbrance thereon, consisting of a judgment lien, and demanding payment of the price according to the contract, does not thereby obviate the defect in the title, nor place the purchaser refusing to pay the price in default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 271, 272; Dec. Dig. § 144.*]

5. Vendor and Purchaser (§ 129*)—Title of Vendor.

A purchaser in a contract for sale of real estate which provides for a good title may demand a title free from litigation, palpable defects, or grave doubts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238–244; Dec. Dig. § 129.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by F. E. Snowden against George H. Derrick and another. From a judgment for plaintiff on the pleadings, defendants appeal. Affirmed.

Langan & Mendenhall, for appellants. W. B. Rinehart, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

COOPER, P. J. This appeal is from the judgment given in favor of plaintiff and against defendants on the pleadings.

The action was brought to recover $1,500 paid by plaintiff to defendants as a deposit and as part payment for the purchase price of real estate. It is alleged in the complaint that on the 16th day of February, 1907, an agreement or writing was entered into, by the terms of which the defendants agreed to sell to the plaintiff a tract of land containing 125 acres therein described, for the sum of $62,500, of which sum $1,500 was to be and was paid at the time when the contract was signed, and the balance was thereafter to be paid in certain installments as therein provided. The contract provided: "In the event that the title to the said lands and premises prove defective and cannot be perfected within a reasonable time, we agree to return and pay back to the said F. E. Snowden on demand said payment of $1,500 this day paid to us."

The complaint further alleges that the plaintiff had the title to said property examined, and found the title defective and imperfect in certain particulars as follows:

"(1) Two certain rights of way evidenced by instruments in writing duly acknowledged and recorded respectively in Liber 572 of Deeds, p. 250, and Liber 597 of Deeds, p. 176, in the office of the county recorder of Alameda county, to the county of Alameda for sewerage and other purposes, which said rights of way are and were in the nature of perpetual easements granted to the said county of Alameda by former owners and holders of the fee-simple title to said land, covering a strip of land twenty-two (22) feet in width along the entire western boundary line thereof, and lying next and adjacent to the land of J. P. Marlin and Rene de Tocqueville.

"(2) The right of Arthur C. Shiman to disaffirm or rescind within a reasonable time the conveyance of 31½ acres of the western portion of said premises by reason of his not being of age at the time of the execution of a certain deed from himself to William J. Shiman, covering said 31½ acres of said premises, and recorded in Liber 1015 of Deeds at page 333 in the office of the county recorder of Alameda county.

"(3) A judgment of the superior court of the county of Alameda, state of California, duly given, made, rendered and entered on the 31st day of January, 1907, in favor of Anna J. Gilson against the said defendant, George H. Derrick, for the sum of thirty-one hundred ninety-five and $^{76}/_{100}$ dollars ($3,195.76) and costs of suit, being case number 23,275 in said superior court, and the said judgment being of record in volume 59 of Judgments, p. 302, remaining unsatisfied."

That on the 18th day of April, 1907, plaintiff informed defendants in writing of the said defects, but that defendants did not remove or cause the said defects to be removed within a reasonable time or at all, and that a reasonable time had elapsed before the 13th day of March, 1908, the day the complaint was filed.

The demurrer to the complaint was properly overruled. The facts stated in the complaint show that plaintiff had done all that was required of him, and by his objections to the title had placed upon the defendants the burden of removing or correcting said objections. By the express terms of the agreement the $1,500 was to be returned to plaintiff if the title should prove defective, and the defects could not be cured within a reasonable time. It is alleged that said defects had not been cured, and that a reasonable time had elapsed.

It is not like the case of an ordinary contract to convey where there is no valid objection to the title. In such case, the contract being mutual, the vendee cannot put the vendor in default without alleging that he is ready and willing and able to pay the amount agreed to be paid, and that he offered to pay the purchase price and demanded a deed. Here the plaintiff demanded and requested that the defendants' title be cured. Defendants did not cure it, or offer to convey to plaintiff a good title. Plaintiff was not required to again go to the defendants and say in effect: "Although I have pointed out certain defects in your title, and although you have not corrected them and you have had a reasonable time to do so, I now offer to pay the balance of the purchase money upon your giving me a good title." If the title was defective, and the defendants could not and did not obviate the defects within a reasonable time, the plaintiff was entitled to the return of the $1,500 as provided in the contract. The complaint shows such a state of facts, and clearly put the burden upon the defendants to show a legal reason why the plaintiff is not entitled to the return of his deposit.

The amended answer of defendants attempted to do this, and, as judgment was given upon the pleadings, we must examine the answer in order to determine the question of its sufficiency, or as to whether or not it states facts which show that plaintiff is not entitled to a return of his deposit.

As to the first defect, the answer admits that the two easements therein described existed as pointed out, but alleges that the plaintiff, when he paid the $1,500 and took the contract, knew of the existence of said easements, and accepted the said contract and paid the deposit with full knowledge of the said easements, and that the contract refers to said easements in such way as to now preclude the plaintiff from claiming that they are an incumbrance on the title. As to the knowledge of plaintiff, or as to matters that must necessarily rest in parol, we cannot hold that such evidence would be admissible to vary the terms of the contract. The written agreement was that defendants would give a good title to the property, and the only exception is that the property is to be taken subject to an outstanding lease to one Coelho. There is at the end of the contract the clause: "Howell and Derrick have privilege to make two 6" sewer connections to sewer." This clause of itself does not show that the county of Alameda was the owner of any rights of way 22 feet in width for sewerage and for other purposes. This is perfectly consistent with the idea that there was no perpetual easement outstanding in a third party for sewers, and is consistent with the theory that the sewer was the property of the owners of the land. In any event, no easements or rights of way are excepted by the terms of the writing, and we deem it the best policy to hold parties to the terms of their agreements as expressed therein. To allow parol evidence as to easements or other defects, for the purpose of showing that the vendee took the contract with notice of them, would be a very dangerous rule. It would make the question as to whether or not the title tendered was good and sufficient depend upon the oral testimony that the parties might be able to procure. It was said in discussing a similar question in Koshland v. Spring, 116 Cal. 689, 48 Pac. 58: "Appellants further maintain that, even allowing the dedication of all the streets laid out on the map, yet respondents had notice of the fact and contracted to buy subject to that easement. This is asserted on the evidence that in the course of the negotiation Koshland, one of the purchasers, was shown copies of the map, knew that a townsite had been laid out on the tract by the Decoto Land Company, and that 'there was a piece of land called Decoto—it was the town of Decoto that was to be sold.' Since defendants were in express terms obligated to make good title as a condition of the sale, we do not concede that actual knowledge by the purchasers of dedication to public use of the extensive street surface exhibited on the map—the tract being mainly or largely agricultural and to be sold as acreage—could be deemed, while the contract remained executory, to imply a waiver of substantial fulfillment of the condition for title."

Defendants admit the defect pointed out in the third specification, and that the judgment therein described is still a lien upon the property, but seek to obviate it by urging "that on or about the 23d day of April, 1907, the defendants in good faith offered the plaintiff in writing to convey to the plaintiff all said real property free of all incumbrances, and demanded payment of the remainder of the purchase price according to the terms of said contract. And the plaintiff then refused to accept said offer, and refused and still does refuse to pay the balance of the purchase price of said premises or any part thereof, according to the terms of the said contract or otherwise; that on the 23d day of April, 1907, when said offer was made, the defendants were, ever since have been, and now are able, willing and anxious to comply with said offer, although on the 23d day of April, 1907, when said offer was made, said judgment had not been paid nor satisfied of record." There is no allegation or statement that said judgment has ever been satisfied or the land relieved from the lien thereof. It does not appear in what manner the defendants could place plaintiff in default by offering in writing to convey a good title free from all incumbrances when they expressly admit the defects pointed out.

The offer was nothing more than the agreement they made in the first place. If they had in fact perfected the title, paid off the judgment, and relieved the property of the easements within a reasonable time, and then gave the plaintiff notice thereof, the question would be quite different; but such is not the case. The defects still existed. The plaintiff had the right, as has been said by the Supreme Court, to a title free from litigation, palpable defects, or grave doubts. It does not appear that he has been able to get such title, or that any such title is now tendered him, or was tendered him at the time the answer was filed and the issues made up.

We conclude that the court was correct in granting judgment in favor of plaintiff upon the pleadings, and the judgment is therefore affirmed.

We concur: HALL, J.; KERRIGAN, J.

14 Cal. App. 307

CANADIAN BANK OF COMMERCE v. LEALE et al. (Civ. 843.)

(Court of Appeal, First District, California. Sept. 28, 1910.)

1. LIMITATION OF ACTIONS (§ 123*) — COMMENCEMENT OF ACTIONS—FILING OF DEFECTIVE COMPLAINT—EFFECT.

The filing of a complaint defective only in that it is neither signed by plaintiff nor his attorney tolls the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 539; Dec. Dig. § 123.*]

2. PLEADING (§ 271*) — COMPLAINT—AMENDMENT.

A complaint not signed by plaintiff or his attorney, as required by law, is not void, but the omission may be cured by amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 819; Dec. Dig. § 271.*]

3. COURTS (§ 91*)—CONTROLLING DECISIONS.

A decision of the Supreme Court not reversed or modified must be followed by the Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

Appeal from Superior Court, City and County of San Francisco, John Hunt, Judge.

Action by the Canadian Bank of Commerce against W. G. Leale and another.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

From a judgment for plaintiff, defendants appeal. Affirmed.

Leon Samuels, for appellants. Olney, Pringle & Mannon, for respondent.

HALL, J. This is an appeal from a judgment against defendants, and comes to this court upon a bill of exceptions.

The action was brought to recover the sum of $6,000 and interest, as due and unpaid on a promissory note executed by defendants to plaintiff. The original complaint was filed on March 9, 1908, which it is conceded was the last day upon which an action could have been brought upon the note without being subject to the bar of the statute of limitations. The original complaint was neither subscribed by plaintiff nor by its attorney when filed, but subsequently, to wit, on March 26, 1908, after service of summons, but before any appearance by defendants, upon permission granted by the court, upon the ex parte application of plaintiff, the complaint on file was subscribed by plaintiff's attorneys, and on the same day an amended complaint in due form and properly signed was filed.

The only defense relied on by defendants is that of the statute of limitations, which was raised both by demurrer and by answer to the amended complaint. The only claim made by appellant for a reversal of the judgment is that the filing of a complaint, defective only in that it is neither signed by plaintiff nor by his attorney, is not sufficient to toll the running of the statute of limitations—that an action so commenced is, in law, not commenced at all.

In support of this contention appellants cite Dixey v. Pollock, 8 Cal. 570, but we think this case is against the contention of appellants. The court in Dixey v. Pollock was called upon to determine the relative rights of three attaching creditors, Dixey, Adams, and John Pollock. The first attachment was levied in the case of R. H. Adams v. D. H. Pollock, but the complaint in the suit of R. H. Adams was not signed until after the levy in the Dixey suit. It was contended that the unsigned complaint in the R. H. Adams suit was void, and therefore not sufficient to support an attachment. The court held that such unsigned complaint was not void, and was sufficient to support the attachment in favor of R. H. Adams, and, although such complaint was not signed until after the levy of the Dixey attachment, the court gave the Adams attachment precedence over the Dixey attachment. The court did not hold the attachment void in Pollock v. Pollock because the complaint was not signed, but because the suit itself was instituted by a person having no authority so to do. The court said: "The suit must be considered as having been instituted by an entire stranger to John Pollock and wholly without authority, and therefore void." The court directed that the proceeds derived from the sale of the attached property be first applied to the execution in the case of Adams, and then to the debt of Dixey. John Pollock was remitted to a new action. The law, then as now, required that a complaint be signed either by plaintiff or by his attorney, but the case just considered clearly holds that a complaint not so signed is not void but is sufficient as instituting an action, and may be amended.

Appellants correctly observe that the case of Dixey v. Pollock, supra, has never been reversed or modified. It must therefore be followed by this court. While there is some authority in other jurisdictions to the effect that an unsigned pleading is a nullity (Schuyler v. Yates, 11 Wend. [N. Y.] 186; Gould v. Gage, 118 Pa. 559, 12 Atl. 476; Browder v. Gaston, 30 Ala. 677), the weight of authority is to the effect that the omission of the signature to a pleading is but an irregularity that does not affect the jurisdiction of the court, and may be cured by amendment. Meyer v. Delaware R. R. Co., 100 U. S. 457, 25 L. Ed. 593; Harris v. Osenback, 13 Ind. 445; Railway Co. v. Peck, 99 Ind. 68; Sims v. Dame, 113 Ind. 127, 15 N. E. 217; Crawford v. Feder, 34 Fla. 397, 16 South. 287; Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6; Weir v. Slocum, 3 How. Prac. (N. Y.) 397; Ehle v. Huller, 10 Abb. Prac. (N. Y.) 287; Harrison v. Wright, 1 N. Y. St. Rep. 736; Gillis v. Atl. Coast Line Co., 127 Ga. 678, 56 S. E. 1003; McIntyre v. Smyth, 108 Va. 736, 62 S. E. 930; Holton v. Guinn (C. C.) 65 Fed. 451. See, also, Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 289

BARRETT-HICKS CO. v. GLAS et al.

(Civ. 743.)

(Court of Appeal, Third District, California. Sept. 26, 1910. Rehearing Denied Oct 11, 1910. Denied by Supreme Court Nov. 25, 1910.)

1. APPEAL AND ERROR (§ 1212*)—DISPOSITION OF CAUSE—MANDATE AND PROCEEDINGS IN LOWER COURT—ADOPTION OF FINDINGS ON FORMER TRIAL.

On a second trial, after judgment of reversal by the Court of Appeal, which, though in reality involving but two questions of fact, was in general language, and did not limit the second trial to the issues of fact upon which it solely rested, where defendants by the theory upon which they presented their case at the second trial, in effect, approved the former proceedings and findings not disturbed by the judgment of reversal, the court could adopt such of the proceedings of the former trial not disturbed by the judgment of reversal as were necessary to support such judgment, and as to which no new proceedings were had at the second trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

2. PRINCIPAL AND SURETY (§ 100*)—BUILDING CONTRACTOR'S BOND—DISCHARGE OF SURETY —CHANGE IN PLANS.

A surety on a building contractor's bond for the construction of a one-story building was discharged by changes in the plans involving the addition of another story where he did not consent thereto.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162-165; Dec. Dig. § 100.*]

3. MECHANICS' LIENS (§ 277*)—ENFORCEMENT —PLEADING — VARIANCE BETWEEN PLEADING AND PROOF.

In proceedings to enforce a mechanic's lien, there was no fatal variance between allegations of the complaint, setting forth in substance the statements in the recorded notice of lien, that claimant was to receive for materials furnished a reasonable market value thereof, and evidence that the price was definitely fixed at 5½ cents a pound which amounted to $89.10 for the amount furnished, where the evidence also showed, and the court found, that the materials furnished were of the reasonable market value of $89.10.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546-554; Dec. Dig. § 277.*]

4. MECHANICS' LIENS (§ 142*)—PROCEEDINGS TO PERFECT—NOTICE OF LIEN—SUFFICIENCY.

The statement in the notice of lien as to the price of the material being substantially true, the notice of lien was sufficient.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 239; Dec. Dig. § 142.*]

5. MECHANICS' LIENS (§ 142*)—PROCEEDINGS TO PERFECT—NOTICE OF LIEN—OFFICE.

The office of the statute in requiring the conditions and terms of the contract for materials to be set forth correctly in the notice of mechanic's lien is to inform the owner as to the extent and nature of a lienor's claim so as to facilitate investigation as to its merits.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 239; Dec. Dig. § 142.*]

6. MECHANICS' LIENS (§ 157*)—PROCEEDINGS TO PERFECT—NOTICE OF LIEN—SUFFICIENCY.

The test as to the sufficiency of a notice of mechanic's lien as to recital of the terms and conditions of the contract is whether the notice does or does not so far depart from the terms and conditions of the contract as to render it misleading to the injury of the owner, and, if there is a substantial agreement between the contract and notice so that there could not arise in the mind of the owner any misapprehension as to the extent and nature of the lienor's claim, any technical variance will be immaterial.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

7. PAYMENT (§ 65*)—BURDEN OF PROOF.

Where plaintiff has proved the existence of a debt sued on, at least within the period of statutory limitations, the burden of proving payment is on defendant.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 162-175, 196-202; Dec. Dig. § 65.*]

8. MECHANICS' LIENS (§ 114*)—PERSONS ENTITLED—SURETY ON CONTRACTOR'S BOND.

That one who furnished materials for the construction of a building, who was also a surety on the contractor's bond, took from such contractor an assignment of all money due and to grow due on the contractor's contract merely as indemnity against his loss as a surety and to insure proper application of the money would not render such surety liable under the building contract to the owner or laborers, mechanics, and materialmen, nor preclude him from obtaining a lien for materials furnished by him.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

9. MECHANICS' LIENS (§ 94*)—PERSONS ENTITLED—FURNISHING OF MATERIAL.

That a subcontractor furnishing materials and labor in the construction of a building did not personally bestow labor or services on the building would not preclude him from obtaining a mechanic's lien therefor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 126; Dec. Dig. § 94.*]

10. MECHANICS' LIENS (§ 291*) — ENFORCEMENT—FORECLOSURE—DECREE—PAYMENT OF UNMATURED NOTE.

On foreclosure of mechanics' liens, some of which are paramount to a mortgage and others subject thereto, it was error to decree a sale of the property in fee, and payment out of the proceeds of the unmatured mortgage note.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 604; Dec. Dig. § 291.*]

11. APPEAL AND ERROR (§ 877*)—RIGHT OF REVIEW.

The mortgagors, defendants in the mechanics' lien proceedings, on their appeal could complain of part of the decree ordering payment of the mortgage, though the mortgagee did not appeal, since the mortgagors might be injured by such decree in effect foreclosing a mortgage before the debt was due which might result in a deficiency judgment being entered against them, after a forced sale bringing less than the actual value of the land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3566; Dec. Dig. § 877.*]

Appeal from Superior Court, Madera County; H. Z. Austin, Judge.

Action by the Barrett-Hicks Company against Frank Glas, Jr., and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Judgment modified, and judgment and order affirmed.

W. H. Larew, for appellants. L. L. Cory, for respondent.

HART, J. This is an action for the foreclosure of certain liens upon the building of the defendants, and this appeal is prosecuted from the judgment rendered and entered against said defendants and from the order denying them a new trial.

Various phases of this litigation have been before this and the Supreme Court on two previous appeals. See Burnett et al. v. Frank Glas, Jr., et al., 154 Cal. 249, 97 Pac. 423, and, also, Barrett-Hicks Co. v. Frank Glas, Jr., et al., 9 Cal. App. 491, 99 Pac. 856.

Counsel for respondent here in his brief presents an accurate and well-stated summary of the history of this litigation and of the facts thereof, and we shall therefore adopt counsel's statement as our own:

The decision of the District Court of Appeal, affecting the parties to this appeal, is that of Barrett-Hicks Co., Appellants, v. Frank Glas,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Jr., et al., Respondents, 9 Cal. App. 491, 99 Pac. 856. The decision of this court, deciding the issues in the case as to all parties, is J. H. Burnett, et al., Respondents, v. Frank Glas, Jr., et al., Appellants, 154 Cal. 249, 97 Pac. 423.

"On November 9, 1903, the appellants in this case, Frank Glas, Jr., and W. H. Glas, entered into a contract with W. J. Sircy for the construction of a one-story and basement brick store building for the sum of $7,320. The building was to be erected according to certain plans, drawings, and specifications which were found to be a material part of the contract, but which were never recorded in the recorder's office. The contractor gave a bond upon the contract with M. R. Madary, one of the assignors of this respondent, and C. J. Craycroft, as sureties, the sureties guaranteeing the performance of the contract and the delivery of the building free of liens. Work was commenced under the contract and upon the completion of the building a large number of liens were filed, including one on behalf of M. R. Madary. Suits were brought upon these respective liens. Prior to the trial, the suits to foreclose the liens were consolidated with the action brought by J. H. Burnett. The appeal decided by this court was one taken from the judgment rendered in the consolidated action. The appeal in the case decided by the District Court of Appeal was taken by this respondent to review certain portions of the judgment materially affecting its rights.

"In the case of Burnett v. Glas, supra, the judgment was affirmed, it being held by this court, among other things, as follows:

"(a) That the contract was void, in that the plans, drawings, and specifications had not been filed in the recorder's office; and also, because 25 per cent. of the contract price was not made payable at least 35 days after the final completion of the contract.

"(b) That certain liens were paramount and certain liens subsequent to the mortgage upon said property in favor of the Commercial Bank of Madera, and that the lower court was justified in rendering its decree that the entire property be sold, notwithstanding the indebtedness secured by the mortgage was not due, and that the proceeds be applied in payment of the respective liens in accordance with their priority.

"(c) That certain allowances for attorney's fees and interest were erroneous. The judgment was modified by striking out these allowances, and in all other respects affirmed.

"The record on appeal, decided by the Third District Court of Appeal, shows that this respondent had brought suit for the foreclosure of three separate liens, one in its own favor, one in favor of M. R. Madary assigned to it, and one in favor of J. A. Sircy. The lower court rendered judgment in favor of this respondent upon the assigned lien of J. A. Sircy, and rendered judgment against the respondent upon its personal claim, and the assigned claim of M. R. Madary. The lower court based its decision and awarded judgment in favor of the owners and against Barrett-Hicks Company on its personal claim on the finding that the building materials were not furnished to W. J. Sircy by the respondent, but to M. R. Madary; and based its decision and rendered judgment against the respondent upon the assigned claim of M. R. Madary upon the ground that M. R. Madary was a surety, and as such was not entitled to enforce any lien against the property. The Appellate Court found both of these contentions to be unsound; that under the evidence the decision of the lower court was wrong; that the finding of the court that this respondent furnished the materials at the special instance of M. R. Madary was not true, and not supported by the evidence; and that, as to M. R. Madary's claim, the evidence showed that he, as such surety, had been released from all obligation upon his bond for the reasons set forth in its opinion, and therefore was entitled to enforce a claim of lien against the property.

"The principles of law involving the rights of the respective parties having thus been adjudicated and determined, the issues presented in the action of this respondent against the appellants upon the personal claim of the respondent and the assigned claim of M. R. Madary came on regularly for trial, the result being that the judgment appealed from in this case was entered in favor of the plaintiff, the lower court awarding judgment in favor of Barrett-Hicks Company upon its personal claim, and also upon the assigned claim."

The findings and decree made and entered in the former trial affecting all other questions of fact but those involving the claim of the plaintiff and that of Madary, assigned to plaintiff, were not challenged on the former appeal, and therefore not disturbed by the decision reversing the judgment therein.

At the second or last trial, culminating in the judgment from which one of the appeals here is taken, counsel on both sides and the court tried the case upon the theory that there were only two questions of fact to be tried and determined, viz., the question as to the validity of the personal claim and lien of the plaintiff and the question whether the claim assigned to it by Madary was valid. Upon this theory, the court therefore adopted the unattacked and undisturbed portions of the findings and judgment made and entered in the former trial as parts of the findings and judgment made and entered as the result of the last trial. The record here discloses no attempt on the part of the defendants to introduce any proof looking to the impeachment of any of the essential ultimate facts as to which findings were made at the former trial other than those involving the claims of the plaintiff here. But it is now objected in a general way that the court had no legal authority to adopt this course; that all the former findings and judgment were vacated and set aside, and became functus officio by the judgment of reversal entered by this court.

The court pursued the proper course under the circumstances. It is true that the judgment of reversal, though in reality involving, as seen, but two questions of fact, was in general language, and in no way limited the second trial to the issues of fact upon which the judgment solely rested; and, had counsel for appellants chosen that course, all the material issues of fact tendered by the pleadings could have been gone into on the retrial. But, as stated, he, by the theory upon which he presented his case at the second trial, in effect approved the former proceedings and findings not disturbed by the decision of this court, and they therefore remained, so far as pertinent to the questions retried, a part of the record of the case, and would have been such whether they had been expressly adopted by the court or not. Duff v. Duff, 101 Cal. 6, 35 Pac. 437; Chandler v. People's Savings Bank, 73 Cal. 320, 11 Pac. 791, 14 Pac. 864, 2 Am. St. Rep. 812.

On the first appeal of this case the principal contention of the appellant therein (the respondent here) was, as seen, that the evidence failed to support the findings of the court against the claims here in dispute. The decision by the trial court against the personal claim of Barrett-Hicks Company was based upon the ground that the evidence disclosed that the materials furnished by it for the building of defendants were not so furnished "at the special instance and request of said defendants, * * * through their agent, W. J. Sircy, but that said materials aforesaid were furnished at the special instance and request of M. R. Madary, and were charged on the books of said plaintiff to said M. R. Madary, and the allegation in plaintiff's complaint in that regard is untrue, as is likewise the statement in its said notice and claim of lien that said materials were furnished to W. J. Sircy, the contractor," etc. The finding of the trial court against the claim of lien of Madary, assigned to plaintiff, was founded upon the undisputed fact that said Madary was one of the sureties on the bond of the contractor to indemnify the owner. The bond, as is usual in such instruments executed in such cases, provided that the sureties would answer as such for the full performance by Sircy, the contractor, of all the terms and conditions of the contract to be by him performed, "and jointly and severally guarantee * * * the delivery of said building free from all liens that may be filed against the said contractor in the above contract, not exceeding the sum of two thousand dollars."

This court, on the former appeal, reviewing the evidence from which the foregoing findings were educed, held that they were not thus supported, and, referring to the plaintiff's personal claim, declared that the proofs, without contradiction, showed that Sircy himself bought the materials and that Madary's part in the transaction was that of a mere guarantor. As to the defense against the assigned claim, this court held, and its ruling thereon was unquestionably correct, that the evidence disclosed that, while Madary was a surety on the bond guaranteeing the full performance by Sircy of all terms and conditions of his original contract with the defendants, he was absolved or released from all liability thereon by reason af a subsequent contract between Sircy and defendants executed before the completion of the contract guaranteed by the bond, by which a second story was to be added to the building, which, under the first contract, was to be but one story in height. The theory of the defendants at the first trial and on the former appeal was that the added story came within the clause of the original contract providing that "should the owners or the architect, at any time, during the progress of the work, request any alteration to or omission from this contract or the plans or specifications or either of them, they shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to, or deducted from, the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is completed in accordance with the original plans, as amended by such changes, whatever the nature or extent thereof." Answering this contention, the court said: "It is well-settled law that a surety may stand upon the strict letter of his bond, and that where the principal has, without the consent of the surety, materially violated the terms of the agreement for the performance of which the surety stands sponsor, the latter is exonerated. * * * It would be unreasonable to hold that the effect of the bond was to guarantee the work done in the construction of a two-story building; for, if we should take that view, it would follow that the owners might have converted the plans into a six-story building, and increased the cost four or five fold. The change to a two-story building was not decided upon until the one-story building was well towards completion, and the memorandum was not signed until December 24, 1903." See Barrett-Hicks Co. v. Glas et al., 9 Cal. App. 491, 99 Pac. 862—a petition for rehearing in Supreme Court having been denied.

We have carefully examined the record before us, and we find that substantially the same evidence was brought out at the second trial with regard to the claims in controversy as was adduced at the first trial, and, while we do not believe, as counsel for respondent contends, that the doctrine of "the law of the case" is applicable or may be invoked as to this point, there can be no ground for doubting that the evidence is abundantly sufficient to support the finding as to each of the claims involved in this appeal. We perceive no necessity for presenting here the evidence or even the substance thereof. As stated, there is no material difference between the evidence received at the first trial pertaining to these claims and that produced at the last trial.

But some other points are urged by appellants against the findings of the court. Some of these may be stated as they are presented in his brief by counsel for respondent, as follows:

"(1) There is a variance between the allegations and the proof, in that the allegations of the first cause of action of the complaint and the statements of the lien specify a contract different from that supported by the evidence.

"(2) That the respondent introduced no proof of nonpayment of the amount claimed to be due in the first cause of action.

"(3) That M. R. Madary stands in the shoes of W. J. Sircy, and therefore cannot assert or claim a lien.

"(4) That, as Mr. Madary personally bestowed no labor or services, he therefore is not entitled to a lien either personally, or as a subcontractor.

"(5) That there is a variance between the claim of lien of the respondent and its complaint, and the evidence produced, in that the fact that Mr. Madary guaranteed the account was an essential part of the terms, time given and conditions of the contract."

1. We are unable to discover a fatal or any material variance between the allegations of the complaint, setting forth in substance the statements in the recorded notice of lien, and the evidence disclosing the nature of the contract between the contractor and plaintiff for the materials furnished. The specific contention is that, while the allegation is that the respondent was to receive for said materials (corrugated iron) the reasonable market value of the materials so furnished, the evidence shows that such corrugated iron was sold and furnished for a definite or stipulated price expressly agreed upon by the parties. The complaint alleges that the plaintiff "agreed to furnish certain corrugated iron for said building from time to time as demanded, and was to be paid therefor the reasonable market value thereof from time to time," etc. Barrett, president of plaintiff corporation, testified, in part, as follows: "This iron was to be used on the awning. He (Sircy) told me how many sheets he would require. The price was 5½ cents a pound. I figured it up at $89.10. * * * The reasonable market value of the iron was $89.10." Sircy testified that plaintiff "furnished the iron to me, shipped it to me, the iron was used in the construction of the Glas building. The price was $89.10. They were to ship it to me. They did so. They gave me a price on the material. That was a reasonable market price." The court found that the materials furnished by plaintiff were of the reasonable market value of $89.10, and this finding corresponds with the allegation of the complaint and the statement in the lien.

Conceding that the evidence shows that the price charged for the corrugated iron was definitely fixed and expressly agreed upon at the time it was sold to the contractor, it nevertheless further appears from the evidence that said price or sum constituted the market value of the materials at the time of the sale. "The statement in the notice of lien was therefore substantially true, which was all that was required to give it validity." Star Mill & Lumber Co. v. Porter, 4 Cal. App. 474, 88 Pac. 499; Wagner v. Hansen, 103 Cal. 107, 37 Pac. 195. The object of the statute in requiring the conditions and terms of the contract to be set forth correctly in the notice of lien is to "inform the owner as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits." Wagner v. Hansen, supra. And the test as to the sufficiency of the notice with respect to the terms and conditions of the contract is whether such notice so far departs from the terms and conditions of the contract as to render it misleading to the injury of the owner. If it does, the variance is fatal. If, however, there is a substantial agreement between the contract and notice of lien, so that there could not arise in the mind of the owner any misapprehension as to the extent and nature of the lienor's claim, then any technical variance which might appear would be immaterial.

In Star Mill & Lumber Co. v. Porter, supra, it is said: "The notice is, indeed, incorrect in stating as one of the terms of the contract that the claim was based upon a quantum meruit, instead of upon a special promise to pay a fixed amount; and this doubtless as a matter of pleading would constitute at common law a material variance, though hardly under existing practice. Code Civ. Proc. § 469. But, as we have already said, the technical doctrine of variance has no application to a notice of lien, where all that is required is that the statement of the terms of the contract shall be substantially true. There are, indeed, many cases cited by the appellant, and other cases, which might be conceived to hold a contrary doctrine [citing a number of cases]. But these, or most of them are distinguished from the present case, in that it did not appear that the fixed price stated was the market price. In the absence of this fact, the statement would be substantially false and might mislead the owner to his prejudice. But, where the fact appears, no injury can result to the owner; nor can the misstatement be regarded as material." It seems to us plain that the point we are considering here comes clearly within the principle laid down in the foregoing case.

2. It was not incumbent on the plaintiff to

prove nonpayment, but the burden of proving payment rested on the defendant. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. It is there said: "It is not necessary to determine whether the evidence was sufficient to warrant the finding of nonpayment—if proof of nonpayment by plaintiff had been necessary. Where the plaintiff has proved the existence of a debt sued on—at least, within the period of statutory limitation—the burden of proving payment is on the defendant. That this is the rule at common law no one can doubt; and we have no statutory law changing it." See, also, Greenleaf on Evidence; 1 Cowen & Hill's Notes to Phillips on Evidence, side page 810; Still v. Saunders, 8 Cal. 281; Lisman v. Early, 15 Cal. 199; Caulfield v. Saunders, 17 Cal. 569; Green v. Palmer, 15 Cal. 412, 76 Am. Dec. 492.

3. The contention that Madary "stands in the shoes" of Sircy, the contractor, and is therefore equally liable with Sircy for the proper performance of the terms of the contract, and consequently entitled to no lien for his claim, arises out of the circumstance of the assignment by Sircy to Madary of all moneys, which would become due under said contract. The evidence shows that one of the considerations moving Madary to become one of the sureties on Sircy's bond was an agreement on the part of the latter that he would "assign and transfer to Madary all the money that was to grow due on the contract." "That," testified Madary, "was a consideration of my going on the bond. * * * The object of the assignment was to prevent the contractor doing as he pleased with his own money. Sircy was indebted to me at the time he made these various assignments." There was no evidence that Sircy assigned the entire contract to Madary, nor any showing that Madary was to reap any of the fruits of the contract, except in so far as he might furnish labor and materials to Sircy to be used in executing the terms of said contract. The court found that Sircy was in the erection and construction of the building representative and contractor of the defendants, Frank Glas, Jr., et al.; that Sircy was not at any time the agent of Madary in any respect in the erection of said building; that the assignment of all moneys due and to grow due on said contract to Madary by Sircy "was so made that M. R. Madary, as bondsman of W. J. Sircy, could see to a proper application of all sums of money received, and that the same was applied in payment of labor performed and materials furnished for said building"; that said Sircy was not, in the construction of said building, acting under the supervision or control of Madary, or subject to his supervision. These findings are well supported by the evidence, and the conclusion of law following therefrom, that Madary thus in no manner or degree became responsible or liable under the terms of the contract, is sound and unimpeachable.

In Stone v. Owens, 105 Cal. 292, 38 Pac. 726, a contract with the state for the construction of a sea wall and wharf on the water front of the city of San Francisco was, in consideration of money advanced and to be advanced to the contractors, assigned by the latter to one Wood, with authority to demand and receive all warrants and moneys due or to become due under said contract. The question presented was: Did Wood become a party to the contract for the completion of the sea wall and wharf by the assignment of the contract to him as collateral security for money loaned? The Supreme Court, answering this question negatively, says: "As it appears that the contracts were delivered to Wood at the time they were assigned, and also appears on the face of the written assignments, as well as by extrinsic evidence that the assignments were intended to operate as collateral security for the payment of debts, the legal effect of the assignments and the power of attorney to receive the warrants, and the money to become due under those contracts, was merely a pledge of those contracts creating a lien thereon subject to which the title to, and the general property in, the pledge remained in the pledgor (Civ Code, § 2888; Haber v. Brown, 101 Cal. 452, 35 Pac. 1035, and cases there cited); and such pledge and lien implied no obligation of the pledgee to perform, or to pay for, the work which the pledged contracts required to be performed by the pledgors—the Owens brothers. And surely no such obligation is expressly imposed by those assignments." See Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, and Canale v. Copello, 137 Cal. 22, 69 Pac. 698. The case at bar, as to the point under present review, is no different from the case from which the foregoing excerpt is made. Madary merely accepted the assignment as indemnity against loss as a surety, and therefore to insure the proper application of the moneys due and to become due on the contract, and thus in no sense assumed any liability to the owners or the laborers, mechanics, and materialmen.

4. There is no merit in the contention that, because Madary personally bestowed no labor or services on the building, he is not entitled to a lien for the labor furnished the contractor in putting on the roof for which he claims a lien. Madary was a subcontractor in the matter of putting on the roof, and not only furnished the material for that purpose, but delegated the work of putting on the roof to one of the regular employés in his planing mill, or, as he called his employé, "our roofing man." It is claimed that the case of Miltimore v. Nofziger Bros. Lumber Co., 150 Cal. 790, 90 Pac. 114, is an authority for the proposition that a subcontractor, though furnishing labor as well as

material, cannot claim a lien for labor unless such labor was personally performed by him. We do not so read that decision. As we understand the language of the opinion, it merely holds that the constitutional provision (section 15, art. 20) with reference to the rank of each lien, where different liens are asserted against any property, places mechanics, materialmen, artisans, and laborers in the same class, and their equality being thus established by said constitutional provision, which is self-executing, "the provision of the Code that persons performing manual labor shall be first paid out of the proceeds of the property, and, in effect, that the materialmen shall have no lien, except upon such balance of the proceeds as may remain after the laborers are fully paid, clearly impairs, and in many cases will destroy, the right of materialmen given by the Constitution," and "to that extent the statute is void." In other words, the only proposition dealt with in that case was the question of priority or the rank among different lienors. It may be suggested that it would, indeed, be a singular principle that would sustain a provision of law to the effect that a subcontractor, who has agreed with the contractor to furnish certain materials for the structure and to put the same in place, would not (himself perhaps without the skill to do the work in person) be entitled to a lien for the labor so performed because he had not himself personally performed it.

5. It is insisted that there is a material difference between the lien filed by respondent and as alleged in the complaint and the proved contract out of which the lienor's claim grew, and that such variance is fatal. The contention here is that the fact that Madary guaranteed the payment of respondent's claim was one of the terms or conditions between the respondent and the contractor. As counsel for respondent well says, the transaction between Madary and respondent by which the former guaranteed payment by Sircy involved a separate and distinct arrangement between the respondent and Madary, and with which the contractor had nothing to do. The guaranty had reference only to the means adopted by the plaintiff to secure for itself indemnity against loss in the transaction by which it agreed with Sircy to furnish him certain materials.

6. But we are of the opinion that the court, under the circumstances of this particular case, exceeded its authority by directing in its decree the payment, out of the proceeds of the sale of the premises, of the unmatured note secured by the mortgage on said premises executed by the defendants, Glas, to the Commercial Bank of Madera. That the appellants have a right to complain of this part of the decree we have no doubt, notwithstanding the fact that the bank has not appealed from the judgment, and therefore urges no complaint against it. The only other liens than that of the mortgage involved in this case are subject to the mortgage, the latter lien having attached to the premises prior to the time at which the right to the said other liens accrued. In Burnett et al. v. Glas et al., supra, there were liens paramount to the mortgage and others subject thereto, and the court, while holding that, under such circumstances, it was necessary to sell the whole property and pay the note secured by the mortgage from the proceeds of the sale, in order to protect the rights of all the lienors, although said note was then not due, said, through Mr. Justice Angellotti, that "if all the mechanics' liens had been paramount to the mortgage, or if all had been subject thereto, the case would have been very different and appellants might well have insisted that no provision be made in the decree for the payment of the mortgage. In the first case, the mortgagee would have to redeem from the lien sale to preserve its claim, and in the second case the property would be sold subject to the mortgage." This declaration may perhaps be correctly said to be obiter, but there can be no doubt that it involves a statement of the true rule in both the supposititious cases. The rights of the appellants as mortgagors would therefore be very much prejudiced by a decree which in effect would foreclose their mortgage before the debt to secure which said mortgage was given is due, and which might possibly result in a deficiency judgment being entered up against them before the debt is due, much to their injury. For illustration, it might happen, as it often does in such cases, that the property sold, as it would be, at a forced sale, would not bring its actual value. The payment of the mortgage debt under the circumstances appearing in the case of Burnett v. Glas was a matter indispensably necessary in order to preserve the rights of all lien claimants—those whose liens were superior to as well as those whose liens were subject to the mortgage. Here, all the liens being subsequent and subject to the mortgage, there is no just reason for the payment of the note secured thereby before it is due.

But counsel for the respondent takes the position, which was also approved and adopted by the court, that, inasmuch as no attack was made on the former appeal on any other portions of the findings and decree following the first trial than those involving the claims here in controversy, the judgment of reversal as to these later claims in no manner affected or disturbed the said other portions of the findings and decree, and that they were therefore affirmed, and that they now stand immune from attack here. We have already shown by the authorities that the court below was authorized to adopt such of the proceedings of the former trial as were not disturbed by the former decision of this court and as are necessary to support the judgment here and as to which no new proceedings were had at the second trial. But it appears from the record on a former appeal, as seen, that there were certain liens which were paramount to the mortgage and certain other liens the right to which accrued after the mortgage lien attached and were subject thereto. And it is admitted by counsel for respondent that, after the filing of the decision of the Supreme Court in Burnett et al. v. Glas et al., all the liens which were paramount to the mortgage were paid and satisfied, thus eliminating them as a further bone of contention in this litigation. Upon the first trial of the present action, therefore, all the liens involved were subsequent and subject to the mortgage. The court, however, in the first trial of this case adopted nearly all the findings and decree filed and entered in the case of Burnett et al. v. Glas et al. And it has done likewise in the present action, and has added a finding with regard to the effect of the judgment in that case on the mortgage lien, that said "judgment has now become final." This conclusion, so far as the decision in the Burnett Case is concerned, is doubtless sound; but in the present action the mortgage lien of the bank was made an issue by the complaint. It is alleged in the complaint that it is still a subsisting lien on the premises of the appellants, and that it is paramount to the other liens concerned here, and, all other liens heretofore litigated and adjudicated having been eliminated as issues in the present action, it must follow, as we have declared, that the decree of the court here directing the premises to be sold and from the proceeds of such sale the note secured by the mortgage be paid, thus virtually foreclosing the mortgage before the debt it was given to secure is due, is erroneous to that extent. But we see no necessity for a reversal of the judgment for this reason. The court found that said bank "holds a mortgage upon all the premises described in said complaint, which mortgage is superior to and prior to any claim of lien against said building and premises of the plaintiff herein," and upon this finding and consistently therewith, and in accordance with the suggestion of the Supreme Court in Burnett et al. v. Glas et al., the judgment may and should be so modified as that the direction therein shall be that the premises shall be sold, subject to the mortgage lien subsisting thereon in favor of the Commercial Bank of Madera, to satisfy the claims of the respondent.

7. The point that Madary is entitled to no lien for the reason that he is a surety on the contractor's bond may be disposed of against the contention of the appellant on the authority of Barrett-Hicks Co. v. Glas et al., supra. The facts in this case upon said point are precisely the same as those in the cited case, which, as seen, involved the appeal from the judgment entered after the first trial of the present case.

8. Counsel's statement that the court refused to receive evidence offered by the defendants in support of their alleged offset to Madary's claim is not borne out by the record. We have not succeeded in discovering in the record any evidence of any effort on the part of the defendants to establish or prove the set-off alleged in their answer, or any ruling of the court on any such proposition. We have, with much care, examined all the important points urged by appellants, and have found no reason for disturbing the judgment and order, except in so far as that the former should be modified in the respect hereinbefore suggested and pointed out.

The court below is hereby directed to modify the judgment so that it will, for the purpose of satisfying the liens of the respondent herein, direct the sale of the premises involved in this action, subject to the mortgage lien of the Commercial Bank of Madera, and as so modified the judgment as well as the order will be affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

158 Cal. 548

GOULD v. MOSS, Judge. (L. A. 2,767.)

(Supreme Court of California. Nov. 11, 1910.)

1. MANDAMUS (§ 190*)—PROCEEDINGS—COSTS—POWER TO AWARD.

Code Civ. Proc. § 1095, provides that, if a judgment be given for the petitioner in mandamus, he may recover his costs. *Held*, that this applies to original proceedings, whether in the superior court, the Supreme Court, or in the District Court of Appeals, and that the Supreme Court has power to award costs.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 438; Dec. Dig. § 190.*]

2. MANDAMUS (§ 190*)—PROCEEDINGS—COSTS—NECESSITY OF JUDGMENT.

Although the Supreme Court has power to award costs in mandamus proceedings, costs do not necessarily follow the judgment, and, unless specially awarded, cannot be recovered.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 438; Dec. Dig. § 190.*]

3. MOTIONS (§ 16*)—REQUISITES—STATEMENT OF GROUNDS.

Where the grounds of a motion to strike out a memorandum of costs in a mandamus proceeding that court had no jurisdiction to allow costs, etc., the motion will be dismissed, though, if it had been based on the ground that no costs were adjudged, it would have been sustained. but the memorandum will be disregarded.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 10; Dec. Dig. § 16.*]

Department 1. Mandamus by Will D. Gould against Leon F. Moss. Motions by defendant to strike memorandum of costs and to retax the costs. Dismissed.

James H. Blanchard and Will D. Gould, for petitioner. Murphey & Poplin, for respondent.

SHAW, J. This was an original proceeding in mandamus begun in the Supreme Court to compel the defendant to certify a statement of the case on motion for a new trial in the matter of a petition of Mary Woodman Kilborn to revoke the probate of the will of Julia Ann Kilborn, deceased. An alternative writ was issued. The defendant appeared and answered, as also did the said Mary Woodman Kilborn, and upon the hearing final judgment was rendered by this court on September 6, 1910, in presence of petitioner, directing the defendant to certify said statement as soon as it should be correctly engrossed. On October 5, 1910, the plaintiff filed in this court a memorandum of costs, claiming the sum of $91.70 for the several items, including the printing of the plaintiff's petition and points and authorities, clerk's fees on filing the petition, and cash paid for telegrams and for a certified copy of the judgment of this court. The defendant now moves this court to strike out this memorandum of costs, and also to retax the costs. The grounds of the motion to strike out are that this court has no jurisdiction to allow costs in such proceedings, and that, if jurisdiction exists, the memorandum was not filed within the time allowed by law.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is provided in section 1095 of the Code of Civil Procedure that, if judgment be given for the applicant in a proceeding in mandamus, he may recover such damages as he may be found to have sustained, together with costs. This provision applies to original proceedings of that character, whether begun in the superior court, in the Supreme Court, or in a District Court of Appeal. The point that this court is without power to award costs in such cases is without merit.

We need not consider the question whether or not the memorandum was filed too late. There was no warrant for filing it at all. While, as above stated, the court may give judgment for costs in mandamus proceedings, yet, if the judgment does not include costs, the filing of a memorandum of costs by the prevailing party will avail him nothing. The judgment of the court in bank in this case does not award costs to the plaintiff. Whether correct in this respect or not, it has become final. Even if we had the power to revise or correct it, we are not asked to do so. The plaintiff is assuming that the judgment, as given, carries costs. In this he is mistaken. If the motion to strike out had been based on the ground that no costs are adjudged, it would have been granted. As it is, the motions cannot be granted but the memorandum of costs will be disregarded.

The motions are dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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14 Cal. App. 330

GIBSON v. BERRYMAN. (Civ. 762.)

(Court of Appeal, First District, California. Oct. 7, 1910. Rehearing Denied by Supreme Court Dec. 2, 1910.)

1. New Trial (§ 123*)—Notice—Waiver.

Notice of intention to move for a new trial may be waived.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 279; Dec. Dig. § 123.*]

2. New Trial (§ 123*)—Notice—Waiver.

When both parties by stipulation waived notice of intention to move for a new trial, the court had jurisdiction to order a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 279; Dec. Dig. § 123.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by A. Gibson against F. M. Berryman. From the judgment, plaintiff appeals Affirmed.

W. C. Cavitt, for appellant. Earll H Webb (Andrew Thorne, of counsel), for respondent.

HALL, J. This is an appeal from a judgment against plaintiff, taken in accordance with sections 953a, 953b, and 953c, Code of Civil Procedure. The action was brought to obtain a decree enjoining defendant from enforcing a judgment for $900, obtained by defendant herein against plaintiff herein in an action of unlawful detainer. An appeal was taken to this court by the plaintiff herein from the judgment in the action of Berryman v. Gibson, and the judgment was affirmed. 7 Cal. App. 679, 95 Pac. 671. By this action it is sought to enjoin the enforcement of such judgment, upon the grounds, first, that the court was without jurisdiction to render the judgment; and second, that said judgment was obtained through fraud and collusion between Berryman and the respective attorneys of the plaintiff and defendant in the action of Berryman v. Gibson.

As to the want of jurisdiction, it appears that the action of Berryman v. Gibson was tried, and resulted in the court making and signing findings of fact and conclusions of law. By the findings of fact it appeared that Berryman was entitled to a judgment for $900, being treble the amount of rent due and unpaid. The court, however, directed judgment for $80, and the judgment was entered in favor of Berryman for such amount. In due time the plaintiff in that action moved to vacate said judgment, and to amend the conclusions of law so that the same might conform to the findings of facts. After hearing and argument by the attorneys for both parties, the court granted the motion to vacate the judgment and to amend the conclusions of law, and ordered that the cause be set down for a new trial. Subsequently on the next day an order was filed, signed by the judge of the court, amending the conclusions of law to the effect that plaintiff (therein) was entitled to judgment for $300 for rent, and that the same be trebled, and ordered judgment entered accordingly. On this condition of the record the attorneys on the 18th day of February, 1907, signed a stipulation to the effect that a new trial might be granted, and that an order granting such new trial might be entered. This stipulation was filed March 1, 1907, and thereupon the court entered an order upon such stipulation, granting a new trial.

No notice of intention to move for a new trial had been given by either party, and the time for giving such notice had expired. The cause came on for a new trial, and, both parties appearing, it was partly tried, and after various continuances, some regular and some irregular, it was called for trial on a certain date, and plaintiff (therein) appeared; but, defendant (therein) not appearing, judgment was ordered for plaintiff. There is evidence sufficient that the attorney for defendant (therein) had notice that the trial was set for the date upon which it was concluded. In fact, he appeared in court a few minutes after judgment was ordered against his client (plaintiff herein). The contention of appellant is that, without any notice of intention to move for a new trial, the court had no jurisdiction to make the order granting the new trial, notwithstanding the stipulation of the attorneys, and that, for that reason, the judgment which was subsequently rendered and affirmed on appeal (7 Cal. App. 679, 95 Pac. 671) was and is void.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is manifest that, when the stipulation was entered into and when the order was entered, the record was in such shape that plaintiff in that action was entitled to a judgment against defendant therein for $900. By the stipulation and order Gibson obtained the advantage of a new trial. It is well established that notice of intention to move for a new trial may be waived. Williams v. Gregory, 9 Cal. 76; Gray v. Nunan, 63 Cal. 220; Hobbs v. Duff, 43 Cal. 485; Calderwood v. Brooks, 28 Cal. 151; Schieffery v. Tapia, 68 Cal. 185, 8 Pac. 878; Hibernia S. & L. Society v. Moore, 68 Cal. 156, 8 Pac. 824. If the new trial had not been granted on the stipulation, Berryman would have been entitled, on the findings of fact and the conclusions of law as they then stood, to a judgment against Gibson for $900. Gibson took advantage of the order which was entered with the consent of his attorney, and should not now be heard to complain. Meerholz v. Sessions, 9 Cal. 277; Brotherton v. Hart, 11 Cal. 405; Erlanger v. S. P. R. R. Co., 109 Cal. 395, 42 Pac. 31. Both parties, by the stipulation, waived notice of intention to move for a new trial, and the court upon said stipulation had jurisdiction to make the order.

We have carefully read all the evidence in the record, and find nothing to support the contention that any fraud was practiced upon appellant or the court. Appellant's attorney in the case of Berryman v. Gibson seems to have acted in entire good faith with his client, and there is nothing to show any act of collusion or fraud upon the part of Berryman or his attorney. The findings of the court upon the question of fraud are fully supported by the evidence.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 315

McQUAIDE v. ENTERPRISE BREWING CO. (Civ. 785.)

(Court of Appeal, First District, California. Oct. 3, 1910.)

1. Corporations (§ 409*) — Lease — Acceptance—Execution—Authority of Officers.

Where the terms of a proposed lease were discussed at a meeting of corporate directors, and they agreed to take the lease, there was sufficient authority in the president and secretary to execute it, though no formal written resolution authorizing it was adopted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1620–1622; Dec. Dig. § 409.*]

2. Corporations (§ 426*)—Lease—Execution by Officers—Ratification.

After the execution of a lease to a brewery corporation by its president and secretary, the landlord erected a building on the land according to plans approved by the corporate officers, and in pursuance of the terms of the lease. On completion of the building, the corporation took possession, and for 15 months paid the rent by corporate checks which were duly entered in its books. It also sublet the premises to sundry tenants, collected rent from them for its own benefit, and on their default on the rent took legal proceedings in its own name to eject them. It also sold its beer to one of the tenants, who ran a saloon on part of the premises. *Held* that, irrespective of the authority given the officers to execute the lease, there was a ratification of it by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702–1704, 1713, 1714; Dec. Dig. § 426.*]

3. Corporations (§ 487*)—Ultra Vires Contract—Liability.

Where a corporation has received the benefits of an executed contract, it cannot escape liability thereon on the ground of its being ultra vires, where the contract was not malum in se or malum prohibitum.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1893; Dec. Dig. § 487.*]

4. Corporations (§ 435*)—Restrictions as to Holding Real Property—Lease—Subletting.

Civ. Code, § 360, providing that a corporation cannot hold any more real property than may be reasonably necessary for the transaction of its business, is not contravened by the act of a corporation, whose purpose is to manufacture and sell beer, in leasing a building and subletting it for purposes of a saloon, since one of the objects of the corporation was to find a market for its beer and increase its sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1763, 1766; Dec. Dig. § 435.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Emma L. McQuaide against the Enterprise Brewing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. S. Melsted and Richard O'Connor, for appellant. R. F. Mogan and Leon Samuels, for respondent.

COOPER, P. J. This action was brought to recover of defendant corporation the sum of $500 for rent of the premises described in the complaint for the month ending November 30, 1908. The case was tried before the court without a jury, and findings filed, in which judgment was ordered for the plaintiff in the amount claimed.

The first contention of appellant is that the defendant corporation never leased the premises from the plaintiff, and hence is not liable for rent of said premises. This was one of the issues made by the pleadings, and the court found in favor of the plaintiff to the effect that the defendant did execute the lease, and that it thereafter entered into possession of the premises and has ever since remained in such possession, and "that the signatures of the president and secretary of said corporation to said lease were not without authorization on the part of said corporation defendant, and are not ultra vires or null or void, but, on the contrary, each of said signatures was affixed to said lease with the authorization of said corporation defendant."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We have carefully examined the evidence, and find that it supports the findings in this regard. The evidence shows without conflict: That the lease was in writing, signed in the corporate name and under the corporate seal of defendant, by its president and secretary, with their several official designations attached. That the land was vacant when the lease was made, and that plaintiff erected a building thereon at a cost of $27,000, according to the plans and specifications submitted to and approved by defendant's officers, in pursuance of the stipulations contained in the lease. That the rent was to begin when the building was completed, and when it was so completed the keys were delivered to defendant's president, and the defendant thereafter paid the monthly rent for 15 months by checks signed with the name of the corporation, which payments were entered in the corporation's books in the regular course of business. That after defendant went into possession of said premises it sublet the premises in its own name by different leases to different tenants, part of them being sublet for the purposes of a saloon, and a part for a workingman's hotel, and it collected the rents from the subtenants for its benefit. The rents so collected were placed to the credit of the subtenants in the regular course of the corporation's business. That it sold beer manufactured by it to its subtenant who occupied the saloon and the hotel. That when some of its subtenants defaulted in the payment of their rent it brought suit in its corporate name to eject said tenants and to obtain judgment of restitution of the premises against such subtenants. That upon the completion of the building it placed in said hotel and saloon some $1,600 worth of furniture and fixtures. Remensberger, the defendant's president, testified as follows: "I read the lease. I guess Mr. Windeler read it—I don't know for sure—and the terms of the lease were mentioned at the time of the meeting of the board of directors. Q. And it was stated at the meeting of the board of directors that this was to be a lease to the Enterprise Brewing Company, wasn't it? A. Yes, sir. Q. And thereupon did the board of directors then assembled agree to take that lease? A. Yes, sir. Q. Subseqeuntly to that meeting, and pursuant to the wishes of the members of the board then assembled, wherein they stated that they wanted to take that lease, did you and and Mr. Windeler sign that lease? A. Yes, sir. Q. After the lease in this action had been signed by the Enterprise Brewing Company, by yourself as president and Mr. Windeler as secretary, did the matter of this lease at any time thereafter come up for consideration by the board of directors of the Enterprise Brewing Company? A. No. * * * I believe there were two or three meetings of the board of directors to consider the matter of this lease."

It is not necessary to further discuss the contention as to the insufficiency of the evidence. Honesty and fair dealing require that the defendant be held to the terms of the lease. Under the circumstances as disclosed by this record, it was not necessary to show a formal resolution in writing signed by the board of directors authorizing the lease. It was authorized by the board of directors; it was afterwards ratified by them. The president of the corporation virtually so states. No director of the defendant has taken the stand and denied it.

It is next claimed that the defendant had no power to enter into the lease, and that it is ultra vires. The doctrine of ultra vires when invoked by a stockholder of a corporation, or in quo warranto proceedings by the state, particularly as to executory contracts and in violation of its charter or entirely outside the scope and purpose of its creation, is looked upon quite differently than it is when relied upon by a corporation as a shield to escape its just liabilities under an executed contract. In such case the rights of the party with whom the corporation has made the contract, and the consequences to him, are to be carefully weighed before the court will hold the contract void. In such cases the courts simply consider the facts as to the circumstances of the contract; as to whether or not the corporation has received benefits under it; as to whether or not the doctrine of estoppel in pais may be invoked. In other words, it is the policy of the law and the endeavor of the courts to hold corporations as well as natural persons to their contracts and make them liable for the obligations they have incurred. Such defense introduced against a contract which has been executed wholly or in part by the corporation is looked upon with disfavor, and particularly of late years when corporations have multiplied until they control and operate all kinds of business, and in many cases to the exclusion of individuals. The rule is based upon the strongest principles of justice and public policy that a contract should be enforced against a corporation when it has received the consideration or the benefits of the contract. As to contracts of corporations that are malum in se or malum prohibitum, they will not be enforced; but as to contracts not thus objectionable justice and public policy, as before stated, require that the doctrine of ultra vires should be limited in its scope and application.

Appellant invokes section 360 of the Civil

Code, which provides: "No corporation shall acquire or hold any more real property than may be reasonably necessary for the transaction of its business or the construction of its works, except as otherwise specially provided." It is claimed that the words "acquire or hold" apply to a lease of real estate. If this be so, the court found "that said leased property at all times in said complaint mentioned was and now is reasonably necessary for the transaction of the business of said corporation defendant." There is evidence sufficient to support this finding. One of the purposes of the defendant corporation, as set forth in its articles, is "to manufacture and sell beer." One of the objects of defendant in procuring the lease was to sublet the saloon to one of its old customers who had been in the habit of buying beer from them and who would buy beer and sell it at the saloon. It was one of its objects to find a market for its beer and increase its sale. With this purpose in view, it purchased the bar fixtures and furnished the bar with such fixtures and furniture. It procured the place where the beer was to be sold, bought the furniture and bar glasses to be used in selling it, leased the property, and sublet it to the party who was to sell it. It would not have been in violation of law for the defendant to have purchased a lot and erected a building so as to have a place in which to dispose of its wares. If so, it was not in violation of law for it to lease such place and sublet it to others. Such transaction was germane to the purposes of the corporation defendant and not foreign to it. Winterfield v. Cream City Brewing Co., 96 Wis. 239, 71 N. W. 101; National Brewing Co. v. Ahlgren, 63 Ill. App. 475; Standard Brewery v. Kelly, 66 Ill. App. 267; Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755; Glass v. Heim Brewing Co., 47 Mo. App. 639.

The judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

(158 Cal. 550)

Ex parte WILLIAMS. (Cr. 1,644.)

(Supreme Court of California. Nov. 12, 1910.)

Municipal Corporations (§ 594*)—Police Power—Ordinances—Picketing.

A municipal ordinance declaring that "picketing," for the purpose of intimidating and threatening the employés of a private industrial concern, is a misdemeanor, is a valid exercise of municipal power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316–1318; Dec. Dig. § 594.*]

Application by J. J. Williams for a writ of habeas corpus directed against the Police Court of the City of Los Angeles. Writ denied.

Austin Lewis, R. M. Royce, and Geo. F. Snyder, for petitioner.

BEATTY, C. J. This is a petition for a writ of habeas corpus which has been denied by the court.

The prisoner was arrested upon a complaint accusing him of violating a penal ordinance of the city of Los Angeles. The ordinance is quite comprehensive in its enumeration of the acts which it declares to be misdemeanors, and the prisoner was charged in the information with two distinct offenses, as defined by the ordinance: First, with "loitering" on a public street in front of the Fulton Engine Works, for the purpose of inducing and influencing persons to refrain from doing and performing services and labor at said works; second, with "picketing" in front of said works, for the purpose of intimidating, threatening, and coercing such persons.

It is argued in support of the petition that the ordinance is invalid. As to the provision concerning "picketing," for the purpose of intimidation, threatening, etc., I have no doubt that it is a valid exercise of the powers of the local Legislature. As to the provisions relating to "loitering," I have very serious doubts. They are so vaguely comprehensive that a person stopping on the street anywhere in the vicinity of a place of business for the purpose of dissuading an employé from continuing in his employment might be convicted of a misdemeanor.

I therefore concur in the order denying the writ, only upon the ground that the charge of picketing for the purpose of intimidation, etc., gives the police court jurisdiction to try the charge.

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14 Cal. App. 323

ASTON v. ASTON. (Civ. 835.)

(Court of Appeal, First District, California. Oct. 5, 1910.)

1. Appeal and Error (§ 874*)—Appeal from Order Denying New Trial—Questions Reviewable.

The overruling of a demurrer is not reviewable on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3478; Dec. Dig. § 874.*]

2. Divorce (§ 286*)—Appeal—Scope of Review—Order Denying New Trial.

The action of the court in awarding all the community property to a wife obtaining a divorce cannot be questioned on appeal from an order denying a new trial, but only on appeal from the judgment.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 286.*]

3. Divorce (§ 249*)—Dispossession of Community Property—Power of Court.

Where a divorce is granted to a wife for the husband's adultery, the court may in its discretion give all the community property to her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701–705, 707, 709, 710, 712; Dec. Dig. § 249.*]

4. Divorce (§ 129*)—Grounds—Evidence.

Adultery justifying a divorce may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411–441; Dec. Dig. § 129.*]

5. Divorce (§ 129*)—Grounds—Evidence.

Evidence *held* to show a husband's adultery justifying the granting of a divorce to the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411–441; Dec. Dig. § 129.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. DIVORCE (§ 179*)—EVIDENCE—ADMISSIBILITY—REVIEW.

Where, in a suit by a wife for divorce on the ground of adultery, the court admitted in evidence an instrument signed by the husband's paramour, reciting that the husband had consented to the paramour's sale of her real estate, on condition that evidence connecting the husband with the instrument would be offered, and a subsequent instrument signed by the husband and his paramour, and referring to the former instrument, was introduced to connect the husband with the prior instrument, the husband, failing to object to the sufficiency of the evidence to connect him with the prior instrument, could not urge on appeal that the court erred in admitting the prior instrument.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 565; Dec. Dig. § 179.*]

7. DIVORCE (§ 115*)—EVIDENCE—ADMISSIBILITY.

In a suit by a wife for divorce on the ground of adultery, instruments signed by the husband and his paramour, indicating that the paramour held herself out as his wife and that he held her out as his wife, were admissible.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 371-378; Dec. Dig. § 115.*]

Appeal from Superior Court, Santa Cruz County; M. T. Dooling, Judge.

Action for divorce by Philip Aston against Honora Aston, who filed a cross-complaint for divorce. From an order denying a new trial after judgment for defendant on the cross-complaint, plaintiff appeals. Affirmed.

W. A. McGuire and Z. N. Goldsby, for appellant. Cassin & Lucas, for respondent.

HALL, J. Plaintiff brought this action to obtain a decree of divorce from his wife, Honora Aston. Defendant, however, obtained a decree of divorce from plaintiff upon the grounds of desertion and adultery, pleaded in her amended and supplemental cross-complaint. By the decree defendant was awarded all the community property. Plaintiff moved for a new trial, and from the order denying his motion he appealed to this court. There is no appeal from the judgment.

Appellant urges that the court erred in overruling his demurrer to the amended and supplemental cross-complaint. But the action of the court in overruling a demurrer is not open to review upon an appeal from an order denying a motion for a new trial. Moore v. Douglas, 132 Cal. 400, 64 Pac. 705; Morse v. Wilson, 138 Cal. 559, 71 Pac. 801.

Appellant also urges that the court erred in awarding all the community property to respondent. This is also an attack upon the judgment that may only be raised by an appeal from the judgment. But the divorce in this case was granted both for desertion and adultery committed by appellant. By reason of the divorce being granted for adultery, the court had the power in its discretion to give all the community property to the innocent party. Miller v. Miller, 33 Cal. 353.

Appellant contends that the finding that appellant committed adultery with a woman named Perez, at a house numbered 709 Fifth street in the city of Oakland, is not sustained by the evidence. Appellant left the home of plaintiff and defendant at Santa Cruz in 1891. The evidence tends to show that in 1905 appellant was living with a woman at 709 Fifth street in the city of Oakland. That this woman, with appellant's knowledge and apparent consent, referred to him as her husband, used his name, and he likewise referred to her as his wife and designated her as Mrs. R. A. Aston. This is particularly evidenced by a writing, signed by this woman, as follows: "My husband, Philip H. Aston, having consented to the sale of my real estate in Alvarado, Alameda Co., Cal., as per contract with E. D. Wilbur, dated at Oakland, Cal., October 16th, 1905, I hereby confirm the same, this 21st day of October, 1905. (Signed) Mrs. R. A. Aston." And in connection therewith a writing signed by appellant as follows: "I hereby consent to the above, and agree to any disposition that my wife (Mrs. R. A. Aston) cares to make of her separate property. (Signed) P. H. Aston." The children of this woman addressed the appellant as "Papa." The evidence tends to show that this woman's real name was Perez. Upon the day of the above transaction appellant and the Perez woman were found apparently living in the same house, and clearly represented themselves as husband and wife.

Adultery may be established by circumstantial evidence (Evans v. Evans, 41 Cal. 103), and that is the usual way in which it is proven. The evidence supports the inference that appellant and the woman Perez (alias Mrs. R. A. Aston) were living together in adultery, and the finding as to the adultery of the appellant is supported by the evidence.

Appellant also contends that the court erred in admitting in evidence the writing referred to in the above document as the "contract with E. D. Wilbur, dated at Oakland, Cal., October 16th, 1905," and some correspondence between "Mrs. R. A. Aston" and Wilbur, occurring intermediate October 16, 1905 and October 21, 1905. None of these writings were signed in the presence of appellant, and they were objected to when offered. Upon objection being made to the offer of the first of these writings, dated October 16, 1905, and signed "Mrs. R. A. Aston," the court asked the attorney for defendant if he proposed "to follow this up with other proof that will connect it," to which he replied that he did, and thereupon the court overruled the objection. While the same question and answer were not put and made when the other writings were offered, we think it is apparent that the court and counsel understood that they were offered and received under the same conditions. Finally, defendant did put in evidence the instrument dated October 21, 1905, signed by both appellant and "Mrs. R. A. Aston," and referring to the first writing objected to and received in evidence. It is perfectly clear from the record that this last writing was the evidence that defendant relied on as connecting the others with appellant. There was a certain connection shown. The last document, which was clearly admissible against appellant, referred to the first, and all the preceding writings were in connection with and leading up to the final transaction of October 21st. The purpose of all the evidence in question was to show that the woman, with appellant's knowledge, held herself out as the wife of appellant, and that he held her out as such wife, and held himself out as her husband. The last document clearly shows this. If appellant did not think the connection sufficiently shown by the last document, we think fairness to the trial court and opposing counsel required that he should have moved to strike out the evidence admitted over his objection.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We find no error requiring a reversal of the order denying the motion for a new trial, and the order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 326

CLARK v. BELL. (Civ. 803.)

(Court of Appeal, Second District, California. Oct. 6, 1910.)

1. Payment (§ 55*) — Plea of Payment — Counterclaim.

Plaintiff sued on an assigned claim of an indebtedness for work and materials in the sum of $1,864.01, less $1,342.69 paid plaintiff's assignor before assignment. Defendant pleaded further payment, before the assignment, to plaintiff's assignor for materials furnished the assignor and used in the work under the assignor's authority to the amount of $396.50, and demanded credit for such sum. *Held* that, the plea with reference to such additional sum was properly pleaded in the answer as a defense in the nature of a plea of payment, made at the instance of plaintiff's assignor, and not as a counterclaim.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 142; Dec. Dig. § 55.*]

2. Appeal and Error (§ 171*)—Findings—Issues—Objection—Estoppel.

Where parties have proceeded to trial on a pleading without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact and the issue found upon, the party whose duty it was to object will not be heard on appeal to say that the finding is not within the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1069, 1161–1165; Dec. Dig. § 171.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by William H. Clark against W. M. Bell. Judgment for plaintiff for less than the relief demanded, and he appeals. Affirmed.

Schweitzer & Hutton, for appellant. E. V. Chavez and A. J. Mitchell, for respondent.

ALLEN, P. J. The action was upon an assigned claim growing out of a contract between plaintiff's assignor and defendant, whereby the court finds that defendant agreed to pay plaintiff's assignor, on account of the performance of certain work and the furnishing of certain materials, the sum of $1,864.01; that defendant had paid plaintiff's assignor before the assignment the sum of $1,342.69; that, in addition, defendant had paid before the assignment for certain materials furnished plaintiff's assignor in the work, and which under the contract he was given authority to pay, the further sum of $396.50, which would, under the findings, leave a balance due plaintiff of $124.82. During the progress of the trial leave was given defendant to amend his answer upon payment of $13 costs. The latter amount the court by stipulation incorporated in the judgment, and gave plaintiff a judgment for $137.82. Plaintiff appeals upon the ground that the credit of $396.50 was improperly allowed, because it was in the nature of a counterclaim and no averments appear with reference to payment before the assignment.

The averments with reference to the payment of $396.50 were not in the nature of a counterclaim, but were matters of defense as a plea of payment made at the instance of plaintiff's assignor. It is averred that under the contract between the parties the right to pay this sum was accorded defendant. No demurrer was filed to the answer or amended answer and the same were treated by the parties as presenting proper issues. The court finds as a fact that the payment of the $396.50 was before the assignment. "It is well settled that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issues." Illinois Trust & Sav. Bank v. Pacific Ry. Co., 115 Cal. 297, 47 Pac. 63.

An evident misprint appears in the conclusions of law, whereby a seeming disparity between the findings and such conclusions exists as to the amount of the contract price; but it in no manner affects the judgment as rendered and needs no correction or attention.

Judgment affirmed.

We concur: SHAW, J.; JAMES, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14 Cal. App. 338

KEIFER v. MYERS. (Civ. 826.)

(Court of Appeal, Second District, California. Oct. 7, 1910. Rehearing Denied Nov. 5, 1910; Denied by Supreme Court Dec. 5, 1910.)

1. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEAL—LAW OF THE CASE.

A decision of the court on appeal construing agreements between the parties and determining their legal effect, is the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

2. EVIDENCE (§ 397*)—PAROL EVIDENCE—VARYING WRITTEN AGREEMENTS.

The right to prove by parol the facts establishing a contract different from that expressed in a writing evidencing the contract is confined to those cases where an equity is sought to be shown superior to the writing, which equity a court of chancery will enforce by annulling or reforming the instrument or limiting its operation, or enjoining its use, and under this rule instruments purporting to grant absolute rights may be shown to have been intended to possess some limited character, but the right to defeat an expressed equity by destructive parol proof is not within the rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756–1765; Dec. Dig. § 397.*]

3. EVIDENCE (§ 400*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS.

In the absence of fraud or mistake justifying reformation, a written agreement of pledge cannot be shown by parol to be an agreement of absolute sale.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 400.*]

4. PLEDGES (§ 44*)—TENDER—EFFECT AS DISCHARGE.

A tender of the amount due under a pledge is, by Civ. Code, § 1504, a performance of the obligation at the date of tender, and hence fixes the amount which may be required of the pledgor as a condition of redemption, so that no voluntary payments thereafter made by the pledgee can be added to such amount.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 44.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. H. Keifer against R. H. Myers. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank G. Finlayson, W. R. Hervey, and R. H. Myers, for appellant. Lynn Helm and E. S. Williams, for respondent.

ALLEN, P. J. This was an equitable action wherein plaintiff sought a decree adjudging him the owner of certain shares of the capital stock of a laundry company. The issue presented was as to the character of the transfer to defendant of such shares. The trial court found the transaction to be a pledge of the shares, and not an absolute sale, and plaintiff was decreed appropriate relief.

The principal question involved herein was before this court upon a former appeal from a judgment of nonsuit. Keifer v. Myers, 5 Cal. App. 668, 91 Pac. 163. Upon that appeal, as upon this, the written agreements entered into between the parties with reference to the transfer and indorsement of the certificates of stock were before this court, and in the first appeal this court construed such agreements and determined that upon their face the same were clearly intended to be and were agreements relating to a pledge. That construction of the agreements and the legal effect which should be given the same has become the law of the case. We cannot, therefore, upon this appeal, consider appellant's contention that the same should be construed or held otherwise.

There remains, however, another question presented by the record, and that is as to the action of the trial court in sustaining an objection to evidence offered by defendant of conversations between the parties leading up to and culminating in the execution of the agreements as indicating the effect which the parties intended should be given thereto; the question propounded being: "State all the facts leading up to and attending the making of the contract between yourself and Mr. Keifer relating to the transfer to you of 198 shares of stock of the Sanitary Laundry Company owned by Mr. Keifer; what was said and done by each of you?" Appellant insists that the equitable rule long established, and as followed by our Supreme Court in Pierce v. Robinson, 13 Cal. 125, and numerous other cases, is applicable to a case of the character here presented. The Pierce Case, as in all cases which have come under our observation, wherein the right to prove by parol facts tending to establish a contract different from that expressed by the language of the instrument, is confined to those cases where an equity is sought to be shown superior to the terms of the instrument, which equity a court of chancery will enforce by annulling or reforming the instrument, or limiting its operation, or enjoining its use. Under this rule, deeds may be shown to be mortgages and other instruments purporting to grant absolute rights may be shown to have been intended to possess some limited character. But the right to defeat an expressed equity by destructive parol proof is not comprehended within the rule. In our opinion, the written agreement of pledge cannot be shown by parol to be an agreement of absolute sale, no more than a mortgage, which is but a lien, may by parol be shown to have been intended as a grant of the property described. That in cases of the nature here presented evidence is not admissible dehors the instrument to establish a character different from that expressed by the language employed. Whatever rights exist in cases analogous to the one under consideration, if the instrument through fraud or mistake does not express the real agreement, must be worked out through a reformation of the contract under appropriate pleadings and subject to the rules and sufficiency of the evidence in actions of that character. Gardner v. Cal. Guarantee Co., 137 Cal. 71, 69 Pac. 844. We think the court did not err in its fixation of the amount requisite to redemption from the pledge. A tender of the amount due under a pledge has the effect of performance of all incidents of the obligation at the date of the tender. Section 1504, Civ. Code. The refusal of defendant to accept the tender based upon a disavowal of a pledge and a claim of absolute ownership renders subsequent payments by the pledgee as voluntary in their character. "No man can be a debtor for money paid unless it was at his request." Curtis v. Parks, 55 Cal. 106; Huddleston v. Washington, 136 Cal. 519, 69 Pac. 146.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We have examined the other specifications of error, all of which relate to rulings upon the admissibility of evidence, and those specifications not covered by the principles hereinbefore declared are not of a character which would warrant a reversal of the judgment.

Judgment affirmed.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 321

Ex parte BOHANNON. (Civ. 295.)

(Court of Appeal, First District, California. Oct. 5, 1910.)

CONSTITUTIONAL LAW (§ 206*)—GRANTS OF SPECIAL IMMUNITIES—REGULATION OF PRACTICE OF MEDICINE—EXEMPTIONS FROM GENERAL LAW.

In St. 1907, c. 212, Gen. Laws 1910, p. 609, Act 2163, "for the regulation of the practice of medicine," etc., the proviso "that nothing herein shall be held to apply or to regulate any kind of treatment by prayer," even if prayer can be regarded as practicing medicine and as a privilege or immunity, extends such privilege to all, and is not an exemption from the general law, which would make the whole act unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625–648; Dec. Dig. § 206.*]

Petition by J. L. Bohannon for a writ of habeas corpus. Writ denied.

Gibson & Woolner, H. A. Stout, and Burton J. Wyman, for petitioner.

COOPER, P. J. Petitioner desires to have a writ of habeas corpus to obtain his release from imprisonment under a judgment rendered in a court of competent jurisdiction, convicting him of unlawfully practicing medicine without having a license or a valid unrevoked certificate authorizing him to practice medicine, contrary to the provisions of the law in such case made and provided. The act under which the petitioner was convicted is entitled "An act for the regulation of the practice of medicine and surgery, osteopathy, or other system or means of treating the sick or afflicted in the state of California; for the appointment of a Board of Medical Examiners in the matter of said regulation." St. 1907, p. 252; Gen. Laws, 1910, p. 609, Act 2163. The act concludes with the following exception or proviso: "Provided that nothing herein shall be held to apply or to regulate any kind of treatment by prayer." It is claimed that the latter exemption makes the whole act unconstitutional and void, and that it gives to a certain class of persons, to wit, those who treat physical ills by prayer, privileges and immunities which "under like conditions are not granted to all citizens."

We do not so construe the section. If prayer can be regarded as practicing medicine and as an immunity, the act allows every person, man, woman or child, such immunity and the right to pray for the sick and afflicted, and that is the only way that disease can be treated by prayer. Whether such treatment avails anything or not is not for us to say; but the privilege of practicing such treatment or such supplication is granted and allowed to all. A prayer is only a reverent petition to some divinity or object of worship. It has been said, "More things are wrought by prayer than this world dreams of." Those who believe in the teachings of holy writ attach great importance to the efficacy of prayer. Many examples of it are given in the New Testament. For instance, where Peter's wife's mother lay sick of a fever we are told that the Savior "touched her hand and the fever left her, and she arose and ministered unto them." The proviso or exception was evidently put into the act to prevent any interference with the right of any one to pray for the sick and afflicted.

Writ denied.

We concur: HALL, J.; KERRIGAN, J.

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14 Cal. App. 334

PEOPLE v. MOCK YICK GAR. (Cr. 273.)

(Court of Appeal, First District, California. Oct. 7, 1910.)

1. MARRIAGE (§ 50*) — PRESUMPTION FROM REPUTATION—STATUTES.

Under the express provisions of Code Civ. Proc. § 1963, subd. 30, that a man and woman are living together as husband and wife is prima facie sufficient to show a lawful contract of marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79–89; Dec. Dig. § 50.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—REVIEW—VERDICT—EVIDENCE.

Defendant was charged with placing his wife in a house of prostitution contrary to Pen. Code, § 266g, and in his defense testified, as did another witness, to the effect that he had previously married in China a woman with whom he had lived as husband and wife, and who was still living, and from whom he had never been divorced, and this testimony was not contradicted. *Held*, that the evidence was not improbable in itself, and could not be disregarded by the jury, and as it was sufficient to raise a reasonable doubt as to the existence of a prior marriage which would preclude a conviction, a verdict of conviction should be reversed as contrary to the evidence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1159.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Mock Yick Gar was convicted upon the charge of placing his wife in a house of prostitution, and he appeals. Reversed and remanded.

Carroll Cook, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Fred L. Berry, Asst. Dist. Atty., for the People.

HALL, J. Defendant was charged with placing his wife in a house of prostitution. He was convicted, and has appealed to this court from the judgment and the order denying his motion for a new trial. The evidence shows without conflict that defendant was married to the prosecutrix, a Japanese woman, at Redwood City on the 18th day of April, 1907. The ceremony was performed by a justice of the peace. On or about May 1, 1909, defendant placed the said woman, who had been a prostitute before the marriage, in a house of prostitution in the city and county of San Francisco, and there lived with her for a considerable time. Defendant mainly relied on the defense that he was never lawfully married to the Japanese woman, for the reason that at the time of the marriage ceremony between them he had a wife living in China to whom he had been married, and from whom he had never been divorced. In support of this defense the uncle of defendant testified that he was present with defendant in China when a marriage ceremony was performed between defendant and a Chinese woman, that he afterwards visited defendant at his home, and that defendant and the Chinese woman lived together as husband and wife. Defendant also testified that he went through the Chinese marriage ceremony with a Chinese woman in China in 1897, and they afterwards lived together as husband and wife, and as a result a child was born to them, and that the woman is still living; that he had never been divorced from her, and since his return to the United States had sent her support all the time, and ever since the ceremony was performed had treated her as his lawful wife. No attempt was made to contradict the evidence given by defendant and his uncle, and the testimony of each showed that the marriage ceremony with the Chinese woman was performed before the ceremony with the Japanese woman took place.

The section of the Penal Code (266g) under which the information is drawn is directed against a person placing his wife in a house of prostitution. Unless the Japanese woman was the wife of defendant he was not guilty of the offense charged. She was not his wife, notwithstanding the marriage ceremony with her, if defendant, at the time of such ceremony, had a wife living from whom he had never been divorced. The uncontradicted testimony of defendant and his uncle proved such to be the case. While the details of the ceremony with the Chinese woman were not given, it was shown that after such ceremony the Chinese woman and defendant lived together as husband and wife. This was prima facie evidence of a marriage. A man and woman deporting themselves as husband and wife are presumed to have entered into a lawful contract of marriage. Section 1963, subd. 30, Code Civ. Proc. Unless the jury had the right to entirely disregard the uncontradicted evidence of defendant and his uncle, defendant should have been acquitted.

While the jurors are the judges of the value of evidence addressed to them, their power is not an arbitrary one, but must be exercised with legal discretion and in subordination to the rules of evidence. Section 2061, Code Civ. Proc. There are cases where, because of the improbability of the testimony given, the court or jury may disregard it and give it no effect (County of Sonoma v. Stofen, 125 Cal. 32, 57 Pac. 681; Blankman v. Vallejo, 15 Cal. 639; People v. Milner, 122 Cal. 171, 54 Pac. 833). But we have been cited to no case where it has been held that uncontradicted testimony, that is in no respect improbable in itself, may be utterly rejected. The testimony given by defendant and his uncle concerning the prior marriage was in no way improbable. The defendant, after living in this country for a considerable time, returned to China for a time. This was proven by witnesses for the people. According to the uncontradicted testimony of of the defense, while in China on this visit he was married to a Chinese woman, and he and she subsequently lived together as husband and wife, and a child was born to them. That defendant should have been married on his visit to China is not improbable. It must be remembered that defendant was not required to prove his innocence. It was quite sufficient if there was any reasonable doubt of his guilt. His guilt depended upon the fact that he was not already married when he married the Japanese woman. The law does not require that such prior marriage be proved by a preponderance of evidence. It is sufficient if the evidence raises a reasonable doubt as to the existence of such prior marriage. People v. Roberts,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

122 Cal. 377, 55 Pac. 137; People v. Winters, 125 Cal. 325, 57 Pac. 1067.

The evidence of the prior marriage, being uncontradicted and in no respect improbable in itself, there was no conflict in the evidence upon this point. Certainly no unbiased and reasonable man can say that there was no reasonable doubt as to the existence of the prior marriage. The existence of a reasonable doubt as to the prior marriage required that the defendant be acquitted of the charge for which he was tried. The jury, in disregard of the uncontradicted and in no way improbable testimony, found the defendant guilty as charged. It must be held that the verdict is contrary to the evidence, and for that reason the judgment and order are reversed, and the cause remanded for a new trial.

I concur: KERRIGAN, J.

COOPER, C. J. I concur in the opinion of Mr. Justice HALL in this case, and desire to add that the testimony of the prosecutrix (a Japanese woman) is such that it is extremely doubtful in my mind if it would support the verdict. She had been a prostitute, living in a house of prostitution, for some time before she claimed to have married defendant. She afterwards, apparently with the knowledge and consent of defendant, returned to her former mode of life. Evidently some trouble arose between the prosecutrix and defendant, either by reason of his appropriating or using money of her earnings, or otherwise. It appears from the record that she had the defendant arrested twice before the present charge—once for embezzlement, and failing in that, for bigamy, and finally, being unsuccessful in that, for the present crime of placing her in a house of prostitution. The statute provides (Pen. Code, § 266g): "Every man who, by force, intimidation, threats, persuasion, promises, or any other means, places or leaves * * * his wife in a house of prostitution * * * is guilty of a felony and punishable by imprisonment in the state prison for not less than three nor more than ten years." It was evidently the purpose of the Legislature to punish the man who is so lost to all principles of decency as to force, intimidate, or persuade his wife to live in a house of prostitution, and for the purpose of protecting the innocent and virtuous wife. It could not have been intended for the punishment of a man who marries a prostitute and continues to live with her in a house of prostitution, which abode she voluntarily selected. In such case the man has not by his act caused his wife to enter and enlist in the army of prostitutes who ply their vocation. She was already there; and, while it is a low order of man who will live with such a woman, the statute does not make it a crime to do so.

MEMORANDUM DECISIONS

158 Cal. 389

ALL NIGHT AND DAY BANK v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY et al. (S. F. 5,654.) (Supreme Court of California. Sept. 20, 1910. Rehearing Denied Oct. 19, 1910.) In Bank. The All Night and Day Bank against the Superior Court of the State of California, in and for the County of Los Angeles, and another. On application for writ of mandate. Writ denied. Gavin McNab and R. P. Henshall, for petitioners. John D. Pope and W. G. Cooke, for respondents.

PER CURIAM. It is ordered that the petition of the All Night and Day Bank and Newton J. Skinner, president, and W. J. Connor, secretary, of the All Night and Day Bank, for the appointment of an officer, as receiver, with whom the shares of stock—mentioned in the petition herein—may be assigned, be and the same is hereby denied; and that the petition of the said parties for a supersedeas and restraining order be granted to the following extent only: It is ordered that within five (5) days from this date said All Night and Day Bank and Newton J. Skinner, president, and W. J. Connor, secretary, issue to the Title Insurance & Trust Company, as receiver, 1,155 shares of the capital stock of the All Night and Day Bank, being the same stock mentioned in their petition, and that the said receiver hold and vote and otherwise fully represent said stock, subject always to the orders and control of the superior court of the county of Los Angeles, pending the appeal in the said action of Hugh Blue, Trustee, v. All Night and Day Bank et al., and that in all other respects execution of the judgment be stayed pending appeal.

158 Cal. 376

MOORE v. DONOVAN. (L. A. 2,292.) (Supreme Court of California. Sept. 15, 1910.) In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge. Action by Mary O'Connor Moore, administratrix of Patrick Moore, deceased, against Aggie Donovan. From an order denying a motion for new trial, plaintiff appeals. Reversed. C. P. Kaetzel (P. F. Dunne, of counsel), for appellant. Paul M. Gregg and W. H. Spencer, for respondent.

PER CURIAM. It has been agreed by the parties to this appeal, by stipulation filed herein, that the appeal may be submitted upon the transcript on file in this case and upon the briefs on file in the case of Mary O'Connor Moore, Administratrix, etc., v. Mrs. George Trott (L. A. No. 2,103), which was decided by this court for reasons given in the opinion therein filed on October 8, 1909. 156 Cal. 353, 104 Pac. 578. The present case involves the question of the delivery of a deed which was given in escrow to Mr. Teitzen in the same inclosure, at the same time, and under the same circumstances as the deed under consideration in Moore v. Trott, supra. It was decided by the court below in favor of the defendant, and the plaintiff appeals from an order denying her motion for a new trial. Upon the authority of the decision in Moore v. Trott, and for like reasons, the order of the superior court denying a new trial is reversed.

14 Cal. App. 277

PEOPLE v. TESTA. (Cr. 275.) (Court of Appeal, First District, California. Sept. 21, 1910.) Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge. Vincent Testa was convicted of rape, and he appeals. Affirmed. Louis Ferrari, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

KERRIGAN, J. Defendant was informed against for the crime of rape. He was tried and convicted of the offense charged in the information. Thereafter he made a motion for a new trial and in arrest of judgment, which motions were denied. Defendant prosecutes this appeal from the judgment. The sole contention in the case is that the evidence is insufficient to support the verdict of the jury. We cannot agree with this contention. The nature of the evidence is such that we will refrain from stating it in detail. It is sufficient to say that the story told by the prosecutrix on the witness stand as to the circumstances of the commission of the offense is not at all improbable. Moreover, it was corroborated in several essential respects by other witnesses, and particularly by a letter written by the defendant while in jail to the parents of the prosecutrix. The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

CALIFORNIA REPORTER

112 PACIFIC REPORTER

158 Cal. 593

In re KILBORN'S ESTATE.

GOULD v. KILBORN.

(L. A. 2,740.)

(Supreme Court of California. Nov. 19, 1910.)

1. Wills (§ 282*)—Action to Annul Probate—Allegation as to Testator's Sanity—Sufficiency.

In a proceeding to set aside the probate of a will, the allegation in the petition that testator was not "of sound mind or memory, or in any respect capable of making a will," was a sufficient averment of the ultimate fact, and it was not necessary to aver the character of insanity in more detail.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

2. Wills (§ 221*) — Action to Annul Probate—Testamentary Capacity.

A testator's unsoundness of mind at the time of making a will is a sufficient ground to sustain an action to annul the probate of the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 221.*]

3. Appeal and Error (§ 921*) — Trial by Jury Without Consent of Parties—Review.

Where it was contended on appeal that the trial judge erred in submitting the case to the jury of his own motion, the judge's error must be shown, so that, where the only showing concerning it in the record was the judge's recital in the decree, "A jury, having been demanded and ordered by the court, was impaneled and sworn and proceeded to try the issues," it will not be presumed that the jury was summoned other than at the wishes of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 921.*]

4. Appeal and Error (§ 213*)—Trial by Jury Without Consent of Parties—Necessity of Objecting in Trial Court.

Where no objection was made below to the submission of a case to the jury without consent of parties, it cannot be made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 213.*]

5. Wills (§ 400*)—Action to Set Aside Probate—Appeal—Who May Allege Error.

Where, in a proceeding to set aside the probate of a will, the judge did not submit to the jury certain issues because of the lack of evidence to sustain them, with the exception of those relating to undue influence, defendant could not complain of such ruling on appeal, as it was in his favor.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 400.*]

6. Wills (§ 399*)—Probate—Action to Set Aside—Appeal—Record—Contents.

In a proceeding to set aside the probate of a will, the ruling of the trial judge that certain issues should not be submitted to the jury because of the lack of evidence to sustain them will be sustained on appeal, in the absence of any showing that the recital as to the evidence was not true.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 399.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Petition to revoke the probate of the will of Julia Ann Kilborn, brought by Mary Woodman Kilborn against Will D. Gould. Decree for petitioner, and defendant appeals. Affirmed.

James H. Blanchard and Will D. Gould, for appellant. James G. Maguire, for respondent.

SHAW, J. This is an appeal from an order revoking the probate of an alleged will of Julia Ann Kilborn, deceased, and the letters testamentary thereon issued to Will D. Gould, who was named in the will as executor. Gould appeals as executor and also in his own right. The appellant relies solely on matters appearing on the face of the record; the evidence and proceedings on the trial not being presented.

The petition to revoke the probate alleged that at the time of the execution of the will the said Julia Ann Kilborn was not of sound mind, that it was not executed in the manner prescribed by law, and that it was procured by the fraud and undue influence of Will D. Gould and Mrs. O. F. Sawyer, one of the subscribing witnesses thereto. The cause was tried by a jury and a verdict returned to the effect that the execution of the will was obtained by the exercise of undue influence by Mr. Gould and Mrs. Sawyer, acting jointly.

The first point urged by the appellant is that the court erred in overruling his demurrer to the petition to revoke. The demurrer is based in part upon the ground that the petition is uncertain in that it does not set forth any facts showing that the testator was not of sound and disposing mind and memory and not acting under duress or menace or fraud, or undue influence of any person whatever, at the time she made the will. The petition alleges that at the time the testator made and subscribed the will she was not "of sound mind or memory, or in any respect capable of making a will." This is a sufficient allegation of the ultimate fact. It is not necessary to aver more particularly the character of the insanity. Estate of Gharky, 57 Cal. 279. As to the allegations relating to undue influence, we need only say that it is not necessary to aver that the testator was not acting under undue influence, in order to revoke probate of the will. If it is relied on as ground for revocation, it is necessary to allege that the testator was acting under undue influence and was thereby caused to execute the will, stating the facts. The insertion of the word "not" in the demurrer may be a clerical error. It is not explained or excused by the appellant. We might disregard it if good reason appeared and a meritorious case was presented. But the case was tried on the merits on the issue of undue influence alone. The appellant was not under any misapprehension with regard to the facts to be offered against him, nor in any wise misled by the uncertainty in this respect. The pleading is not a model, but the facts are stated with considerable detail, though not with great skill, and we are disposed to treat the demurrer according to its literal meaning. Even if we treated it otherwise, the defect in the complaint, if any, is so insignificant that it should be deemed cured by the verdict.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

With respect to the contention that the petition does not "state facts sufficient to constitute a contest for revocation of said last will," it is sufficient to say that the averment that the testator was not of sound mind when she made the will, in connection with the other formal allegations, concerning which there is no question, is all that is necessary to answer this ground of demurrer. Estate of Gharky, supra.

Appellant further urges that the court below erred in ordering a trial by jury of its own motion. The only evidence in the record to show that it did so is the recital in the decree of revocation, as follows: "A jury, having been demanded and ordered by the court, was impaneled and sworn and proceeded to try the issues." The natural meaning of these words is that the court ordered a jury trial in compliance with the demand of one or the other of the parties. As error must be shown and is not presumed, we cannot presume that this language was intended to express other than its ordinary and obvious meaning. Furthermore, it does not appear that the appellant objected to a trial by jury, and he cannot avail himself here of an objection of that character not made in the court below.

The decree recites that the issues other than those relating to undue influence were not submitted to the jury because there was not sufficient evidence to justify such submission. This was the equivalent of a nonsuit as to these other issues. It was a ruling in favor of the appellant of which he cannot complain. In the absence of anything to show that the recital as to the evidence is not true, we must accept it as a fact.

The above are the only points urged by the appellant as ground for reversal. They are obviously without substantial merit.

The judgment is affirmed, with costs.

We concur: ANGELLOTTI, J.; SLOSS, J.

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158 Cal. 596

HOFF et ux. v. LOS ANGELES-PACIFIC CO. (L. A. 2,567.)

(Supreme Court of California. Nov. 19, 1910. Rehearing Denied Dec. 19, 1910.)

1. TRIAL (§ 165*)—MOTION FOR NONSUIT—EVIDENCE.

A motion for nonsuit admits the truth of the plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. NEGLIGENCE (§ 136*)—JURY QUESTION.

Negligence is a question of fact for the jury, though there be no conflict of evidence, if different conclusions can be therefrom rationally drawn.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–306; Dec. Dig. § 136.*]

3. STREET RAILROADS (§ 98*)—DUTY OF PERSON CROSSING TRACK—CARE REQUIRED.

While one about to cross a street railway track is not held to that high degree of care required in case of a steam railroad running through the country, he must exercise such care as is reasonable under all the circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204–209; Dec. Dig. § 98.*]

4. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTIONS.

One in great peril, where immediate action is necessary to avoid it, is not required to exercise that carefulness required of a prudent man under ordinary circumstances, and the reasonableness of his effort to escape injury after discovering the danger is for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333–336; Dec. Dig. § 136.*]

5. STREET RAILROADS (§ 117*)—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for injuries in a collision between plaintiff's automobile and defendant street railway's car, whether plaintiff was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. § 117.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Cory C. Hoff and wife against the Los Angeles-Pacific Company (a corporation). From a judgment of nonsuit, plaintiffs appeal. Reversed and remanded for new trial.

Gray, Barker & Bowen and Allen, Van Dyke & Jutten, for appellants. J. W. McKinley and Gurney E. Newlin (Roy V. Reppy, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal from a judgment of nonsuit in an action for damages for personal injuries sustained by plaintiff Alta May Hoff, the wife of her coplaintiff, in a collision in the city of Los Angeles between an automobile in which she was riding and which was being operated by her husband, and two electric cars of defendant, coupled together and operated by defendant's servants. The collision occurred at the intersection of Sixteenth street, along which defendant operated a double-track electric street railway, with Western avenue, about 5 o'clock p. m. on August 23, 1908. Mr. Hoff was endeavoring to cross defendant's tracks at such intersection with his automobile, containing himself, his wife, and four other persons, when the machine was struck a little back of its center by defendant's cars, which were proceeding along Sixteenth street from the west, with the result that the machine was violently thrown quite a distance, and Mrs. Hoff severely injured.

The motion for a nonsuit was granted on the ground that the plaintiffs' evidence showed that Mr. Hoff was guilty of contributory negligence. It is conceded by defendant for the purposes of this appeal that such evidence showed negligence on the part of defendant's motorman, in that at the time of the collision defendant's cars were being propelled at a rate of speed in excess of that allowed by an ordinance of the city; such ordinance prohibiting a rate of speed in excess of eight miles per hour over any crossing in the district including the intersection of Sixteenth street and Western avenue, and that no bell was rung and no whistle blown as the cars approached this crossing.

Learned counsel for defendant freely concede the correctness of the rule stated as to the review of the action of trial courts in granting nonsuits in cases of this character in Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 609, 86 Pac. 738, 739, as follows: "The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. If there is any evidence tending to sustain plaintiff's action, the nonsuit should be denied, without passing upon the sufficiency of such evidence, and, where there is a conflict in the evidence, some of which tends to sustain the plaintiff's case, a motion for a nonsuit should not be granted. Nor is there any dispute as to the well-settled rule "that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence," and that, if but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury." Herbert v. Southern Pacific Co., 121 Cal. 227, 229, 53 Pac. 651. "It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. * * * If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury." Seller v. Market Street Ry. Co., 139 Cal. 268, 271, 72 Pac. 1006. In view of these well-established rules, we are of the opinion that the trial court erred in granting the motion for a nonsuit.

While it is true that one about to cross the track of a street railway is, as said in Kernan v. Market Street Ry. Co., 137 Cal. 326, 70 Pac. 81, "not held to that high degree of care which is required in the case of an ordinary steam railroad running through the country, on which heavy trains of cars are moved at a high rate of speed and cannot be quickly stopped or controlled" (see, also, Clark v. Bennett, 123 Cal. 275, 55 Pac. 908), he must, of course, exercise such care as is reasonable under all the conditions, rights, and circumstances (Scott v. San Bernardino, etc., Co., 152 Cal. 604, 610, 93 Pac. 677), and, if he fails to do so with the result that his own negligence contributes to the accident in which he is injured, he cannot recover, in the absence of the application to the other party of the doctrine of what is called in our decisions the last clear chance doctrine. The care required has been declared to be "that degree of care which people of ordinarily prudent habits—people in general—could be reasonably expected to exercise under the circumstances of a given case" (Driscoll v. Cable Ry. Co., 97 Cal. 553, 567, 32 Pac. 591, 592 [33 Am. St. Rep. 203]), "that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise" under similar conditions (Clark v. Bennett, 123 Cal. 278, 55 Pac. 908). While undoubtedly in some cases the facts may be such as to leave no room for doubt in the mind of any reasonable person as to the negligence of a plaintiff, as in Bailey v. Market Street, etc., Co., 110 Cal. 320, 42 Pac. 914, where the plaintiff standing between two tracks waiting for a car stepped backward without looking upon one of the tracks in the face of an approaching car that was within a very few feet of her, the question of negligence is generally one upon which reasonable persons may well differ. We think that the evidence in this case construed most favorably to plaintiffs, as they are entitled to have it construed, presents such a case.

It is not seriously contended that the evidence compels the conclusion that Dr. Hoff's conduct after he first saw the approaching cars was such as to show contributory negligence on his part as matter of law. At that time he was from six to eight feet from the track upon which the cars were approaching, with the front of his machine nearly on the track, and traveling at a rate of speed of five or six miles an hour. As we must on this appeal, we are considering the evidence in the light most favorable to plaintiffs. He then saw the cars approaching at a point apparently about 100 or 125 feet away. He almost immediately increased his speed in an endeavor to get over the track. It is not at all clear that this was not his only chance to escape a collision under the existing circumstances, for the evidence is such as to warrant the conclusion that he could not then have stopped his machine before it reached the railroad track. But it is to be remembered "that a person in great peril, where immediate action is necessary to avoid it, is not required to exercise all of that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances," and that the reasonableness of his effort to escape injury after discovery of the danger is a question for the jury to be determined by them in view of all the circumstances. Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Bilton v. Southern Pacific Co., 148 Cal. 443, 450, 83 Pac. 440. It is further to be borne in mind that the evidence is of such a nature that it may reasonably be concluded that Mr. Hoff was warranted in assuming that the cars were approaching at such a rate of speed that they would not cross Western avenue at a greater rate than eight miles an hour, the speed allowed by the ordinance (see Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 Pac. 677), and that, if such had been the fact, it would have been entirely reasonable to assume that the crossing would be made in safety.

Learned counsel for defendant assumes that Mr. Hoff was in a position of peril at the time he discovered the approaching cars, and say that "his negligence consisted in getting into a position of peril through failure to use his sense of sight at the proper point in his approach towards the track." Mr. Hoff testified that he was traveling along Western avenue, between 12 and 15 miles an hour, that he saw the railroad track when he was about half a block away, that he at once looked and listened in both directions as far as he could see, that he heard or saw nothing to indicate the approach of a car, that he began to slow down when about 40 or 50 feet south of the track and decreased his speed until he was going only 5 or 6 miles an hour, that when about 35 feet from the track he looked to the west 150 feet or so and saw no car, that he then looked to the east to see if a car was approaching from that direction, that he then just looked at the track in front seeking a smooth place to go over and then to the west again when he saw the car as before stated, apparently some 100 or 125 feet away. The evidence does not compel the conclusion that he should have seen the car when he looked from a point about 35 feet from the tract. We are at a loss to understand how upon this evidence it can be held as a matter of law that Hoff was guilty of negligence. There is nothing to indicate that the situation at this crossing was such that it was negligent to approach it at a rate of speed of 6 miles an hour. Of course, it was incumbent upon Hoff in so approaching the crossing to use ordinary care to detect the approach of cars on either track, and this involved the exercise of the senses of both sight and hearing on his part to the extent that an ordinarily careful person, regardful of the safety of himself and his companions, would exercise those faculties. See Bailey v. Market St., etc., Co., supra; Scott v. San Bernardino, etc., Co., supra. But we cannot agree that the evidence compels the inference that he refrained from the exercise of such faculties when once he had arrived at a point 35 feet from the track. It must be borne in mind that traveling at 6 miles an hour not more than 4 seconds would elapse between the time he looked to the west 35 feet from the track and the time he again looked and saw the car. In the meantime he had looked to the east to see if there was danger from that point, as it was his clear duty to do, and in so doing was necessarily compelled to momentarily withdrew his eyes from the west, and he had also looked to the front to see that his proposed crossing place was all right, the rails being slightly elevated above the ground, and then immediately looked west again, all this in the short space of four seconds. The best we can say for defendant upon the evidence in this record is that the question whether Hoff was negligent in approaching this crossing is one upon which reasonable men might well differ. This being so, it was a question for the jury, and the trial court should not have granted the motion for a nonsuit. We find nothing in the cases cited by learned counsel for defendant that warrants a different conclusion.

In view of our conclusion upon the point discussed, it is unnecessary to consider any other point made for reversal.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.

158 Cal. 603

In re LOS ANGELES TRUST CO. (L. A. 2,585.)

(Supreme Court of California. Nov. 19, 1910.)

1. JUDGES (§ 39*)—DISQUALIFICATION—RIGHT TO ACT.

Under Code Civ. Proc. § 170, providing that no judge shall act in any proceeding where he is disqualified except to arrange the calendar or regulate the order of business, or transfer the proceeding to some other court, a judge who is disqualified to hear a petition under section 1276, by a corporation for leave to change its name, is not disqualified from making the order to show cause, required by section 1277, so as to fix the time for the hearing and direct the notice expressly required by law, since such act does not involve discretion, but relates solely to the arrangement of the calendar and regulation of the order of business.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 184; Dec. Dig. § 39.*]

2. TIME (§ 9*)—COMPUTATION—WEEKS—PUBLICATION OF ORDER TO SHOW CAUSE.

Under Code Civ. Proc. §§ 12, 1277, providing that the time in which any act is to be done must be computed by excluding the first day and including the last, and declaring that an order to show cause why the application of a corporation for leave to change its name should not be granted must be published for four successive weeks, an order to show cause on August 24th, made on July 27th preceding, which was published in every publication of a newspaper published daily except Sundays from and including July 27th to and including August 23d following, was sufficiently published.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9;* Notice, Cent. Dig. § 29.]

3. COURTS (§ 486*)—TRANSFER OF CAUSE—DISQUALIFICATION OF JUDGE.

Under Code Civ. Proc. § 170, disqualifying a judge in enumerated cases, and requiring him to secure another judge, and when the superior court has more than one department the action shall be transferred to another department, a disqualified judge of a superior court of a county having more than one department, may transfer the proceeding to another department, notwithstanding section 398, relating to change to another county, which is applicable only when as provided in section 397, all the judges of the court are disqualified.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 486.*]

4. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—NOTICE OF TRIAL.

The failure of the court on petition by a corporation for leave to change its name to comply with a rule of court as to five days' notice of trial does not affect the jurisdiction, and the corporation objecting to the change could not complain thereof where it was not prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4129; Dec. Dig. § 1046.*]

5. CORPORATIONS (§ 47*) — PETITION TO CHANGE NAME—FINDINGS OF FACT.

Findings of fact are not required in a proceeding by a corporation under Code Civ. Proc. § 1276 for leave to change its name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

6. CORPORATIONS (§ 47*)—PETITION FOR LEAVE TO CHANGE NAME—SUFFICIENCY.

A petition by a corporation for leave to change its name from "Los Angeles Trust Company" to "Los Angeles Trust and Savings Bank" which alleges that the corporation proposes to conduct a savings bank department as well as a trust department, and that it will be to its advantage to have its name indicate that fact, states a reason for a change of name within Code Civ. Proc. § 1276, sufficient to warrant the court in granting the petition, unless there is reasonable ground for concluding that the proposed name so closely resembles the name of another corporation that its adoption will tend to deceive the public to the injury of the latter corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

7. CORPORATIONS (§ 47*)—CHANGE OF NAMES—PROCEEDINGS—OBJECTIONS.

The Los Angeles Trust Company applied for leave to change its name to the "Los Angeles Trust and Savings Bank" and showed that it proposed to conduct a savings bank department as well as a trust department. The Los Angeles Savings Bank resisted the application on the ground that the proposed name so closely resembled its own that the change would deceive the public with resulting injury to it. It was not actively engaged in the savings bank business, but had transferred practically all its business to another savings bank, and took no new business, and had only a small amount on deposit. *Held*, that the change in name was properly allowed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

8. EVIDENCE (§ 387*)—OFFICIAL CERTIFICATE—CONCLUSIVENESS—PAROL EVIDENCE.

A mere declaration by the Secretary of State as to his understanding when he issued a certificate to a corporation is not competent to impeach the certificate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1698; Dec. Dig. § 387.*]

9. CORPORATIONS (§ 47*)—PROCEEDINGS FOR LEAVE TO CHANGE NAME—EVIDENCE.

Where a corporation resisted the application of another corporation for leave to change its name on the ground that the proposed name so closely resembled its own name that its adoption would tend to deceive the public, evidence of the reasons for the desire to change the name and as to the market value of the name of the objecting corporation was inadmissible, but evidence as to the cessation of active business by the objecting corporation was admissible on the issue of deception of the public and injury to the objecting corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 134; Dec. Dig. § 47.*]

10. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—REFUSAL TO STRIKE OUT TESTIMONY.

The error, if any, in refusing to strike out testimony establishing a fact previously testified to by another witness is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4195; Dec. Dig. § 1058.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Application by the Los Angeles Trust Company for a change of name. From an order permitting the change, the Los Angeles Savings Bank appeals. Affirmed.

Shankland & Chandler, for appellant. Gibson, Trask, Dunn & Crutcher (Henry M. Young, of counsel), for respondent.

ANGELLOTTI, J. This is an appeal by the Los Angeles Savings Bank, a corporation, from an order of the superior court granting the application of the Los Angeles Trust Company for authorization to change its name to "Los Angeles Trust & Savings Bank," made under the provisions of sections 1275–1279, Code Civ. Proc. Appellant objected in the superior court to the granting of such application on the ground substantially that the proposed name so closely resembled its own name that it would tend to deceive the public as to the identity of the two corporations, with the result that it would be injured thereby.

The application of respondent, complying fully with the provisions of section 1276, Code Civ. Proc., was filed with the clerk of the superior court of Los Angeles county during the forenoon of July 27, 1909, and an order was thereupon made by Judge Wilbur, one of the 12 judges of said court, directing all persons interested in said matter to appear in his department on August 24, 1909, at 10 o'clock a. m. to show cause why the application should not be granted, and directing publication for four consecutive weeks of a copy of the order in the Los Angeles Express, a newspaper of general circulation in the county published daily except Sundays. This paper was what is known as an evening paper, being published in the afternoon. The order to show cause was published therein from and including July 27, 1909, to and including August 23, 1909, as often as said paper was published, viz.; every day except Sunday. On August 24, 1909, the matter came on for hearing before Judge Wilbur, respondent and appellant both appearing. Evidence on behalf of the parties was received, and on August 25, 1909, the matter was submitted for decision. On August 27, 1909, counsel for both parties attended at the judge's chambers at his request, and were informed by him that by reason of certain facts that had come to his knowledge it was possible that he was disqualified as matter of law to act as judge in such proceeding. Evidence was received upon the question of Judge Wilbur's disqualification, and on September 2, 1909, Judge Wilbur ordered the matter transferred to department 11 of said court, presided over by Judge Willis, for further proceedings. On September 3, 1909, the matter was taken up before Judge Willis in department 11, both parties being present. Appellant objected to being compelled to proceed at once with the hearing, claiming that such procedure was in violation of a rule of the court requiring five days' notice, and that it was not ready to proceed. Its objections were overruled and a hearing was then had de novo. There is no pretense that it did not produce all the evidence that it desired to present, or that it was at all injured by being compelled to proceed with the hearing on that day. In its order granting respondent's application the trial court specifically found in favor of the allegations of respondent's application, and against the allegations of appellant's remonstrance. The facts in regard to the question of Judge Wilbur's alleged disqualification were substantially as follows: There was no pretense that there was any actual bias. Judge Wilbur and four other gentlemen were the trustees of a trust for charitable purposes known as the Hollenbeck Home, the property held by them as said trustees being certain land on a portion of which a home for indigent women and homeless children was to be erected, and twenty-five shares of stock in the First National Bank of Los Angeles. Certain of the directors of said National Bank held in trust for the stockholders of said bank all of the stock of respondent Trust Company. The Hollenbeck Home trustees received no compensation and had no personal interest in the execution of their trust other than such interest as any person acting as a trustee of a charitable trust might have in its welfare.

Upon the facts we have stated various technical contentions having no real connection with the merits of appellant's opposition to respondent's application are made by learned counsel for appellant.

Although the hearing was had and decision made by a judge admittedly qualified to act—Judge Willis—it is urged that the proceeding must fail because the order to show cause was made by Judge Wilbur, who it is claimed, was disqualified to act at all; section 170, Code of Civil Procedure, providing that no judge shall "sit or act" in "any action or proceeding, to which he is a party or in which he is interested." Assuming purely for the purposes of this decision that upon the facts stated Judge Wilbur was disqualified to sit or act in this proceeding, we are of the opinion that the making of the order to show cause was not such action as is prohibited on the part of the disqualified judge. Section 1277, Code of Civil Procedure, provides that upon the filing of the application in the form prescribed by section 1276, Code of Civil Procedure, the court shall thereupon make an order reciting certain things, and "directing all persons interested in said matter to appear before the court at a time and place specified, not less than four or more than eight weeks from the time of making said order, to show cause why the application for change of name should not be granted." No discretion whatever is given to the court in the matter of making such order. It must be made upon the filing of a petition in the form prescribed by law, and the court simply fixes therein the date when the matter shall come on for hearing. Section 170, Code Civ. Proc., provides that the provisions "shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the * * * proceeding to some other court." The whole purpose of the order to show cause is simply to give notice to the general public of the making of the application, and of the time when the same will come on for hearing, so that any person interested may present his objections. In making it the court is simply fixing the time of hearing and directing the notice expressly required by the law. Such action on the part of a judge may well be held to be action relating solely to the arrangement of the calendar and regulation of the order of business. It is not at all analogous to such action as is involved in extending the time within which a bill of exceptions may be filed, where the judge must determine whether good cause for such extension is shown by the applicant. See Johnson v. German, etc., Ins. Co., 150 Cal. 336, 88 Pac. 985.

Section 1277, Code Civ. Proc., provides that the time of hearing specified in the order must be "not less than four or more than eight weeks" from the time of making the order, and that a copy of the order must be published for four successive weeks in some newspaper of general circulation printed in the county, if a newspaper be printed therein. The claim that these requirements were not complied with finds no support in the facts above set forth. The requirement as to a full four weeks' publication was complied with by the publication in the Los Angeles Express on every publication day from and including July 27, 1909, to and including August 23, 1909, and such four weeks' publication was completed with the publication in the issue of August 23, 1909. See Derby v. City of Modesto, 104 Cal. 515, 522, 38 Pac. 900; Sherwood v. Wallin, 154 Cal. 735, 738, 99 Pac. 191. And there is absolutely nothing in the record to show that there was not a full four weeks' period between "the time of making such order" and the time fixed for hearing thereby, even if we consider fractions of days. But it is settled by the authorities in this state that in such matters as this section 12, Code Civ. Proc., providing for the exclusion of the first day and the inclusion of the last, is applicable. See Misch v. Mayhew, 51 Cal. 514; Hannah v. Green, 143 Cal. 19, 21, 76 Pac. 708; Wilson v. His Creditors, 55 Cal. 476; Dean v. Grimes, 72 Cal. 442, 14 Pac. 178; Hagenmeyer v. Board of Equalization, 82 Cal. 214, 23 Pac. 14; Bates v. Howard, 105 Cal. 182, 38 Pac. 715; Bellmer v. Blessington, 136 Cal. 3, 68 Pac. 111.

There can be no question of the right of Judge Wilbur to transfer the matter from his department to another department of the same court, instead of to the superior court of another county, for hearing. The statutes clearly contemplate that this shall be the course followed in case of a disqualified judge in counties where there is more than one judge (section 170, Code Civ. Proc.), and the provision in section 398, Code Civ. Proc., relating to a change to another county, is applicable only when all the judges of the county are disqualified, and when, as specified in subdivision 4 of section 397, Code Civ. Proc., "there is no judge of the court qualified to act."

Assuming the applicability of the rule of court as to five days' notice of trial, failure to comply therewith in the matter of hearing before Judge Willis did not affect the jurisdiction, and it is clear that appellant's rights were not prejudiced thereby.

If findings of fact on the part of the trial court were essential, we are satisfied that the recitals in the order must be taken as constituting such findings. We are of the opinion, however, that formal findings of fact are not required in a proceeding of this character. See In re Danford, 108 Pac. 322, 324.

The petition for authorization to change name was in full compliance with the statute, and constituted a sufficient basis for the proceeding and subsequent order. The statute (section 1276, Code Civ. Proc.) provides that the petition must specify "the reason for such change of name." Appellant claims that no good reason was alleged. A reason stated was that as the applicant proposed to conduct a savings bank department as well as a trust department, it believed that it would be to its advantage to have its name indicate that fact, so that its customers and the general public might be informed by its name that it had a savings bank department, and not be led to believe thereby that it conducted only a trust department. This was certainly a compliance with that portion of the law requiring a statement of the reasons for change of name.

It was also a sufficient reason to warrant the court in granting the application, unless there was reasonable ground for concluding that the proposed name so closely resembled the name of appellant that its adoption by respondent would tend to deceive the public as to the identity of the two corporations, with resulting injury to the appellant. In re U. S. Mortgage Co., 83 Hun, 572, 32 N. Y. Supp. 11. This is really the only question in which appellant has any interest. Upon this point, respondent filed in court, in compliance with section 1278, Code Civ. Proc., the certificate of the Secretary of State that the name desired to be used by the applicant is not the corporate name of any corporation existing at said time, and that said name does not so closely resemble the name of any such existing corporation as will tend to deceive. We see no good ground for holding that the decision of the court below to the effect that no substantial right of appellant would be invaded by the proposed change of name was erroneous. It appeared that appellant was no longer actively engaged in the savings bank business, having transferred practically all its business to the Security Savings Bank, and taking no new business, and now having only about $21,000 on deposit. It is apparent that until appellant does engage in active business again, a matter as to which there appears to be no certainty, there can be no probability of confusion existing or the identity of the two corporations being destroyed. If it ever does re-engage in active business along the lines specified in its articles of incorporation, being according to such articles strictly a savings and loan corporation, we are satisfied that the lower court was warranted in holding that the presence of the word "trust" in the proposed name of respondent, which has been a part of its name ever since its incorporation in 1902, will sufficiently serve to characterize it and distinguish it from appellant to prevent injury to appellant, and imposition or deceit upon the public. As said in Re U. S. Mortgage Co., supra: "A mere possibility by the suggestion of extreme instances that might never occur should never be the basis of the court's action, the duty being to determine what with reasonable certainty would be the natural consequences of granting the application."

Several alleged errors of law in the rulings of the court in regard to evidence are specified by appellant, but none is of such a nature as to warrant a reversal. The evidence offered to impeach the certificate of the Secretary of State hereinbefore referred to, consisting of a mere declaration by that officer to appellant's attorneys as to his understanding when he issued the certificate, was not competent for that purpose. The questions asked Mr. Drake by appellant relating to the reasons for the desire to change respondent's name were of no importance so far as the controversy between these parties is concerned. The evidence elicited by respondent from Mr. Sartori on cross-examination in regard to the cessation of active business by appellant was material upon the question at issue between the parties, viz.: that of the deception of the public and injury to appellant in the event of the change of name being had. We do not see how evidence as to market value of appellant's name could assist in the determination of this question. No prejudice could have resulted to appellant from the refusal of the court to strike out certain testimony of Mr. Drake as to information regarding appellant obtained from the report of the bank commissioners. The same facts had already been testified to by Mr. Sartori for appellant.

There is no other matter requiring notice. The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

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158 Cal. 559

McLEMORE v. EXPRESS OIL CO. (S. F. 5,179.)

(Supreme Court of California. Nov. 17, 1910.)

1. MINES AND MINERALS (§ 36*)—LOCATION FOR OIL—PROTECTION OF LOCATOR'S RIGHTS BEFORE DISCOVERY.

That one who has made a mining location on government land for oil, which Act Cong. Feb. 11, 1897, c. 216, 29 Stat. 526 (U. S. Comp. St. 1901, p. 1434), requires to be made under the laws relating to placer mining claims, may without actual possession of the claim be protected from a homestead entry of the land, his location must be valid and complete, for which discovery of oil is essential; and not having made such discovery, he is protected only while in possession, diligently prosecuting his work to a discovery, which means not the pursuit of capital to prosecute the work, or an attempted holding by cabin, lumber or unused derrick, but the diligent continous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view; the laws as to assessment work having no application till the discovery is made.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 36.*]

2. PUBLIC LANDS (§ 35*)—HOMESTEADS—COMPLETE ENTRY.

A homestead entry is complete, so as to protect whatever preferential rights the homesteader has, without his actually going on the land, for which he is allowed six months from the date of the entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 74; Dec. Dig. § 35.*]

3. MINES AND MINERALS (§ 9*)—RIGHT TO EXPLOIT LANDS ENTERED AS HOMESTEAD.

The rule that a homestead entry removes the land out of the public domain is not subject to any exception that without minerals having been discovered on it, and proof of its present value for mineral purposes, another than the homesteader may enter on it merely for the purpose of exploiting it to see if perchance it possesses such value.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 11; Dec. Dig. § 9.*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. A. McLemore against the Express Oil Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Frank H. Short and F. E. Cook, for appellant. Larkins & Feemster, for respondent.

HENSHAW, J. The action is in ejectment. Judgment passed for plaintiff, and from that judgment and from an order denying defendant's motion for a new trial it appeals. The controversy is between a claimant to government land under homestead entry, and a claimant to the same land under a purported mining location. An attempted location had been made by eight associates, defendant's grantors, under the placer mining laws. The valuable mineral sought to be discovered was oil. This was in January, 1906. A cabin was constructed upon the claim, its boundaries were marked, some bits of road built, and, in the language of appellant's brief, work had been done and improvements made upon the claim "far in excess of the requirements of the United States statutes with respect to assessment work and before any claim had been initiated by the plaintiff, they had expended in a direct and legitimate way many times over the amount required in the way of assessment work." Upon April 12, 1907, plaintiff first connected himself with the land by fulfilling all the requirements for entering it as a homestead. At that time, finds the court, no one of the defendants was in possession of the land.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant's first contention is that the evidence of location, occupation, and possession of the ground as a mining claim by defendant was sufficient to exclude it from entry by plaintiff upon the 12th day of April, 1907, when his homestead entry was made. Undoubtedly appellant's contention in this respect would be correct if the location was valid and complete at the time of the homestead entry, since "actual possession of a mining claim held under a mining location is no more necessary for the protection of the title thereto, than it is for any other grant of the United States" (Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735), and the principle has become axiomatic that discovery and appropriation are the source of title to mining claims, and that assessment or development work is the condition of their continued possession (27 Cyc. 588). But this rule applies only when the location is valid and complete. And a location is valid and complete only when, after compliance with other requirements, a discovery of valuable mineral in place has been made. In the case of ordinary minerals, little or no difficulty has been experienced by the courts in this matter. In practice, the miner went upon the public domain, and, before he took the trouble to stake his claim and post and record his notice, he made discovery. The staking of the boundaries of the claim and the posting of notice followed such discovery. When, however, Congress enacted that locations could and should be made of public lands containing petroleum or other mineral oils under the laws relating to placer mining claims (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]), the courts were at once confronted with serious difficulty in their endeavor to obey the congressional mandate, and fit the placer mining laws to the exigencies of oil locations which in their nature were radically dissimilar. Thus, it is well established, that the sole power of disposition and control of the public lands being vested by the Constitution of the United States in Congress (Const. U. S., art. 4, § 3), Congress could at any time change its policy in regard to those lands so long as vested rights were not impaired.

It was fully established, also, that a qualified person, who had made a valid location upon a part of the public mineral domain (which valid location always, of course, included discovery), acquired vested rights, which no change in congressional policy could affect or impair, but per contra that a change in policy could impair the rights of one upon the public domain who had not acquired a valid location. As has been said, in the case of other minerals discovery preceded the demarkation of the boundaries, the posting and recording of the notice. In the case of oil, discovery, in the very nature of things, would rarely or never be made except at the end of much time and after the expenditure of much money, the discovery of oil involving the erection of a derrick and the laborious drilling of a well, frequently to the depth of 3,000 feet and more. If, therefore, the placer mining laws, which were declared by Congress to be the only laws under which oil locations could be established, were to be made of any practical benefit to the oil locator, it must be by permitting him to mark the boundaries of his location and post and record his notice, and protect him in possession while he was with diligence prosecuting the labor of digging his well to determine whether or not a discovery could be made. So it was held by the federal courts, by the courts of some of the other states, and by this court in Miller v. Chrisman, 140 Cal. 447, 73 Pac. 1084, 74 Pac. 444, 98 Am. St. Rep. 63, to the following effect: "One who thus in good faith makes his location, remains in possession and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Such entry must be always peaceable, open and above board, and made in good faith, or no right can be founded upon it." Weed v. Snook, 144 Cal. 439, 77 Pac. 1023; Cosmos, etc., Co. v. Gray Eagle Oil Co. (C. C.) 104 Fed. 20; Id., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; Id., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849, 129 Am. St. Rep. 1093; Moffat v. Blue River, etc., Co., 33 Colo. 142, 80 Pac. 139. But it is always to be borne in mind that, until the perfection of the inchoate and incomplete location by discovery, the locator has, first, no vested rights which Congress is obliged to recognize. So that Congress may change its policy in regard to the lands to the extent even of excluding therefrom the diligent operator who has not made discovery. However inequitable such a proceeding might be, it in no way would be illegal.

Second. It is to be observed that the laws touching assessment work are not applicable to such an imperfect location. When the location is valid and complete, the law exacts the doing of but $100 of work per year, and, when that is done, all of the locator's rights are fully protected, whether he remains in possession longer than is necessary to do that work or not. But, where the location is incomplete, no question of assessment work is involved. What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view. Of such work defendant's grantors were not in the prosecution up to April 12, 1907. They were not only not in the actual possession of the land, as the court finds, but the evidence discloses that what they had done was no more than an attempt to hold the land under the theory that assessment work was adequate for that purpose. It is shown by the evidence that they were not only not engaged in the diligent prosecution of the work, but that they were not financially able so to prosecute it, and were either in search of capital to enable them to do so, or in search of a purchaser to buy out such interest as it might be thought that they had. The cases of Cosmos, etc., Co. v. Gray Eagle Oil Company (C. C.) 104 Fed. 20, and 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, are not at all in conflict with these views. To the contrary, these views and those expressed in Miller v. Chrisman, supra, Weed v. Snook, supra, and New England, etc., Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180, are themselves in great part based upon the opinion of the learned circuit judge in those cases. The federal cases involved conflicts between "scrippers" and oil locators, under an act which allowed the scrippers, for the land from which they had been displaced, to "select in lieu thereof an equal tract of vacant land open to entry." They endeavored to select land that was not only in the possession of oil men, but of oil men who were diligently prosecuting their work to a discovery so as to complete their locations. The circuit court held that such land so occupied and worked was not vacant land open to entry within the meaning of the act, and declared (we quote from the syllabus which correctly enunciates the determination): "A claimant of land entered under Act June 4, 1897 (Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541]), in lieu of land situated within a forest reservation, on an affidavit stating its nonmineral character, that it was free from mining claims, and was entered for agricultural purposes, will not be granted relief in equity against another claimant in possession under an oil placer mining location, made prior to such entry, and followed up by development work, which was being prosecuted on the land when the entry was made, and resulted in valuable producing wells, where the affidavit of the entryman was also false in other particulars, the land being valueless for agricultural or grazing purposes, but situated in an oil district, and the entry being in fact made because of its supposed value for oil, although no discovery of oil had then been made thereon."

Plaintiff filing his homestead entry upon the 12th day of April, 1907, made physical and personal entry on the 5th day of October, 1907—within the six months limited by law. Appellant contends that plaintiff had made no "entry" within the meaning of the law until he took possessionem pedis on October 5th; that up to that time he had acquired merely a preferential right of entry over those claiming under the homestead or agricultural laws, but not over those who might have entered under the mining laws. In this connection appellant expounds the different meanings which have been given to the word "entry," and concludes that the entry of a homesteader is not complete, within the meaning of the law, until he has actually gone upon the ground. But this is not the meaning of the word as employed in the statute. In "Suggestions to Homesteaders" issued by the Commissioner of the General Land Office March 9, 1908 (paragraph 27, page 12), it is said: "Actual residence on the lands entered must begin within six months from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases thereafter mentioned, but all entrymen who actually reside upon and cultivate lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation." Says the Supreme Court of the United States in Hastings, etc., R. R. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363: "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is issued to him, the entry is made—the land is entered." All of these things had been done by plaintiff, and his entry was therefore complete. What effect did this entry have upon the right of defendant subsequently to enter upon the land and exploit it for minerals?

"A homestead entry," says the Supreme Court of the United States, "which is prima facie valid removes the land, temporarily at least, out of the public domain." Hastings, etc., Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; U. S. v. Turner (C. C.) 54 Fed. 228. But appellant contends that this language is to be construed with an exception, and that this exception is that one who claims the land to be valuable for mineral purposes has the right, notwithstanding such homestead entry, to enter thereon and explore it for the valuable minerals it is thought to contain. Herein reliance is placed upon McClintock v. Bryden, 5 Cal. 97, with the note which is appended to that case in 63 Am. Dec. 87. But it will be found upon examination that that, and the cases like it, all arose where the land was of proved mineral value, and the decisions were based upon the national laws, which, in effect, excepted from homestead entry the mineral lands of the nation, the mineral lands being those of more value for mineral than for agricultural purposes. We know of no case, and have been cited to none, where a right of entry upon lands held under an agricultural entry has been permitted without proof of the present value of the lands for mineral purposes merely for the purpose of exploiting them to see if perchance they possess such value. That is precisely what appellant desires here to do, and contends that it has the right to do. No discovery of oil has been made upon the lands, but defendant insists that it has the right to enter and explore them to see if there is oil therein. The decisions are against the existence of such a right. In Lentz v. Victor, 17 Cal. 273, it is declared that such an entry upon an agricultural holding can be justified and upheld only by showing, first, that the land is public land; and, second, "that it contains mines or minerals." The Land Department has uniformly laid down the rule to the following effect: "The burden of proof being upon the protestants (mineral claimants), they are required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity, and of such character, as to establish its mineral value." 1 Land Dec. Dep. Int. 561; Creswell Mining Co. v. Johnson, 8 Land Dec. Dep. Int. 440; Dobler v. Northern Pac. R. Co., 17 Land Dec. Dep. Int. 103; Winscott v. Northern Pac. R. Co., 17 Land Dec. Dep. Int. 274; Southern Pac. R. Co., 25 Land Dec. Dep. Int. 223; Alldritt v. Northern Pac. R. Co., 25 Land Dec. Dep. Int. 349.

For these reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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158 Cal. 619

In re PEPPER'S ESTATE. (S. F. 5,107.)

(Supreme Court of California. Nov. 21, 1910. Rehearing Denied Dec. 21, 1910.)

1. Husband and Wife (§ 262*)—Community Property.

It is presumed that personal property acquired after marriage by the husband was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

2. Husband and Wife (§ 264*)—Community Property—Separate Property — Evidence to Establish—Weight.

In view of Code Civ. Proc. § 1826, providing that the law does not require such proof as excludes all possibility of error, and produces absolute certainty, but only such proof as produces conviction to an unprejudiced mind, or proof to a moral certainty, and section 1835, defining satisfactory evidence, justifying a verdict, as that which ordinarily produces moral certainty in unprejudiced minds, it is not necessary to the establishment of the separate character of property acquired by a spouse after marriage, that the evidence demonstrate that fact to the exclusion of the possibility of a doubt.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

3. Appeal and Error (§ 1011*)—Review—Findings—Conclusiveness.

A finding of the trial court upon conflicting evidence that property acquired by a spouse after marriage was separate property is no more reviewable on appeal than any other finding under such circumstances.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

4. Husband and Wife (§ 248½*)—Community Property—Separate Property — Property Acquired Before Marriage — Perfecting of Title After Marriage.

Where the husband had occupied a ranch for many years before his marriage under a claim of ownership, the fact that his title to a part of the land was not perfected by conveyance until thereafter would not affect the character of the land as separate property.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 248½.*]

5. Husband and Wife (§ 257*) — Separate Property—Profits of Land.

Under Civ. Code, § 163, providing that all property owned by the husband before marriage with the rents, issues, and profits thereof is his separate property, the profits of selling trees and plants raised by the husband in a nursery conducted on land acquired by him before marriage are his separate property; the fact that the husband's industry and attention to the business was an important element in conducting it not changing the character of such profits.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 904–910; Dec. Dig. § 257.*]

6. Executors and Administrators (§ 222*)—Claims Against Estate — Necessity of Presentation.

If an amount advanced by the wife to her husband to be used by him in conducting his separate business was a loan, the wife's remedy was to present her claim therefor as a creditor to his executors, and not to claim such amount as separate property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 222.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. EVIDENCE (§ 220*) — ADMISSIBILITY—DECLARATIONS AGAINST INTEREST.

While the husband's declarations that all of his property was acquired before marriage were self-serving statements, and not admissible in favor of his successors in interest on the petition of his executor to distribute his estate as separate property pursuant to the will, against the wife's claim as community estate, if such declarations were made in his wife's presence, her conduct in respect thereto was admissible against her.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 220.*]

8. EVIDENCE (§ 236*)—DECLARATIONS AGAINST INTEREST—PERSONS AGAINST WHOM ADMISSIBLE.

Under Code Civ. Proc. § 1850, providing that where a declaration formed part of a transaction, which is itself the fact in dispute, or is evidence of that fact, such declaration is evidence as part of the transaction, statements by testator against his interest as to the community character of his property were admissible against parties claiming under his will as against his wife's claim to his estate as community property.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 236.*]

9. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On the executors' petition to distribute a husband's estate pursuant to his will, wherein his wife claimed a part of his estate as community property, a declaration by testator that upon his arrival in the county in 1858, which was 16 years before his marriage, he had very little property, had a bearing upon the issue or the community character of the property so remote as to make its exclusion harmless, especially where it did not appear that any large part of testator's estate was owned by him in 1858.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

10. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS OF LAW.

Where the issue was whether property owned by testator at his death was separate or community property, testimony of a declaration by testator that he considered certain money he had acquired since marriage as community property was properly stricken; whether it was community property being a question of law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2171; Dec. Dig. § 471.*]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

In the matter of the estate of William H. Pepper, deceased. From a decree of distribution, according to the will, Phebe Pepper appeals. Affirmed.

J. R. Leppo, for appellant. Thomas P. Boyd, W. F. Cowan, and F. A. Meyer, for respondents.

SLOSS, J. William H. Pepper died testate, leaving an estate which was appraised at $113,000 and over. By his will he gave to his widow, Phebe Pepper, $26,000, and a house and lot valued at $4,000. In due course the executors petitioned for distribution of the estate in their hands in accordance with the terms of the will. The widow appeared and answered, claiming that all of the estate was community property, and that she was entitled to one-half thereof, in addition to the legacy and devise given her by the will. The trial court, after hearing evidence on this issue, decided that the entire estate was the separate property of the decedent, and decreed distribution in accordance with the terms of the will. The widow appeals from the decree of distribution. The point most strongly urged by the appellant is that the evidence fails to support the finding of the separate character of the estate.

William H. Pepper came to Sonoma county in 1858 or 1859. He settled upon a tract of land in Green Valley, containing 160 acres. He took up his residence upon this land and commenced at once to cultivate it, putting in a nursery and an orchard, and devoting part of the land to pasturage and the growing of grain. Later, and prior to his marriage to the appellant, he acquired additional land adjoining his original holding, until his ranch or farm comprised about 291 acres. He was married to the appellant in 1874. At that time he had put upon his land various improvements, and was conducting thereon an active nursery business. His course of procedure was to grow plants, principally fruit trees, either from seed or from stock imported from France or the Eastern states, until they had attained the age of one or two years, and then to sell the plants so grown. From the time of his marriage until his retirement in 1900, he lived upon the land mentioned, and devoted his entire time and energy to the conduct of the nursery and the farming operations which were being carried on there. During all this time the appellant lived with him, and performed her household and other duties as a faithful wife should. The area of land applied to nursery purposes was, from time to time, increased by Pepper. There is the direct testimony of several witnesses, including Mrs. Pepper herself, to the effect that during all the years of his marriage Pepper was engaged in no business other than that which he conducted on the ranch. In January, 1900, he sold the land, with the nursery and the personal property thereon, to one Robinson for $20,000, and took up his home in Petaluma. In March, 1906, he died. His estate consisted of the house and lot devised to his widow, of cash in bank to the amount of $51,121.92, of interest-bearing notes to the amount of $57,400, and of bank stock and furniture appraised at $1,350. The bank deposits were made, and the notes and other personal property acquired, so far as appears, after his marriage. The presumption is, therefore, that all of these items were community property. In re Boody, 113 Cal. 682, 45 Pac. 858; Fennel v. Drinkhouse, 131 Cal. 447, 63 Pac. 734, 82 Am. St. Rep. 361. Was the trial court justified in finding that this presumption was overcome? There are to be found, in many of the decisions of this court, expressions to the effect that the separate character of property acquired by either of the spouses after marriage is to be established only by "clear and convincing evidence," "clear and decisive proof," or the like. Meyer v. Kinzer, 12 Cal. 252, 253, 73 Am. Dec. 538; Mott v. Smith, 16 Cal. 557; Adams v. Knowlton, 22 Cal. 288; Morgan v. Lones, 78 Cal. 62, 20 Pac. 248; In re Boody, supra; Davis v. Green, 122 Cal. 364, 55 Pac. 9; Rowe v. H. S. & L. S., 134 Cal. 405, 66 Pac. 569. But, as is said in Freese v. Hib. S. & L. Soc., 139 Cal. 392, 73 Pac. 172, "it was never intended by this court to lay down a rule requiring demonstration in such matters; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. Code Civ. Proc. § 1826. Such proof is never required. Generally, moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind, and evidence which ordinarily produces such conviction is satisfactory." Code Civ. Proc. §§ 1826, 1835. And, in speaking of a similar question in Couts v. Winston, 153 Cal. 686, 96 Pac. 357, we said that "whether or not the evidence offered * * * is clear and convincing is a question for the trial court. * * * In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court."

While the respondents were unable to trace with exactness the transmutations of Pepper's acquisitions into the items of property which he left at his death, we think it can hardly be questioned that the record authorized an inference that his entire estate consisted of the proceeds of the sale of property owned by him at the time of his marriage, together with such profits and earnings as he had made in conducting his ranch. It was shown that he held the ranch before his marriage, and had been occupying it under a claim of ownership for many years. The mere fact that his title to a part of the land was not perfected by conveyance from the source of paramount title until a later date would not alter the character of the land itself as separate estate. Lake v. Lake, 52 Cal. 428; Estate of Higgins, 65 Cal. 407, 4 Pac. 389; In re Lamb, 95 Cal. 397, 30 Pac. 568; Estate of Boody, 119 Cal. 402, 51 Pac. 634. It was also shown that he had been engaged in no business other than that of conducting the ranch. In this testimony the court had a sufficient basis for the conclusion that whatever Pepper had at his death, over and above the property owned by him when he married, had been acquired in the business or occupation carried on by him on said ranch.

There can be little question, on the evidence, that the principal part of such business consisted of the conduct of his nursery. The appellant argues with great earnestness that the profits and earnings of such nursery business after marriage must, as matter of law, be held to be community property. We think this position cannot be sustained. Section 163 of the Civil Code provides that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." The question here is whether the proceeds of the nursery conducted on the land can be considered as "issues" or "profits" of the land. Earnings, acquired by the exercise of the industry or skill of either husband or wife, are to be credited to the community. On the other hand, the products of land, separately owned by either spouse, and cultivated by either or both, become the separate property of the one owning the land. The appellant does not dispute the proposition that, if Pepper had, year after year, sown his land to grain, the resulting crops would have formed a part of his separate estate. But it is argued that, in the case of the nursery, the principal element in the success of the venture was the industry, skill, and attention of Pepper, and that the use of the land was merely incidental to what was, in effect, a commercial enterprise. We are unable to see that this argument furnishes a sufficient ground of distinction. In any agricultural enterprise, the labor and skill of man are essential to success. An orchard or a grain field must be cultivated and cared for. The resultant product is in part due to the processes of nature operating upon the land, and in part to the intelligent application of manual labor to the soil. It is, in the nature of things, impossible to apportion the crop so as to determine what share of it has come from the soil and what share from the exertions of man. The product must be treated as a whole, and, if it is the growth of land separately owned, it is the separate property of the owner of the land. See Diefendorff v. Hopkins, 95 Cal. 343, 352, 28 Pac. 265, 30 Pac. 549. The case of the nursery differs from that of the orchard or the grain field, if at all, only in the fact that the enterprise may require the application of personal skill, labor and attention in a greater degree. But the occupation is, none the less, one conducted upon land, and the product sold is the growth of that land. The seed or the cutting is planted in the soil, it is there nurtured and grown until it reaches a certain stage of development, and is then taken up and sold. If the crop of grain sown and harvested by the owner of the land constitutes "issues and profits" of the land, we are unable to see why the same may not be said of young trees and plants raised on the land until they are ready for transplanting. There may be cases in which the business is virtually one of purchase and sale of plants, the ground being used merely to preserve the plants until sales can be effected. In such cases it might well be said that the enterprise is so predominently commercial that the profits are not to be treated as issuing from the land. But on the facts before us, the court below, while it might have regarded the case as coming within this class, was not bound to do so. The decisions of this court are not in conflict with these views. It would not be profitable to review the cases cited by counsel, since none of them deal with facts like those before us.

There was evidence that, soon after his marriage, Pepper has obtained from his wife the sum of $2,000, which he had used in the nursery business. The money was never returned to Mrs. Pepper. This circumstance is not inconsistent with the finding that the entire estate was separate property of Pepper. Under the evidence the court might have concluded that Mrs. Pepper made a gift of the $2,000 to her husband. If, however, it was a loan the lender's recourse was to present a creditor's claim to the executors.

The appellant complains of errors alleged to have been committed by the court below. The respondents were permitted to introduce evidence of declarations made by Pepper to the effect that all of his property had been accumulated by him before his marriage. Standing by themselves, these self-serving statements were, of course, not admissible in favor of the declarant or his successors in interest. There was, however, testimony to the effect that Pepper had made the declarations in the presence of his wife. Her conduct in the face of his assertions was competent as against her.

On the other hand, the court did not permit the appellant to prove declarations of Pepper himself. In so far as his statements were against his interest, they were admissible against the parties claiming under his will. Code Civ. Proc. § 1850. The first of Pepper's declarations sought to be proved was one to the effect that, upon his arrival in Sonoma county in 1858 he had very little property. This statement referred to a period antedating his marriage by sixteen years. Besides, it had not been shown by the respondents that any considerable part of the estate left by Pepper could be traced back to his possession in the year 1858. The evidence in question had so remote a bearing upon the ultimate issue that its exclusion, if error, must be regarded as of no consequence.

The court permitted one of appellant's witnesses to testify that Pepper had stated, some 16 years before his death, that he had accumulated $40,000 since his marriage, and that this was, or that he considered it, community property. The court struck out the declaration that the amount stated was community property. We think there was no error in this ruling. Whether the property was community or separate was a question of law, depending on the manner and time of its acquisition. The opinion of Pepper on this legal question was entitled to no weight. The statement of fact made by him was allowed to stand, and this was all the appellant was entitled to.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

158 Cal. 611

MESSENGER v. KINGSBURY, Surveyor General. (S. F. 5,252.)

(Supreme Court of California. Nov. 21, 1910. Rehearing Denied Dec. 21, 1910.)

1. NAVIGABLE WATERS (§ 37*)—TIDE LANDS.
The state may grant in private ownership such tide lands as are capable of reclamation without detriment to the public right.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–227; Dec. Dig. § 37.*]

2. PUBLIC LANDS (§ 144*) — SALE — WITHDRAWAL.
The disposition of the public lands is entirely in the control of the Legislature, which may withdraw or reserve from further sale any part of the public domain.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

3. PUBLIC LANDS (§ 144*) — SALES — CONTRACTS—WITHDRAWAL.
Where no valid contract for the sale of public lands has been entered into between the state and a purchaser, and no right has vested in the latter, the withdrawal of the land from sale by repeal of the statute authorizing sales or otherwise precludes the government officers from transferring title.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

4. PUBLIC LANDS (§ 144*) — SALE — WITHDRAWAL.
Where the survey of one applying for the purchase of swamp lands under Pol. Code, §§ 3440, 3443, had not been approved, and he had not paid the installment of the purchase price required by the statute, he acquired no vested rights, and the Legislature was authorized by Act March 25, 1909 (St. 1909, c. 444), enacting Pol. Code, § 3443a, to withdraw the lands from sale.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

5. MANDAMUS (§ 16*)—DEFENSES—WRIT NOT BENEFICIAL.
Mandamus will not be granted to compel the reception of an application to purchase public lands, wrongfully rejected, where such lands have since been withdrawn from sale.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.*]

In Bank. Appeal from Superior Court, Solano County; Wm. S. Wells, Judge.

Proceedings by James E. Messenger for writ of mandate against W. S. Kingsbury, Surveyor General of the state of California. From the judgment and from an order denying a new trial, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., R. C. Van Fleet, Deputy Atty. Gen., and Malcolm C. Glenn, Deputy Atty. Gen., for appellant. A. E. Bolton and Smith, Miller & Phelps, amici curiæ.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SLOSS, J. This is a proceeding originally brought in the superior court for a writ of mandate to compel the defendant, as surveyor general, to receive and file an application of plaintiff made under section 3443 of the Political Code to purchase from the state a piece of land, a portion of which is swamp and overflowed land, and a portion is tide land bordering on the waters of Suisun Bay. Plaintiff recovered judgment in the trial court, and this judgment and an order denying defendant's motion for a new trial, were, on the 23d day of February, 1909, affirmed by the District Court of Appeal for the First appellate district. On the application of the appellant the proceeding was transferred to this court for hearing and determination.

As stated by the learned justice who wrote the opinion in the District Court of Appeal: "It clearly appears from the complaint and the findings that a portion of the land sought to be purchased is a strip of land lying along the margin of Suisun Bay, between the line of ordinary low tide and the line of ordinary high tide, and does not extend into or through the swamp and overflowed lands adjoining. It is alleged in the complaint, however, that all of the land sought to be purchased is capable of being reclaimed for agricultural purposes, and can be reclaimed without any interference with navigation, or any fishing or fisheries on Suisun Bay or elsewhere, and the court so found." Upon these facts, there were presented for decision the questions (1) whether the state has power to transfer its tide lands, constituting the shores of navigable waters, into private ownership, except in aid of navigation, commerce or fisheries; and (2) whether, granted that it has such power, it has upon a proper construction of its legislation in fact offered such lands for sale. Both questions are answered by the appellate court in the affirmative.

That the state may, if it sees fit so to do, grant in private ownership such tide lands as are capable of reclamation without detriment to the public right is a proposition that seems well supported by the authorities cited by the respondent. It will be sufficient for the present purpose to refer to Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Ward v. Mulford, 32 Cal. 365, and Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

The other question—i. e., whether or not the state had, at the time of the proceedings under consideration, made provision by law for exercising this power—presents a more difficult problem. As the case stood when it was under consideration by the Court of Appeal, the determination of this question of statutory construction was necessary to a decision. But, as we shall presently point out, the law has now been changed so as to deprive the plaintiff of his right to relief under any view that may be taken of the meaning and effect of the statutes as they read at the time these proceedings were instituted.

The claim of the plaintiff is based upon sections 3440 and 3443 of the Political Code. Section 3440 provides that "the swamp and overflowed, salt-marsh and tide lands belonging to the state must be sold at the rate of one dollar ($1.00) per acre, in gold coin, payable, twenty per cent. of the principal within fifty days of the approval of the survey by the surveyor general; and the balance, bearing interest at the rate of seven per cent. per annum, payable in advance, is due and payable one year after the passage of any act of the Legislature requiring such payment, or before, if desired by the purchasers. * * *" Section 3443 provides that "any person desiring to purchase swamp and overflowed, or tide lands, above low tide, must make * * * and file in the office of the surveyor general of the state" an affidavit stating certain matters. The section provides for the determination, by action in the superior court, of any contest filed in the office of the surveyor general.

Plaintiff herein had, at the time of instituting this proceeding, advanced to the point of offering for filing his affidavit and application to purchase, and no further. He has not, to the present time, gone beyond this point. His survey has not been approved, and he has not paid the first installment of twenty per cent., or any part of the purchase price. While matters were in this condition, the Legislature by an act approved and effective March 25, 1909 (St. 1909, p. 774), enacted section 3443a of the Political Code reading as follows: "The words 'tide-lands' mentioned and described in sections thirty-four hundred and forty and thirty-four hundred and forty-three of this code shall not be held or construed to apply to or to include the shore, or any part thereof, or the bed, or any part thereof, of the ocean or of any navigable channel or stream or bay or inlet within the state, between ordinary high and low water mark, and all such land over which the ordinary tide ebbs and flows is hereby withheld from sale. Nothing in this section shall be construed as a recognition that prior to the passage hereof, the tide-lands by this section withheld from sale have been offered for sale by the state."

Now, whatever may have been the effect of sections 3440 and 3443, standing alone, with respect to the purchase of tide lands forming the shore or bed of navigable waters, there can be no question that by the enactment of section 3443a further sales of such lands were forbidden. If lands of this character had theretofore been offered for sale, the Legislature, in passing the new section, manifested, by language too plain to be misunderstood, its intent to withdraw them from further sale under sections 3440 and 3443. The disposition of the public lands is a matter resting entirely within the control of the Legislature and that body has the undoubted right to withdraw or reserve from further sale any part of the public domain. 36 Am.

& Eng. Ency. of Law (2nd Ed.) 225; Day Land, etc., Co. v. State, 68 Tex. 526, 4 S. W. 865. Where a valid contract of sale has been entered into pursuant to law between the state and a purchaser so that an equitable interest in the land is vested in the latter, the state will, of course, be prevented by force of familiar constitutional provisions from destroying the right so vested. Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363. But where there is no contract, and no vested right in the intending purchaser, the withdrawal of the land from sale, by repeal of the statute authorizing sales or otherwise, absolutely terminates the power of the officers of the government to take the steps necessary to transfer title. Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668.

The decisions of this court are clear to the effect that an applicant who has merely filed his affidavit and application to purchase, without paying any part of the purchase price, under statutes essentially similar to the scheme provided by the Political Code for the disposition of public lands, has no such vested right as will prevent a termination of the opportunity to purchase upon a repeal of the law providing for sale.

In Eckart v. Campbell, 39 Cal. 256, the court had under consideration the act of March 28, 1868 (St. 1867–68, p. 507), an act which provided for the disposition of public lands in the same manner as that declared by the Political Code. Indeed, that act formed the basis of the provisions subsequently incorporated in the Political Code. Upon a consideration of the entire statute the court came to the conclusion that one whose application filed in due form had been accepted by the surveyor general, and who had received a certificate of location as provided for in section 12 of the act received "the exclusive privilege to become the purchaser of the particular premises described at any time within the 50 days from its (the certificate's) date. It is, however, a mere privilege which he might, at his option, accept or decline within that time—and his failure to pay the 20 per cent., as required, is conclusive evidence to the land officers that he has abandoned the privilege thus conferred upon him." Referring to section 4 of the act, identical in terms with section 3514 of the Political Code, the court says: "The holder of such a certificate as that held by Eckart (i. e., the certificate of location merely) is, under this section, distinctly characterized as an applicant merely, and it is the payment of the 20 per cent. which converts him into a purchaser, and entitles him to receive from the register a certificate, which sets forth the terms of the contract, now for the first time made between the applicant and the state, the description of the land purchased, the sum already paid, and the amount to be paid hereafter," etc. And finally, as summarizing its views on the proper construction of the law, the court says that: "It does not seem to have been the intention of the statute that the state should be considered as having parted with any interest in the land, until she had received the payment of at least the first installment of the purchase money." Upon this reasoning it was held that the surveyor general had the right to entertain a second application to purchase where the first applicant had failed to make payment of 20 per cent. of the purchase price within 50 days after the date of his certificate of location.

Much closer in their facts to the case at bar, and, in our judgment, determinative of it, are the cases holding that article 17, § 3, of the Constitution of 1879, providing that state lands suitable for cultivation shall be granted only to actual settlers, operates as a restriction on applications made before, as well as after, the Constitution took effect. The first of these cases was Johnson v. Squires, 55 Cal. 103. That was an action to determine a contest over the right to purchase state lands. The plaintiff's application, made prior to the adoption of the Constitution complied, as is assumed by the court, with the law in existence when it was made. That law did not limit the right of purchase to actual settlers, and plaintiff was not such settler. It was held that, by reason of the constitutional provision, he was not entitled to purchase. Referring to said provision, the court said: "This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect. As the case shows, appellant has paid no portion of the purchase money, nor has his proposition to buy been accepted by the agent of the state. He has parted with nothing of value, and can neither assert that the state Constitution has 'impaired the obligation' of a contract, or deprived him of property without due process of law." This case was cited with approval in Dillon v. Saloude, 68 Cal. 267, 9 Pac. 162, and was followed in Urton v. Wilson, 65 Cal. 11, 2 Pac. 411, Mosely v. Torrence, 71 Cal. 318, 12 Pac. 430, and Manley v. Cunningham, 72 Cal. 236, 13 Pac. 622.

The same principle was applied in Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466. There the appellants claimed title to the lands in controversy by virtue of patents issued upon applications for purchase made under the act of March 28, 1868, supra. The property consisted of tide lands fronting on the bay of San Diego, and was situated within two miles of the city of San Diego. On April 4, 1870 (St. 1869–70, c. 573, § 8), the Legislature amended section 70 of said act of 1868 by excluding from the provisions of the act all swamp and overflowed, salt-marsh and tide lands "within two miles of any town or village." Assuming that the original act authorized the sale of the lands in question, the court held that the amendment took from the officials of the government the right to sell said land, no right to the same having vested in the appellants prior to their making a payment. Says the court: "The applications under which appellants claim were not approved until November, 1871, and no payments were made by the applicants prior to that time. They therefore had made no contract with the state, and had no vested rights until that time." The opinion does not disclose the exact date of the filing of the applications, and a copy of the record is not, at the moment, accessible to us. It clearly appears, however, from the opinion itself, as well as the reported abstract of arguments of counsel, that the applications preceded the amendment of the statute. If this had not been so, there would have been no occasion for the court to hold that the right of the applicants did not vest until payment. Furthermore, the argument of counsel for respondents, on page 454, concedes that the applications to purchase were made before the passage of the amending statute.

The effect of these decisions is to put the applicant for the purchase of state lands in a position similar to that of one who enters federal lands under the pre-emption laws of the United States. Under those laws it was uniformly held that no right, as against the United States, vested in a claimant until he had made or tendered the required payment. Up to that time, the land might be withdrawn from sale. People v. Shearer, 30 Cal. 650; Hutton v. Frisbie, 37 Cal. 475; Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668; Yosemite Valley Case, 15 Wall. 77, 21 L. Ed. 82, affirming Low v. Hutchings, 41 Cal. 634; Whitney v. Taylor, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906. In Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, the Supreme Court of the United States intimated, but found it unnecessary to decide, that an Oregon statute similar to that contained in the above-quoted sections of the Political Code was to be regarded as having the same effect as the pre-emption laws; i. e., of conferring a vested right only upon payment or tender of part of the purchase price.

Under these views, a granting to the plaintiff of the relief sought would be of no avail. If it be urged that private rights will not be permitted to be defeated by the wrongful action of government officials, plaintiff could at most, assuming the rejection of his application to have been unauthorized under the old law, be entitled to have his application received, filed, and approved. Conceding for argument's sake, that the law, as it stood at the time of his application, authorized the purchase of these lands, he would find himself in the position of having applied to purchase lands which the state has decided to withhold from sale. He would have no vested right which could prevent such withholding. Whether or not the superior court and the District Court of Appeal rightly held that plaintiff was entitled to his writ of mandate, it is plain that, as the law now reads, no such writ should issue. It would assume to require the surveyor general to perform a mere preliminary act which could not be pursued to an effective termination without a violation of the law.

It is therefore a matter of no concern to the applicant to have this court decide whether sections 3440 and 3443, prior to the enactment of 3443a, authorized the sale of lands of the character here involved. That question, one of great importance, will properly require determination when it is raised in a case involving the claims of applicants who had received patents or had made partial or full payments, before section 3443a was made a part of the Code. It seems to us to be more fitting and proper to postpone its consideration until it shall be presented in a case in which parties really interested in its disposition may have an opportunity to be heard.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

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14 Cal. App. 328

EVINGER v. MORAN. (Civ. 792.)

(Court of Appeal, Second District, California. Oct. 6, 1910.)

1. Pleading (§ 264*)—Amended Pleadings—Operation—Abandonment of Prior Pleading.

The filing of an amended answer operates as an abandonment of the original.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803–805; Dec. Dig. § 264.*]

2. Pleading (§ 231*)—Amended Pleading—Amendments of Court—Statutes.

Under the direct provisions of Code Civ. Proc. § 472, the permission is given to amend a pleading once as of right before the trial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 594–598; Dec. Dig. § 231.*]

3. Pleading (§ 231*)—Amended Pleading—Time of Amendment.

Where a stipulation was filed that a motion for judgment on the pleadings should be submitted upon briefs to be later filed, an amended answer under the direct provisions of Code Civ. Proc. § 472, could be made as of course before the time for filing such briefs had expired; therefore, where such an amended answer has been filed, it supplants the original pleading, and it is error to render judgment on the motion if the new answer presents a defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 594–598; Dec. Dig. § 231.*]

4. Pleading (§ 34*)—Construction—Rules.

A pleading should be most strongly construed against the pleader, and no intendments can be indulged in its aid.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. § 34.*]

5. Pleading (§ 345*)—Defenses.

In an action for money lent, where it was alleged that no time of repayment had been agreed upon, and the defendant's answer setting up that the money was to be repaid when the plaintiff had paid certain moneys to the defendant upon the issuance of a certain patent, and that such patent had not been issued, it must be assumed that the money due defendant had been paid or he would have alleged its nonpayment, and a judgment was therefore properly given on the pleadings for plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 345.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by D. R. Evinger against T. L. Moran. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Kaye, for appellant. Carter & Carter, for respondent.

ALLEN, P. J. The controlling question involved upon this appeal relates to the sufficiency of an amended answer filed by defendant pending the hearing of a motion for judgment upon the pleadings. This amended answer was filed before the trial of an issue of law raised by a demurrer to the original answer. The effect of filing such amended answer, if properly filed, was to supersede the original answer. Kuhland v. Sedgwick, 17 Cal. 123. The permission to amend a pleading once as of right before the trial of such issue is authorized by section 472, Code Civ. Proc. Were it even conceded that the motion for a judgment on the pleadings performs the same office as a demurrer, and therefore the section should be construed as only permitting such amendment as of right before an issue of law is heard under a motion presenting the issues which would be involved in a general demurrer, nevertheless it appears from the record that the amended answer was on file before such motion for judgment was disposed of. A stipulation was filed that the motion was submitted upon briefs thereafter to be filed. The effect of such stipulation is a submission upon the filing of such briefs. The amended answer was filed before the time allowed for filing briefs had expired. If the amended answer was sufficient to raise an issue of fact, the court erred in rendering judgment on the motion directed against the original answer. If, upon the other hand, the amended answer presented no defense, the trial court was warranted in rendering judgment. Benham v. Connor, 113 Cal. 171, 45 Pac. 258.

The complaint alleged a loan by plaintiff to defendant without agreement as to time of repayment. The answer denied that no time for repayment was agreed upon, but alleged that the same was to be payable when plaintiff and an associate paid to defendant a certain $6,000, which they had agreed to pay when a patent was issued for certain land. It is alleged that such patent has never issued, but it is not averred that the $6,000 has not been paid. The event which should mature the loan was the payment of the money. Construing the answer under the rule "that the pleading is to be construed most strongly against the pleader, and that no intendments can be indulged in its aid" (Callahan v. Loughran, 102 Cal. 481, 36 Pac. 836), it must be presumed that if the money had not been paid that such fact would have been averred.

The payment of the money not being negatived, we see no error in the record, and the judgment appealed from is affirmed.

We concur: **SHAW, J.; JAMES, J.**

158 Cal. 638

HALL v. BARTLETT et al. (L. A. 2,113.)

(Supreme Court of California. Nov. 25, 1910. Rehearing Denied Dec. 22, 1910.)

1. DEEDS (§ 38*)—EVIDENCE (§ 451*)—DESCRIPTION—UNCERTAINTY.

A deed, which on its face contains two inconsistent descriptions, either of which will identify a different piece of property, discloses a patent ambiguity which, as a general rule, cannot be removed by parol evidence, and the deed is void for uncertainty.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. § 38;* Evidence, Cent. Dig. §§ 2085–2092; Dec. Dig. § 451.*]

2. DEEDS (§ 111*) — DESCRIPTION — UNCERTAINTY.

Whether the description in a deed is uncertain must be determined from a construction of the entire deed, and the construction to be put on it must be reasonable, as required by Civ. Code, § 3542, and, as required by section 3541, such an interpretation must be indulged in as will give effect to the deed rather than defeat it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309–315; Dec. Dig. § 111.*]

3. DEEDS (§ 42*) — DESCRIPTION — UNCERTAINTY.

Where, from the description in a deed, taking into consideration all its calls, it is possible by rejecting calls which are apparently false to ascertain its application to a particular tract as embraced within the description, the false call will be rejected and the deed sustained, as required by Code Civ. Proc. § 2077, subd. 1, declaring that where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite does not frustrate the conveyance, which must be construed by the first-mentioned particulars.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 85–87; Dec. Dig. § 42.*]

4. DEEDS (§ 38*) — DESCRIPTION — SUFFICIENCY.

A deed described the land as lot 10, of block V of the Mott tract, "the same being the lot on the corner of First street on the east side of F. street, being 65 feet front by 165 feet deep." A map of the Mott tract showed lot 10 of block V, as a lot fronting 60 feet on F. street with a depth of 165 feet, and as located 60 feet from First street, and lot 9 of the same dimensions lying between it and First street, and fronting on F. street. *Held*, that the quoted words did not render the description uncertain as inconsistent with the other description, for the word "on" in the quoted description might be construed as equivalent to "near to" or "at," as simply denoting proximity.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4960–4966; vol. 8, p. 7737.]

5. DEEDS (§ 38*) — DESCRIPTION — SUFFICIENCY.

A deed described the land as lot 10 of block V of the Mott tract, the same being the lot on the corner of First street on the east side of F. street, being 65 feet front by 165 feet deep, "and a two-story frame house situate thereon." A map of the Mott tract showed lot 10 of block V and lot 9 lying between it and First street, both fronting on F. street. A two-story frame house was situated on lot 10. *Held*, that the deed was not void for uncertainty, but the description applied only to lot 10, since the reference to the house as situated on the lot was a part of the description and made it certain, there being no lot other than lot 10 to which it could possibly apply.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. § 38.*

6. DEEDS (§ 38*) — DESCRIPTION — SUFFICIENCY.

Where a deed calls for a part of a larger tract of land, and there is no identification of the part intended to be conveyed by measurement or quantity, and nothing further in the deed by which the part may be identified, there is an uncertainty vitiating the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. § 38.*]

7. DEEDS (§ 114*) — DESCRIPTION — SUFFICIENCY.

A deed which called for all of a certain lot, being a part of lot 10 of block V of a tract, and being 65 feet front by 165 feet deep, sufficiently described the tract, and embraced the entire lot according to its boundaries on the map of the tract disclosing a lot of the dimensions specified in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316–322, 326–329; Dec. Dig. § 114.*]

Beatty, C. J., and Sloss and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by H. E. Hall against Cornelius Bartlett and others. From a judgment for defendants, plaintiff appeals. Reversed.

George H. Moore, for appellant. Lucius M. Fall, for respondents.

LORIGAN, J. This is an action in ejectment in which judgment went for defendants, and plaintiff appeals therefrom on a bill of exceptions. The complaint alleged ownership in the plaintiff, and right of possession to "all that certain lot and parcel of land situate in the city of Los Angeles, county of Los Angeles, and state of California, and described as follows, to wit: Lot ten (10) of block 'V' of the Mott tract as per map of said tract recorded in book 14, page 7, miscellaneous records of said county, excepting therefrom any portion thereof included in Figueroa street, formerly Pearl street, as indicated upon a plat of block 'V' of the said Mott tract recorded in book 53, page 21, miscellaneous records of said Los Angeles county." The answer denied title or right of possession in plaintiff, and set up that defendants were tenants of one E. R. Fox, whom they allege was the owner of the property and entitled to its possession.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On the trial plaintiff in support of his title introduced a judgment roll in an action entitled William M. Peckham et al. v. E. R. Fox in the superior court of Los Angeles county, in which plaintiff was awarded a money judgment and a decree foreclosing a lien (its nature does not appear) on certain real property in the city of Los Angeles described in the judgment, which property was directed to be sold. The property so ordered to be sold was described as situated in the city of Los Angeles and described as follows: "Being part of lot ten of block 'V' of the Mott tract, the same being the lot on the corner of First street on the east side of Figueroa street, being sixty-five feet front by one hundred and sixty-five feet deep and a two-story frame house situate thereon." The return of the sheriff to an order of sale issued pursuant to the decree showed that the property as described in the judgment was sold to plaintiff. Two deeds made by the sheriff to the plaintiff as purchaser at the sale were also offered by counsel for plaintiff, but at this stage simply for the purposes of identification. In them the property sold was described as "all that certain lot, piece or parcel of land situate, lying and being in the city of Los Angeles, county of Los Angeles and state of California, and bounded and particularly described as follows, to wit:" (here follows the identical description contained in the judgment and heretofore quoted therefrom). The second deed was made simply to correct an error in the execution and acknowledgment of the first.

In aid of the deeds plaintiff then introduced in evidence both the map and plat referred to in his description of the property as set forth in his complaint. The map of the Mott tract showed a lot 10 of block V of that tract to be a lot fronting 60 feet on Grasshopper (now Figueroa street) with a depth of 165 feet, and being located 60 feet from First street: and a lot 9 of the same dimensions lying between it and First street and fronting on Figueroa and First streets. The plat of block V of said tract (referred to in the complaint as recorded in book 53, page 21) does not identify either of said lots 9 or 10, but shows the two lots nearest the corner of Pearl (now Figueroa) and First streets, fronting on Pearl street, to be each 60 feet wide and 163.28 feet deep. This offer of the plat and map was supplemented by testimony showing that there were no other plats or maps of the Mott tract recorded in the office of the county recorder of Los Angeles county; that the name of Grasshopper street had been changed to Pearl, and this in turn to Figueroa, and plaintiff himself testified that there was no two-story frame house on the lot at the corner of First and Figueroa, but that there was such a house on lot 10 of block "V" of the Mott tract; that is, on the lot next to the corner. After this proof plaintiff then offered in evidence the second deed executed by the sheriff (corrective of the first) and which had theretofore been marked for identification only, to which the defendants objected on the ground that the description in the sheriff's deed offered varied from the description in the complaint, and for the additional reason that the description in it was so uncertain that it did not describe any property, and the property could not be identified thereby. The trial court sustained these objections to the deed, and rendered judgment in favor of the defendant. The question in this appeal is as to the correctness of the ruling of the court in this respect.

The first objection urged to the introduction of the deed and sustained by the court, namely, that there was a variance between the description therein and that in the complaint, need be given no particular consideration. If the other and more serious ground of objection to the deed, namely, that it was void for uncertainty in its description, was erroneously sustained by the trial court, it is clear that the complaint and the rejected deed described the same property, though in a different form. So that the controlling point on this appeal is whether the rejected sheriff's deed was or was not void for uncertainty.

It is undoubtedly true that where a deed on its face contains two inconsistent descriptions, either of which would identify a different piece of property from that described by the other, there is disclosed a patent ambiguity which, as a general rule, parol evidence is not admissible to remove, and the instrument is void for uncertainty. Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33; Cadwalder v. Nash, 73 Cal. 43, 14 Pac. 385. But whether the description is uncertain or not is to be determined from an inspection of the entire deed, and in considering it the construction to be put upon it must not only be a reasonable one (Civ. Code, § 3542) but such an interpretation must be indulged in as will give effect to the deed rather than defeat it. Civ. Code, § 3541. If from the description in the deed, taking into consideration all its calls, it is possible by rejecting calls which are apparently false to ascertain its application to a particular tract of land as embraced within the description, the false call will be rejected and the deed sustained. Reed v. Spicer, 27 Cal. 58; Irving v. Cunningham, 66 Cal. 16, 4 Pac. 766; 1 Green. on Ev. (15th Ed.) 301; 2 Devlin on Deeds, § 1016. In this respect and as declaring the rule for construing the descriptive parts of a conveyance of real property where the construction is doubtful, and there are no other sufficient circumstances for identifying it, the Code of Civil Procedure expressly provides in section

2077, subd. 1, that "where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown or false, does not frustrate the conveyance, and it is to be construed by the first-mentioned particular."

Now to come to a consideration of the description in the deed in question. It refers to the Mott tract, and when we examine the plat of that tract we find lots 9 and 10 designated thereon. A portion of the description in the deed refers to the property as "part of lot 10 of block V in the Mott tract, the same being the lot on the corner of First street on the east side of Figueroa." It is this portion of the deed which it is claimed shows two inconsistent descriptions—a specific reference by number to lot 10, and also a description which embraces lot 9, because while the latter lot is not expressly mentioned, it is the one which answers the general call for a lot at the "corner of First street on the east side of Figueroa." Taking, however, this portion of the description as we find it, if there were nothing else in the deed, it does not necessarily follow that there was a patent ambiguity in the description. There being a definite reference to lot 10 of block V of the Mott tract, the words of further reference to the lot conveyed as "the same being the lot on the corner of First street on the east side of Figueroa," would not necessarily be construed as inflexibly locative, and hence a distinctively inconsistent description when compared with the special reference to lot 10. The word "on" in the description may be construed as the equivalent of "near to" or "at," as simply denoting contiguity, neighborhood or proximity. Be that as it may, however, and conceding that if the description above quoted constituted the entire description of the property in the deed, it would fall within the rule of Brandon v. Leddy and similar cases, and be void for uncertainty, still it is quite clear that when the whole description of the deed is considered that the call for a lot on the corner of First and Figueroa streets (which is what the second call in this particular description really amounts to) is really a false call, and should be rejected. That this is true needs no particular elaboration. Conceding that the description applied equally to lot 10 of block V of the Mott tract, and to block 9 thereof, as being on the corner of First and Figueroa streets, and, if this were all the description, it would be void for uncertainty, it is apparent that this uncertainty is removed, and the description attaches to lot 10 when we consider the additional terms of description of the lot intended to be conveyed as embraced within the terms "and the two-story house situated thereon." It is the lot, whether it be lot 10 or the lot on the corner of First and Figueroa streets (lot 9), with a two-story house situated thereon which was being conveyed. The evidence shows that a two-story house was situated on lot 10 and that there was no house situated on the lot on the corner of First and Figueroa streets of the Mott tract—lot 9. In fact, it was shown that there was no lot on any of the corners of First and Figueroa streets which might by any possibility be embraced within the description in the deed upon which any house, two story or otherwise, was located. There was no lot which might by any construction be embraced within the calls and upon which any house was constructed except lot 10, and it was upon this lot that the house stood. There can be no question that this reference to the house as situated on the lot conveyed was a part of the description. Burnham v. Stone, 101 Cal. 164–170, 35 Pac. 627; Chapman v. Zoberlein, 152 Cal. 216, 92 Pac. 188. Counsel does not contend to the contrary, and this being true it would appear that the call for a lot on the corner of First and Figueroa streets when considered in connection with the entire description in the deed must be regarded as a false call. It may be said in this connection that if taking into consideration the reference to a two-story house as being situated on the lot conveyed, it does not apply to lot 10, there is no other lot to which it could possibly apply.

It is insisted, further, by respondent that the description is indefinite and uncertain because it calls for a "part of lot 10" without describing or designating what part. Of course, where a deed calls for a part of a larger tract of land, and there is no identification of the part intended to be conveyed by measurement or quantity, and nothing further in the deed by which the part may be identified, there is an uncertainty which vitiates the conveyance. But this is not the case here. The deed calls for "all that certain lot * * * being part of lot 10 of Block 'V' of the Mott tract * * * being sixty-five feet front by one hundred and sixty-five feet deep." Having determined from the description taken as a whole that the land which was intended to be conveyed was lot 10 of block V of the Mott tract, as distinguished from any other lot, it further appears that the dimensions of that lot intended to be conveyed were 65 feet front by 165 feet deep. While it is true that the deed opens the description by a call for a part of the lot, it designates the part as "being sixty-five feet front by one hundred and sixty-five feet deep." The measurement calls are sufficient to include all of lot 10, which appears to have a frontage of 60 feet by 165 feet deep, as delineated upon the map of the Mott tract. While the call for a "part of the lot" would have of itself been an indefinite call, still as it is followed by a reference to measurements which are sufficient to describe and embrace the entire tract according to the map referred to, under familiar rules of construction the indefinite description must give way to the definite one, and if the latter is sufficient to embrace the entire lot according to its boundaries on the map it must control and be given effect; and that it is there can be no question.

This is all the consideration we feel necessary to give to this subject.

We are satisfied that under the proofs made the court should have admitted the sheriff's deed to plaintiff in evidence.

The judgment appealed from is reversed.

We concur: SHAW, J.; MELVIN, J.; HENSHAW, J.

We dissent: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.

BEATTY, C. J. I dissent. It is perhaps not very material, but it does sufficiently appear from the record that the demanded premises were sold to the plaintiff in execution of a decree foreclosing a mechanic's lien. The material point is that it was a sale under execution, a transaction in which the policy of the law and the rights of the judgment debtor require that nothing shall be done or omitted by the execution creditor contrary to law which will have a tendency to prevent competition in the bidding. The law, among other things, requires a definite description of the property to be sold, and I can conceive of no more fatal defect of description than the offer for sale of a part of a lot without describing the part. Here there was no such description. The dimensions, 65 by 165 feet, contained in the description refer by proper grammatical construction to the lot—the whole lot—an undefined portion of which was to be sold, and this construction is corroborated by the fact that they include the whole lot and five feet of frontage more than the whole. In a voluntary sale upon terms satisfactory to the vendor a description as vague and ambiguous as this might justly be aided by a liberal and benevolent construction in favor of the vendee, but an execution sale requires the application of a stricter rule. Cadwalder v. Nash, 73 Cal. 48, 14 Pac. 385. "It is of the utmost importance that land to be sold at execution sale should be so definitely described as to inform the public what particular tract will be offered to purchasers, and each bidder what land he will get if his should be the best offer at the sale. Otherwise bidding would be discouraged instead of promoted, and the right of the defendant sacrificed. To find out what land is to be sold, purchasers look to the proceedings by virtue of which the sale is to take place, which are, in the present case, the levy, the judgment, and the order of sale. If from these an intended purchaser would be left in hopeless uncertainty as to where and what the land is, he will be deterred from buying, at least for anything like a reasonable price." Pfeiffer v. Lindsay, 66 Tex. 123, 1 S. W. 264. It is a significant circumstance that the valuable house and lot here in question was purchased at the execution sale for five dollars.

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158 Cal. 632

POLK v. SLEEPER. (S. F. 5,278.)

(Supreme Court of California. Nov. 22, 1910.)

1. Public Lands (§ 144*)—State Lands—Rights of Purchasers.

One who has merely filed an application to purchase state land, but who has not procured the approval thereof nor a certificate of purchase, and who has not paid any part of the price, has acquired only a personal right which does not survive him, and, on his death, his estate had no interest therein, and neither his administrator nor any person interested in his estate has any right to the land by virtue of the application.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

2. Constitutional Law (§ 93*) — Vested Rights—Application to Purchase State Lands.

One who has merely filed an application to purchase state land, and who has not procured the approval thereof, nor a certificate of purchase, and who has not paid any part of the price, has no such vested right as will prevent termination by the state of the opportunity to purchase by a repeal of the statute providing for a sale of the land.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 183; Dec. Dig. § 93.*]

3. Public Lands (§ 144*)—Rights of Purchasers—Statutes.

Under Pol. Code, §§ 3515, 3523, providing that certificates of purchase and the rights acquired thereunder are subject to sale, and declaring that, where a patent for lands is issued in the name of a decedent, the title vests in his heirs, an applicant for the purchase of state land who procures the approval of his application and a certificate of purchase, and who has paid a part of the price, acquires an interest in the land which is the subject of sale, and which survives his death, so that a patent can be issued in due course.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

4. Public Lands (§ 144*)—Application for Purchase—Contests.

In an action to determine a contest for the purchase of state swamp land, originating in the state land office, and referred by the Surveyor General under Pol. Code, § 3414 et seq., to the superior court for adjudication, the contestant, failing to make out a case in favor of his own application, may have an adjudication as to the validity of defendant's claim, with the result that, if the defendant is also found to be without right, a decree shall be given that neither party is entitled to purchase, but the legal representative of an applicant who died before the approval of his application and the issuance of a certificate of purchase, and the payment of any part of the price, has no such interest in the land as will entitle him to an adjudication of the right of another applicant for the purchase of the same land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

5. Public Lands (§ 144*)—Application for Purchase—Contests.

Pol. Code, § 3414, authorizing a contest before the Surveyor General concerning the approval of a survey or location of state land, or a certificate of purchase, etc., does not authorize the initiation of a contest by one who does not himself seek to purchase the land, or who has no interest in the land which he may protect in some action, but the contest authorized is one solely for the protection of some right of the party contesting which is entitled to protection.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

6. PUBLIC LANDS (§ 144*)—APPLICATION FOR PURCHASE—CONTESTS.

Under Pol. Code, § 3414, authorizing contests before the Surveyor General concerning the approval of a survey or location of state land, or certificate of purchase, and providing for the transfer of the contest to the superior court, and section 3415, as amended in 1907 (St. 1907, c. 300), authorizing any person legally qualified to purchase public land to intervene in the action after the transfer thereof, the only questions involved in the action are those affecting the relative rights of the parties thereto, and the only person who can intervene is one legally qualified to purchase from the state, who, after the order of transfer, presents his own application of purchase, and a cause of action by an applicant who has merely filed his application to purchase, but who has not procured the approval thereof, nor a certificate of purchase, and who has not paid any part of the price, terminates on his death, and his personal representative may not prosecute the action, notwithstanding Code Civ. Proc. § 385, providing that an action does not abate by the death of a party where the cause of action survives.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Thomas W. Polk, prosecuted after his death by Robert T. Polk, as administrator, against Moreau Sleeper, prosecuted after his death against Ed. Sleeper, as administrator. From a judgment for defendant, plaintiff appeals. Affirmed.

Crawford & Crawford and Mannon & Mannon, for appellant. Herbert V. Keeling, for respondent.

ANGELOTTI, J. This is an appeal from a judgment that plaintiff take nothing, that the action be dismissed, and that defendant have and recover his costs taxed at $2.25, in an action to determine a contest for the purchase from the state of certain swamp and overflowed land in Lake county, originating in the state land office between Thomas W. Polk and Moreau Sleeper, and referred by the Surveyor General on June 2, 1886, under section 3414 et seq., Pol. Code, to the superior court of said county for adjudication. The judgment was entered on sustaining a demurrer to plaintiff's fourth amended complaint. From the original complaint, which is brought up as a part of the judgment roll, it appears that this action was instituted by the contestant, Thomas W. Polk, by the filing of such complaint within 60 days after the order of reference, viz., on July 10, 1886. The fourth amended complaint was not filed until the 9th day of January, 1908. The demurrer having been interposed, the action was transferred to the superior court of Mendocino county on account of the disqualification of the judge of Lake county, and on November 23, 1908, this demurrer was sustained, and the judgment appealed from thereupon entered.

Among other grounds of demurrer was that of want of facts to constitute a cause of action and want of legal capacity on the part of plaintiff's administrator to sue.

From the allegations of the fourth amended complaint it appears that this action has outlived both of the original parties. It is alleged that contestant, Thomas W. Polk, died on November 13, 1899, and that Moreau Sleeper died on December 15, 1889. The complaint shows that on November 18, 1885, the register of the state land office issued to said Moreau Sleeper a certificate of purchase for said land based upon an application therefor made by him on December 3, 1868, but it is stated that the same was illegally issued; the facts upon which the claim of illegality is based being alleged. The contestant presented his own application to purchase the said land on May 29, 1886, and this was followed by the order of reference of June 2, 1886. Because of Sleeper's prior application and certificate of purchase contestant's application was never approved. It is claimed that all of his rights in the matter abated with his death, and that consequently the fourth amended complaint states no cause of action, and shows the administrator to be without legal capacity to maintain the contest.

The claim of defendant's attorney that all rights of Thomas W. Polk to purchase this land under his application abated with his death and did not descend to his heirs, if he had any, or to the administrator of his estate, is not disputed by counsel for plaintiff. This claim appears to us to be well based. The effect of our statutes is that the right of one who has merely filed an application to purchase state land and whose application has never been approved and who has received no certificate of purchase or paid any part of the purchase price is purely a personal right, which does not survive him. The authorities in this state are clear upon the proposition that an applicant so situated has no such vested right as will prevent a termination by the state of the opportunity to purchase by a repeal of the law providing for a sale of the land. These authorities are fully discussed and the same conclusion reached in the case of Messenger v. Kingsbury (S. F. No. 5,252, decided November 21, 1910) 112 Pac. 65. We think it is clear that an applicant so situated has nothing more than a purely personal right to himself proceed with the purchase so long as the state does not change its laws relating to the sale of the land. It was held in Cadierque v. Duran, 49 Cal. 356, that "a party who has only filed an application to purchase has acquired no right which he can transfer to another." The same conclusion was reached in People v. Blake, 84 Cal. 611, 22 Pac. 1142, 24 Pac. 313, and these cases are approvingly cited in Anderson v. Yoakum, 94 Cal. 227, 29 Pac. 500, 28 Am. St. Rep. 121. A distinction has been made by this court between such cases and a case where the application has been approved and a portion of the purchase money paid and the applicant holds a certificate of location (Stanway v. Rubio, 51 Cal. 41), and also a case where the purchaser has received a certificate of purchase. Wholey v. Cavanaugh, 88 Cal. 132, 25 Pac. 1112. As to the latter class of cases there can be no question, of course, in view of the statutory provision that "certificates of purchase, and all rights acquired thereunder, are subject to sale, by deed or assignment," etc. Pol. Code, § 3515. And undoubtedly where an applicant has proceeded so far as to obtain an interest in the land that is capable of transfer his interest will survive his death, and a patent can be issued in due course. See section 3523, Pol. Code. But, as to the applicant whose application has not been approved and who has paid nothing, the effect of the decisions is that there is no such interest in the land as constitutes property capable of transfer. Our statutes relating to the sale of public lands make no provision the effect of which would be to enable any one to succeed to the right of an applicant so situated in the event of his death, as has been done by the United States in regard to pre-emption and homestead claims. The decisions as to pre-emption claims are to the effect that, in the absence of such a statute on the subject, the privilege given by the government would lapse with the death of the applicant so situated and the land be open to entry by any one, and that, where such a statute exists, the title subsequently acquired from the government comes to the persons taking it not through the applicant, but directly from the government by virtue of the privilege of purchase expressly given by the statute. It is also held that in such a case the land is not subject to devise by the pre-emptor, and cannot be sold in satisfaction of his debts or for the expenses of administration. See Elliott v. Figg, 59 Cal. 117; Wittenbrock v. Wheadon, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32. The same is well settled as to homestead claims. See 32 Cyc. 834. As said before, our statutes make no provision whatever for such cases. The situation here is exactly the same as it would be in regard to a pre-emption claimant from the United States similarly circumstanced, in the absence of any statutory provision for succession to the rights of the claimant. Thomas W. Polk at the time of his death had at most merely a purely personal privilege to purchase this land, which lapsed with his death, leaving the land so far as his application was concerned open for acquirement by any other qualified purchaser. His estate could have no interest therein, and neither his administrator nor any person interested in his estate has any right in regard to this land by virtue of anything done by him.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

As we have suggested, these conclusions are not disputed by counsel for appellant, but it is claimed that, the action having been originally commenced by the contestant under the order of reference made by the Surveyor General, it may be continued by the administrator of his estate for the sole purpose of protecting the state by obtaining an adjudication as to the validity of the certificate of purchase held by the original defendant. This claim is based, we suppose, upon the doctrine established by the decisions that in an action of this character it is the right of the contestant, notwithstanding he fails to make out a case in favor of his own application, to have an adjudication as to the validity of the defendant's claim, with the result that, if the defendant be also found to be without right, a decree shall be given that neither plaintiff nor defendant is entitled to purchase. See Perri v. Beaumont, 91 Cal. 30, 27 Pac. 534. The decisions in regard to this proposition may be based solely on the fact that the contestant, although he does not show himself entitled under his pending application, may nevertheless be aggrieved by the failure of the court to also adjudge the defendant's application void. For instance, in Perri v. Beaumont, supra, where Perri, the original contestant, was appealing from a judgment similar to the one here involved, it was said: "It cannot be said that the plaintiff is not aggrieved by the failure of the court to decide this part of the controversy, and adjudge defendant's application void. The plaintiff is an actual settler on the land, and has valuable improvements thereon. In addition to this, he is possessed of all the personal qualifications which would entitle him to purchase if the land were surveyed, and it is alleged that he desires to purchase it. It is clear, therefore, that he has an interest in preventing defendant from acquiring the legal title from the state." Of course, in view of what we have heretofore said, none of this can be true as to the deceased or his legal representative, who is the only existing claimant. It is settled by Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616, that the provisions of section 3414, Pol. Code, providing for the initiation of a contest before the Surveyor General and the reference of that contest to the superior court of the county in which the land is situated for determination, do not authorize the initiation of such a contest by one who does not himself seek to purchase the land or who has no interest in the land which he would be entitled to protect in some action or proceeding. In that case an order of reference made by the Surveyor General upon the protest of

Pryor, "who had neither possession, interest, nor claim," was held to be absolutely void and insufficient as a basis for any proceeding in the superior court. It was said that "a mere sentimental interest, or a general interest as a citizen in the protection of state property, * * * or even the particular interest which a qualified person, privileged to purchase state lands and expecting at some future time to apply for the particular tract in question, but who is not a settler thereon, might have in preventing or delaying a prior applicant, would not be a sufficient interest to authorize such a contest." The contest thus authorized is one solely for the protection of some right of the party contesting which is entitled to protection. It is this contest between contestant and contestee which may be initiated and referred under section 3414, Pol. Code, and it is this contest alone that is referred to in the succeeding sections (3415 to 3417). The only parties concerned in the action are the parties who properly become parties to the contest in the Surveyor General's office and whose rights have been referred by that officer to the courts for adjudication, and prior to the amendment of section 3416, Pol. Code, in 1907, no other person could intervene in the action commenced under said reference. This was definitely settled in Youle v. Thomas, 146 Cal. 537, 80 Pac. 714, and reaffirmed in Youle v. Thomas, 150 Cal. 676, 91 Pac. 584. The amendment of 1907 authorizes such an intervention only by one legally qualified to purchase from the state public lands of the same character, who, after the order of reference, presents his own application to purchase the land or a portion thereof, to the Surveyor General. The only questions involved in the action are those affecting the relative rights of the parties thereto. The state is in no sense a party to the action. Where all possible rights of the contestant and those claiming under him in regard to the land lapse by reason of his death, it would appear to necessarily follow that the particular contest referred must end, in the absence of the intervention, under section 3415, Pol. Code, as amended in 1907 (St. 1907, c. 300), of some person who had applied to the Surveyor General to purchase the land or a portion thereof. The contestant's cause of action does not survive him, and section 385, Code Civ. Proc., providing that "an action or proceeding does not abate by the death of a party * * * if the cause of action survive or continue," and providing for the substitution of the representative of the deceased, has no application. In the absence of statutory provision for its continuance, the action abated with the contestant's death. The question we have discussed does not appear to have been suggested upon the former appeal in this case (Polk v. Sleeper, 143 Cal. 70, 76 Pac. 819), and there is nothing in the opinion then filed that can be construed as purporting to decide it. In fact, all that is said therein as to the nature of the action and the rules applicable thereto is in line with the views we have discussed.

From what we have said it follows that, in view of the facts made known to the trial court by the fourth amended complaint, the judgment that the action be dismissed was correct. No point is made here as to the correctness of the judgment in so far as it awards respondent $2.25 costs against appellant, and we have not considered that question and express no opinion thereon.

The judgment appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.

158 Cal. 626

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO. v. FRESNO FLUME & IRRIGATION CO.

MILLER & LUX v. FRESNO FLUME & IRRIGATION CO. (S. F. 4,922 and 4,923.)

(Supreme Court of California. Nov. 22, 1910. Rehearing Denied Dec. 22, 1910.)

1. WATERS AND WATER COURSES (§ 53*)—RIPARIAN RIGHTS—DAMS.

A lower riparian owner must show some damage in order to restrain an upper owner from the beneficial use of the water, so that an upper riparian owner may dam the waters of a stream for the purpose of floating logs therein, if such use did not interfere with the water rights of the lower owner.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 45; Dec. Dig. § 53.*]

2. COMMON LAW (§ 14*)—OPERATION—CHANGE OF COMMON-LAW RULE.

If a rule of common law is unfitted to the changed conditions existing in this state, so that its application will work hardship, the Supreme Court will not follow it.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 3; Dec. Dig. § 14.*]

3. WATERS AND WATER COURSES (§ 116*)—RIPARIAN RIGHTS.

The impounding and distribution of flood and storm waters is not prohibited by law, but rather encouraged, where it does not substantially damage the existing riparian rights of others.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 116.*]

In Bank. Appeals from Superior Court, Fresno County; H. Z. Austin, Judge.

Actions by the San Joaquin & Kings River Canal & Irrigation Company and by Miller & Lux, against the Fresno Flume & Irrigation Company. From judgments for defendant in each case, and orders denying motions for a new trial, plaintiffs appeal. Affirmed.

Houghton & Houghton, Frank H. Short, and Edward F. Treadwell, for appellants. L. L. Cory and Goodfellow & Eells, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. These appeals present the same questions, and may, therefore, be considered and decided together. Stevenson creek is a small stream tributary to the San Joaquin river. In dry seasons of the year its waters do not reach the latter. In its course through the mountains it flows into, through, and out of a flat tract of land—"a mountain meadow"—about 85 miles distant from plaintiffs' lands. Defendant constructed a dam across the cañon at the lower end of this mountain meadow impounding the rain, storm and flood waters of the adjacent hills, and converting the mountain meadow into a lake. Into this lake it brought timber from its forests, and out of this lake for several miles down the channel of Stevenson creek it conducted a V flume, and by the waters of the lake carried its timber down the V flume out of the watershed of the creek to its mills and factories below. Defendant has expended for these purposes exceeding $500,000. Plaintiffs Miller & Lux are riparian proprietors of the San Joaquin river, and plaintiff San Joaquin & Kings River Canal & Irrigation Company is an appropriator of water therefrom. Their actions are to the same end—to enjoin the maintenance of defendant's dam and its alleged interference with and diminution of the natural flow of Stevenson creek. The trial court found, in brief, that the dam and operations of defendant did not diminish the flow of Stevenson creek to the San Joaquin river and did not interfere with any of plaintiffs' rights. It found that in a state of nature the flow of Stevenson creek into the mountain meadow was largely absorbed by the lands of that meadow so that comparatively little of the entering water flowed out. It found that by reason of the complete saturation and filling of this mountain meadow and the conversion of it into a lake more water actually flowed down Stevenson creek below the dam than had previously done so. This water came, first, from the overflow of the dam; second, from its leakage; and, third, from the leakage of the V flume by which the water was carried for some miles down the channel of Stevenson creek. Under these findings the relief asked by plaintiffs was denied, and they appeal. Upon appeal they contend (1) that the maintenance of the dam and works in the bed of Stevenson creek constitutes a nuisance which should have been enjoined regardless of any question of the injury to plaintiffs, and regardless of the question whether or not the dam and works did or did not perceptibly diminish the flow of Stevenson creek or of the San Joaquin river. They contend (2) that the findings show positive injury to plaintiffs' right entitling them to the relief sought.

Plaintiffs construe such cases as Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181, Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589, and Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 61, 99 Pac. 502, 22 L. R. A. (N. S.) 391, as establishing the proposition that the riparian owner is entitled to the unobstructed flow of a stream at all times, including flood periods following the annual fall of rains and the melting of snow in the region about the head of the stream, and that, without regard to the damage itself, it is the right of every riparian proprietor to have the water come to his land through its natural channel undiminished in quantity and unimpaired in quality, save to the extent that results from a reasonable use of the water by other riparian owners upon the stream; that, as a necessary corollary to this doctrine the riparian owner is entitled to have the stream flow in its natural channel, and has a right to object to any change in the channel, or to any artificial work of any kind which tends to retard the flow or spread the stream over more surface, or to change its channel. For this reliance is placed, in addition to the cases above cited, on Wood on Nuisances, p. 348; Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Bliss v. Johnson, 76 Cal. 597, 16 Pac. 542, 18 Pac. 785. But the cases do not support the position which appellants take. Even if at common law or under the civil law it was a part of the usufructuary right of the riparian owner to have the water flow by for no purpose other than to afford him pleasure in its prospect, such is not the rule of decision in this state. The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water. The fair apportionment and economic use of the waters of this state are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this court as cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this state, so that its application will work wrong and hardship rather than betterment and good, this court will refuse to approve and follow the doctrine.

It will be found, therefore, that the decisions of this state not only do not deny the right to the use of storm and flood waters, but encourage the impounding and distribution of those waters wherever it may be done without substantial damage to the existing rights of others. Thus, it is said in Modoc L. & L. S. Co. v. Booth, 102 Cal. 156, 36 Pac. 432: "In a state like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated, it is difficult to lay down a rule as to riparian rights which will be applicable to and cover all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento river in Yolo county could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county, and yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained." In Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054, it was sought to enjoin defendant from arresting and diverting the waters of San Mateo creek. The court decreed that defendant should permit at all times all the ordinary flow of the creek to go down to plaintiff's lands, but that he could take and divert "the storm or freshet or flood waters that may flow in or into San Mateo creek above said lands during times of extraordinary high water or freshet in said creek or stream." The court further found that this diversion would not damage plaintiff's lands in any way nor interfere with his rights in the premises or with rights appurtenant to his lands. This court held that under these findings, which were supported, the plaintiff was not injured, and was not entitled to an injunction restraining the diversion of such storm or flood waters. In Miller v. Bay Cities Water Co., 107 Pac. 115, 27 L. R. A. (N. S.) 772, the principle is clearly recognized and declared that an appropriator of water may divert for use to any point beyond the watershed any portion of the waters of the stream which serves no useful purpose either to the riparian owners, or in supplying the underground stratum, or such waters as are in excess of the quantity necessary for such purpose. In Miller & Lux v. Madera Canal Co., 155 Cal. 61, 99 Pac. 502, 22 L. R. A. (N. S.) 391, this court treated the questions presented under the findings of the trial court. The contention of defendant was that it was diverting or proposed to divert extraordinary flood or storm waters without injury to plaintiff. The findings of the court were that the rise in the river level and the flooding of plaintiff's lands occurred in all ordinary years, and so constituted a part of the regular and annual and usual flow of the river; that these waters were valuable to the lands of plaintiff, because they both irrigated them and deposited upon them valuable sediment. "Upon this showing," says this court, "it cannot be said that a flow of water occurring as these waters are shown to occur constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary." And, further, it is said that our cases "decide that an injunction restraining the diversion of storm or flood waters will not be granted at the instance of a riparian owner, when it appears that he will not be injured in any way by such diversion." If the doctrine announced in Gould v. Eaton, supra, may be thought to confer upon a riparian proprietor greater rights than these, namely, the right to have all the water of the stream at all times flow past his land, without regard to the question as to whether or not any diminution of the flow does or could injure him, then it must be said that the doctrine of Gould v. Eaton is to this extent modified by the later decisions. Of course, the riparian proprietor's rights are not measured by the amount of water which he is actually using at the time of his action. In this sense the actual present damage ceases to be of great consequence, but its place is taken by the necessary and consequential damage which would follow to his land if the unauthorized act of the upper appropriator were allowed to ripen into prescriptive right. Barneich v. Mercy, supra, has no bearing upon this question, the court there deciding merely that a lower riparian proprietor may enjoin an upper riparian proprietor from maintaining a dam upon his land which entirely prevents the flow of the water of the stream to plaintiff's land and ditch. In Byers v. Colonial Irr. Co., 134 Cal. 553, 66 Pac. 732, it is ruled that where the dam of the defendant is not found to be a nuisance in itself, but only a nuisance as used to interfere with plaintiffs' right, the trial court would not be justified in directing its total abatement or removal, but should limit its decree to modifying the use. Here, as has been said, the court finds upon sufficient evidence that the use of the dam actually increases, and certainly does not diminish, the waters of Stevenson creek, to the flow of which into the San Joaquin river plaintiffs are entitled. As riparian owner, which defendant is, it has the right, independent of these other considerations, to impound the waters of the stream for the purpose of floating logs. This is what it is doing, and this fact itself justifies the construction and maintenance of the dam, provided of course it be not so constructed and maintained as to interfere with plaintiffs' rights to the water of the stream. Mentone Irr. Co. v. Redlands, etc., Co., 155 Cal. 323, 100 Pac. 1082, 22 L. R. A. (N. S.) 382. There is no such interference.

The judgments and orders appealed from are therefore affirmed.

We concur: LORIGAN, J.; SHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.

14 Cal. App. 377

SISK v. CASWELL. (Civ. 735.)

(Court of Appeal, Third District, California. Oct. 22, 1910.)

1. Waters and Water Courses (§ 247*)—Irrigation Ditches—Suit to Quiet Title—Complaint—Sufficiency.

A complaint in an action to quiet title to an irrigation ditch, and to enjoin defendant, over whose land the ditch runs, from interfering with the exercise by plaintiff of his right to use the ditch, and for damages suffered by plaintiff from defendant's obstruction of the ditch, *held* sufficient as against a general demurrer.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

2. Waters and Water Courses (§ 247*)—Obstruction of Irrigation Ditch—Complaint—Parties.

Where the complaint, in an action to quiet title to an irrigation ditch, and to enjoin interference therewith, and for damages for a wrongful interference, showed that the object of the suit was to prevent defendant from inflicting on plaintiff, irreparable injury, and to obtain compensation for damages already individually suffered by him from the acts of defendant, allegations of the complaint that plaintiff had conveyed to third persons tracts of land with a distinct agreement that the tracts were entitled to receive the benefits of irrigation by means of the ditch, and that defendant's obstruction of the ditch would subject plaintiff to litigation, did not require that the third persons be made parties, since such allegations merely disclosed the extent of the injury to plaintiff through the conduct of defendant, and plaintiff could obtain equitable relief and compensation for the damages suffered by him.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

3. Waters and Water Courses (§ 247*)—Irrigation Ditches—Reservations.

In a suit to quiet title to an irrigation ditch running on land conveyed by plaintiff to defendant and carrying water for the benefit of other land of plaintiff, evidence *held* to justify a finding that the reservation of the right of plaintiff in the irrigation ditch, was incorporated in the deed pursuant to agreement between the parties and was binding on defendant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

4. Appeal and Error (§ 1011*)—Review—Verdict—Conclusiveness.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

5. Deeds (§ 94*)—Construction—Merger of Previous Contract—Reservations.

That a contract for the sale of real estate called for a conveyance free from all incumbrances, without stipulating for a reservation in favor of the vendor, has but little bearing on the issue whether the vendor was entitled to a reservation, and the deed containing a reservation must be deemed the sole guide for measuring the rights of the parties thereunder, since all prior negotiations are merged in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 266; Dec. Dig. § 94.*]

6. Vendor and Purchaser (§ 134*)—Contracts — Construction—"Incumbrances."

A contract for the sale of real estate, free from all incumbrances, ordinarily refers to incumbrances defined by Civ. Code, § 1114, declaring that the term "incumbrances," includes taxes, assessments, and liens, and a purchaser intending to make the term include an incumbrance affecting only the physical condition of the property, must have the agreement so declare.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 134.*

For other definitions, see Words and Phrases, vol. 4, pp. 3519-3527.]

7. Vendor and Purchaser (§ 135*)—Contracts — Construction—"Incumbrances" —Physical Condition of Property.

Where there is a physical burden on real estate which is visible, the presumption, in the absence of an express agreement, is that the burden is not an incumbrance, within a covenant against incumbrances.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 255-258; Dec. Dig. § 135.*]

8. Vendor and Purchaser (§ 135*)—Contracts — Construction — Incumbrances—Physical Condition of Property.

Where, at the time of the execution of a contract for the sale and purchase of real estate and the payment of a part of the price, a drainage ditch existed on the land, sufficient to run water through it, and it appeared that the value of the land retained by the vendor and his grantees rested largely on the fact that they could be given the benefit of the irrigation by an extension of the ditch on the land, the law would presume, in the absence of an express agreement to the contrary, that the ditch was not an incumbrance, within the contract against incumbrances, and a deed reserving irrigation rights in the ditch merely complied with the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 255-258; Dec. Dig. § 135.*]

9. Deeds (§ 69*)—Contents—Validity—Mistake.

A party may not plead ignorance of the covenants of a deed executed to him after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants, in the absence of any fraud practiced by the grantor preventing the grantee from familiarizing himself with the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 161; Dec. Dig. § 69.*]

10. Deeds (§ 196*) — Validity — Presumptions.

The presumptions are in favor of the validity of a deed and its recitals.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 587; Dec. Dig. § 196.*]

11. Deeds (§ 74*)—Contents—Presumptions.

A grantee in a deed, chargeable with constructive notice of the recitals therein, who remained indifferent as to its precise provisions for about two years after it was filed for record, may not defeat its covenants on the ground that he did not know the provisions thereof, and relied on the contract of sale and on the supposition that the deed corresponded therewith.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 74.*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by William H. Sisk against Thomas Caswell. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Maddux & Maddux, for appellant. P. H. Griffin, for respondent.

HART, J. This controversy arises over an alleged claim of right by plaintiff to the use, for the purpose of irrigation, of water carried through a certain irrigating ditch running through and upon the land of the defendant. The purpose of the suit is to quiet plaintiff's title to and interest in said ditch, to enjoin defendant from interfering with or obstructing the exercise of his right to use the same, and for damages alleged to have been suffered by plaintiff for defendant's wrongful obstruction thereof. The plaintiff obtained judgment as prayed for, and from said judgment and the order denying him a new trial the defendant has appealed.

It appears from the allegations of the complaint that, on the 2d day of April, 1904, the plaintiff was the owner in fee of a tract of land in Stanislaus county, described as the N. E. ¼ of section 18, the S. ½ of said section 18, and, jointly with one W. F. Rose, of the N. E. ¼ of section 19, all said land being in township 4 S., R. 9 E., M. D. B. & M.; that on the 10th day of December, 1904, plaintiff sold and conveyed to defendant said N. E. ¼ of section 18, "reserving, as provided in said conveyance, 'the right to use the ditch now constructed on said premises to run water to other lands of plaintiff in the neighborhood, or to join onto said ditch and to extend the same for the same purpose,' which said right and interest in said land and ditch was, and was so stated in said conveyance, to extend to the heirs and assigns of plaintiff for any lands owned by him or which he had sold in the neighborhood which could be conveniently irrigated therefrom, and plaintiff ever since has been and now is the owner of and entitled to the rights and interest in said land so reserved, except that plaintiff had, on the said 2d day of April, 1904, * * * and on the 29th day of April, 1905, * * * and on the 9th day of May, 1905," sold and conveyed to a number of other parties (named in the complaint), respectively, certain parts, in separate and distinct tracts, of the described land remaining to him after the said sale and conveyance to the defendant. The said water ditch is described as being 10 feet wide on the bottom and 4 feet deep; that the beginning of the center line of said ditch was at a point a fraction over 24 feet west of the northeast corner of said section 18, and, by certain meanderings, ran to a point 455 feet west of the "east boundary of said section." The complaint further declares that "at all times herein mentioned all the lands herein described were within the Turlock irrigation district and entitled to receive therefrom their proportion of the water provided thereby under the laws pertaining thereto for irrigation purposes, and all of said lands were and are in the neighborhood of the land conveyed to defendant as aforesaid and of said water ditch and could be conveniently irrigated therefrom, and said ditch was constructed for the purpose of such irrigation, and but for the acts of defendant herein alleged would have received such water, all of which was well known to defendant."

It is charged that the defendant has wrongfully destroyed "the northerly 522.4 feet of said ditch, to plaintiff's damage in the sum of $75, the cost of reconstruction thereof," and that defendant has prevented plaintiff "from entering upon, and from having and using said ditch and making necessary repairs and improvements thereon, so as to use the same for irrigation of lands which he would have irrigated but for such acts of defendant, to plaintiff's damage in the further sum of $500," and it is further alleged that such damage will continue in a much greater sum each year that plaintiff is so prevented by defendant from having and using said ditch. It is alleged that defendant claims some estate or interest, adverse to plaintiff, "in said ditch and interest in the lands conveyed by plaintiff to defendant as aforesaid, which claim is without right," and that defendant denies plaintiff's right in said ditch, "and has slandered and will, if not restrained, continue to slander plaintiff's title as aforesaid."

Paragraph 8 of the complaint contains the following averments: "That the lands aforesaid are of great value for irrigation, and are of little value without such irrigation; that the acts of defendant, done and threatened as aforesaid, have prevented and will if not restrained continue to prevent the same from being irrigated, and will cause great and irreparable injury, the amount of which cannot be determined; that a portion of the considerations for the various sales and conveyances from plaintiff to the third persons as hereinbefore alleged was the rights and privileges appertaining to the respective tracts by reason of the facts aforesaid, and the said acts of defendant herein complained of have rendered, and will, if not restrained, continue to render plaintiff liable to damage and litigation on account thereof; that plaintiff desires and intends to, and will, if not prevented by the wrongful acts of defendant herein complained of, irrigate his said lands remaining unsold as aforesaid, and will sell portions thereof, but by reason of the said acts of defendant, plaintiff has been prevented, and unless the same are restrained, plaintiff will be prevented, from so irrigating said land or selling any part thereof, which works and will continue to work, if continued, great and irreparable injury to plaintiff, the amount of which cannot be determined."

A general and a special demurrer were interposed to the complaint and overruled by the court.

The special demurrer is based upon the grounds: 1. "That there is a misjoinder of parties plaintiff," the point here involved being that, as the complaint alleges that parts of the land described in said pleading were conveyed by plaintiff to other parties, and as the plaintiff thus "asks relief as to those parties similar to the relief that he asks himself," said other parties should have been made parties plaintiff. 2. That several causes of action have been improperly united, in that "plaintiff has alleged that the damage will arise to all his assignees, and that their cause of action is the same as his and specifies the names of the assignees in his complaint, * * * and also asks that the use to the ditch be quieted as to the rights of the assignees mentioned." 3. That there is a "misjoinder of defendants," in that, if the assignees refused to appear as plaintiffs, they should have been made defendants, "for the reasons stated in" subdivision 1 of the grounds of the special demurrer as they are herein given. 4. That the complaint is ambiguous, unintelligible, and uncertain for the alleged reason that "it cannot be determined whether or not the amount of damages claimed in the complaint is for the individual damage to plaintiff and his land or is the damage to his lands and those of his assignees in the aggregate; that it cannot be ascertained whether it is an action to quiet title or a suit for damages."

The demurrers having been overruled by the court, the defendant filed an answer to the complaint and also a cross-complaint.

The answer specifically denies all the important averments of the complaint, and, as separate defenses, in substance, alleges: That plaintiff agreed, at the time of the execution of the said conveyance to defendant, to construct a canal and deliver water on the land so sold and conveyed to defendant from the water system of the Turlock irrigation district; that, in view of said agreement, defendant "prepared, checked up, and planted 43 acres of said land to alfalfa; that plaintiff failed to deliver any water on said land as agreed, and that on account of said failure "the defendant was unable to plant more than 43 acres, and the land planted failed to make another crop, to the damage of defendant in the sum of $250"; that plaintiff, since the sale of said land to defendant, "has gone upon said land without the consent of the defendant and dug up said land and attempted to construct a canal across said land and otherwise interfere with the possession of the defendant, in all to his damage in the sum of $500."

The sum of the cross-complaint is that defendant bought the land from plaintiff on the 29th day of March, 1904; that on that day defendant delivered to plaintiff his check for $200 as a payment thereon; that, on the 8th day of June, 1904, the plaintiff and the defendant entered into a written contract, by the terms of which the plaintiff agreed to sell to defendant and the defendant agreed to buy, for the sum of $9,925.55, the land affected by this controversy; that the terms of payment as thus agreed upon were as follows: "$200 heretofore paid, $5,804.36 paid this day (including accrued interest), and the balance * * * $4,000, on the delivery of conveyance and title to said property as hereinafter provided," etc.; that on the execution of said contract defendant paid to plaintiff the sum of $5,804.36; that the deed to said property was, as to the terms thereof, to correspond with said contract—that is, that the plaintiff would execute and deliver to defendant a good and sufficient deed, conveying said land "free and clear of all incumbrances made, done, or suffered by said first parties"; that on the 10th day of December, 1904, said first parties executed a deed to defendant, conveying said land; that said deed was drawn by one George Perley, and delivered to the Stanislaus Abstract Company, by which company or its officers it was filed for record with the county recorder; that, without the knowledge and against the consent of defendant, the following reservation was incorporated in said deed, viz.: "Save and except therefrom the east twenty feet of the said north-east quarter of section 18, reserved for road purposes. The parties of the first part also reserve the right to use the ditch now constructed on said premises to run over the lands of the parties of the first part in the neighborhood, or to join onto said ditch and extend the same for the same purpose, such right to use said ditch to extend to the heirs or assigns of the parties hereto of the first part for any lands owned by them or which they or either of them have sold in the neighborhood, which can be conveniently irrigated therefrom." The cross-complaint declares that defendant was not present when said deed was prepared, executed, or delivered; that "said abstract company, nor any one else had any authority from defendant to accept any deed containing either or both of the aforesaid reservations"; that "at the time of the preparing of said deed plaintiff had in his possession a duplicate of the aforesaid agreement of June 8, 1904; that knowingly and fraudulently, and in fraud of the rights of defendant, plaintiff had said deed prepared and signed and acknowledged, and knew at all of said times that said reservations could not be a part of said deed."

The prayer of said cross-complaint is that plaintiff "take nothing by this action," and that the said deed be reformed by striking therefrom the reservations aforesaid, and for the sum of $750 damages, etc. Plaintiff answered the cross-complaint, denying each material allegation thereof and reaffirming the vital averments of the complaint.

1. We see nothing erroneous in the court's order overruling the demurrers. It is not seriously urged that there are not sufficient facts stated in the complaint to entitle plaintiff to the relief asked for, and there can be no doubt that the general demurrer was properly overruled. Nor did the court err in its order overruling the special demurrer.

It may first be suggested that the ground that there is a "misjoinder" of parties plaintiff or parties defendant is, strictly speaking, inaccurate here. Obviously, if the complaint is faulty as to parties, it is because there is a defect or "nonjoinder" of parties, and not a misjoinder. But there would be even then no tenable reason for criticism of the complaint. The object of the suit, as very clearly appears from the averments of the complaint, is to prevent the defendant from inflicting upon plaintiff irreparable injury and to obtain compensation for damages already individually suffered by him from the alleged acts of the defendant. The averments with respect to the sale by plaintiff to the other parties named in the complaint of certain parts of his lands, and that the parts so conveyed were, in common with his own, entitled to the privilege of using the ditch for the purposes of irrigation, were, manifestly, inserted for no other purpose than to disclose the extent of the injury which would be suffered by plaintiff through the conduct of defendant in preventing the plaintiff and his grantees from using said ditch—that is, that the injury so inflicted would be irreparable. The complaint, as we have seen, declares that plaintiff had conveyed to said other parties certain tracts of land with a distinct agreement upon his part with said parties that the tracts thus conveyed were entitled to and would receive the benefit of irrigation by means of said ditch, and that defendant's obstruction of plaintiff's right to use the water carried by said ditch for the lands so conveyed will, by reason of said agreement, subject the latter to litigation and consequent expense and damage, in addition to the injury which he will sustain by being deprived, through the said acts of the defendant, of the privilege of thus irrigating his own land. There is, in other words, absolutely nothing in the averments which calls for any relief for the grantees of plaintiff. They are, therefore, neither necessary nor even proper parties.

The foregoing also disposes of the claim made under the third and fifth grounds of the special demurrer. It is very clear from the complaint that the plaintiff seeks damages for alleged injuries individually sustained by him, and does not claim the right to or ask for damages which the lands of his grantees have sustained through the alleged conduct of the defendant. The reference in the complaint to damage to the lands of his said grantees is, as before stated, for the sole purpose of showing, as an element of damages which he has himself sustained by reason of his promise to said grantees, at the time he executed the conveyances to them, that they should and would be entitled to the use of said ditch, to what extent, and in what way or manner he has sustained damage.

2. All the findings of the court—some in a general way and others specifically—are assailed as being without sufficient support. Some of these assignments we shall specially notice. But it may be said generally that all the averments of the complaint essential to a statement of a cause of action are sustained by the proofs. The charge that the defendant prevented and threatens to continue to prevent the plaintiff and his grantees from using said ditch is amply supported. The plaintiff testified that when he went upon defendant's land for the purpose of extending the ditch so that he and his grantees could use the same, the defendant ordered him away and refused to allow him to proceed; that defendant covered up the ditch and in other ways obstructed plaintiff's use of the canal.

But the most important contention is that the evidence does not justify and support the finding that the plaintiff had the right or was authorized, under his agreement with defendant, to insert in the deed executed by him to said defendant the clause providing for the reservation referred to. The decision of this controversy, in our opinion, could well rest alone on the determination of this question, as it in reality, aside from the question of the alleged injury and threatened injury, involves the vital point in the case. But it will not be improper to consider other questions which are discussed in the brief.

The decree of the court limits its operation to the ditch, making no reference to the reservation so far as it relates to the roadway. The respondent does not complain of the judgment in any respect, and, therefore, that feature of the reservation pertaining to the road is not before us.

The second part of the reservation reserves, as before noted, to the plaintiff and to "his heirs and assigns" the right to use the ditch for the purpose of running water over their lands, and to extend said ditch for such purpose.

The undisputed evidence shows that, on the 29th day of March, 1904, the defendant entered into negotiations with the plaintiff, as the owner of the N. E. ¼ of section 18, Tp. 4 S., R. 9 E., and plaintiff and said William F. Rose, as the owners of the E. ½ of the N. E. ¼ of said section 18, for the purchase of the lands so described; that on said day the defendant gave to plaintiff his check for the sum of $200, on the back of which was the following indorsement: "This check is to apply on payment of N. E. ¼ and E. ½ of N. W. ¼ of section 18, township 4 S., range 9 Mt. Diablo base and meridian. $42.50 for first description and $40 on last named above, when abstract is examined, and charge interest on full amount of purchase money not before 30 days after this date. W. H. Sisk." On the 8th day of June, 1904, said W. F. Rose and plaintiff, as owners of said lands, and the defendant, entered into and executed the written agreement, already referred to, for the sale by the first parties and the purchase by the defendant of said lands.

There is, in connection with this point, considerable discussion in the briefs of the proposition whether the transaction of March 24, 1904, in which the check mentioned was given by defendant to plaintiff, amounted to an agreement of sale or merely an option, tendered to defendant, to purchase the lands. The court found, in harmony with the theory of plaintiff on the proposition, that the transaction involved an option and not an agreement to sell and buy. We cannot see what material difference it would make, so far as it would affect the right of plaintiff to insert the reservation in the deed, whether the transaction amounted to a contract of sale or only an option. But counsel for appellant declares that if the sale was effected on "December 10th the plaintiff should recover," but that if it took place on "March 29th or June 8th, the defendant should recover." We are unable to perceive in the circumstance, on whatsoever date it might have occurred, any such importance or any particular probative significance. Indeed, if the circumstance ever possessed any weight in its bearing upon the principal question in this case, viz.: Whether the reservation was included in the deed fraudulently and in violation of the agreement of sale between the parties, its importance in that regard, like that of any other circumstance which was offered at the trial in support of the main issue, has been lost, so far as this court is concerned, in the fact that there is disclosed by the record before us ample evidence to support the finding, which in effect declares that the reservation was incorporated in the deed upon an agreement between the parties to the instrument and with the consent of the defendant. Indeed, if all of plaintiff's testimony was credited by the trial court, it justified a direct and unqualified finding that the reservation was inserted in the deed upon an express agreement of the parties.

The plaintiff testified that, on the occasion of the delivery of the check to him by defendant, a conversation occurred between them concerning the conditions of the sale and the covenants of the deed, wherein defendant "consented to have the reservation for the ditch and the road—the ditch that was then constructed on the land." "The deed," continued plaintiff, "was prepared in accordance with the understanding at that time. There was nothing in the deed, as far as I understood it, different from what was understood before the deed was drawn." Mr. W. F. Rose, to some extent, corroborated the testimony of plaintiff on this point.

The defendant, it is true, denied that there was any understanding that the reservation should be inserted in the deed, and declared that he knew nothing of said reservation until long after the deed had been recorded and shortly before the institution of this action. But the testimony introduced by defendant on this point only presents a substantial conflict in the evidence, and, of course, this court cannot settle the issue of veracity between the parties.

It is contended, however, that the deed, with respect to the reservation, is obviously at variance with the terms of the written agreement of sale, in that said agreement not only made no provision for said reservation, but that therein, as before noted, the plaintiff agreed to execute and deliver to the defendant, upon the payment of the consideration, "a good and sufficient deed, conveying said land, *free and clear from all incumbrances, made, done or suffered by the said first parties*." There is absolutely nothing in this point, and we are of opinion that it presents a question which can have little bearing on the determination here of the principal point in this case. All the prior negotiations and agreements of the parties relative to the sale and purchase of the lands involved here were, of course, merged in the deed of conveyance, and the deed itself must, as we shall presently see, be the sole guide for measuring and determining the rights of the parties thereunder. But the point is given considerable attention by counsel, and we shall therefore examine it to some extent. The argument is that, by the language of the agreement which we have italicized, the plaintiff agreed to convey the land to defendant free from all burdens of whatsoever kind or character, whether they be such as would affect the title or those which would affect only the physical condition of the property, as, for illustration, public roads or rights of way. We think that it is reasonably certain that the "incumbrances" referred to and contemplated by the agreement are of that class only that are defined by section 1114 of the Civil Code, viz.: "Taxes, assessments, and liens." See section 1180, Code Civ. Proc., and section 2872, Civ. Code, for definition of a "lien." If the vendee intended to include all incumbrances of the two general kinds, he should have taken the pains to have explicitly so declared in the agreement, and no doubt would have done so had that been his intention.

In Memmert v. McKeen, 112 Pa. 320, 4 Atl. 544, it is said: "Incumbrances are of two kinds, viz.: 1. Such as affect the title. 2. Those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or right of way, of the latter. Where incumbrances of the former class exist, the covenant referred to, under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. Cathcart v. Bowman, 5 Pa. 317; Funk v. Voneida, 11 Serg. & R. [Pa.] 109 [14 Am. Dec. 617]. Such incumbrances are usually of a temporary character and capable of removal; the very object of the covenant is to protect the vendee against them; hence, knowledge, actual or constructive, of their existence, is no answer to an action for breach of such covenant. Where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not title, but the physical condition of the property, a different rule prevails. Thus it was held in Patterson v. Arthurs, 9 Watts [Pa.] 152, that where the owner had covenanted to convey certain lots free from all incumbrances, a public road, which occupied a portion of such lots, was not an incumbrance within the meaning of the covenant." See Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Haldane v. Sweet, 55 Mich. 199, 200, 20 N. W. 902; Harwood v. Benton & Jones, 32 Vt. 724; Scribner v. Holmes, 16 Ind. 142; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Smith v. Hughes, 50 Wis. 620, 7 N. W. 653.

Speaking of that class of incumbrances that affect only the physical condition of the property, Brewster, in his work on Conveyancing, § 203, says: "In cases where there is a physical burden of this sort, which is visible, there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to this plain, existing burden, and that the vendor on the one hand demands, and the vendee on the other pays, only the fair value of the land as visibly incumbered. Therefore, it is said such burdens, by way of open and notorious easements, are not really incumbrances within the meaning of this covenant, because the real subject-matter of the dealings between the grantor and the grantee is the land, subject to visible easements."

There is evidence in the record to the effect that, at the time of the check transaction, the ditch on the lands conveyed to defendant, while not fully completed, was "entirely V'd out"; that the defendant, at the time the deed was written and delivered to the abstract company for him, had seen said ditch. Plaintiff testified: "It was a ditch. I think it would have run water through it if run into the upper end." It further appears that the value of the lands owned by plaintiff and his grantees rested largely upon the fact that they could be given the benefit of irrigation by an extension of said ditch to said lands. Under all the authorities, the presumption is, therefore, there being no express agreement to the contrary, that the parties acted in this transaction, in so far, at least, as the ditch is concerned, "with reference to this plain, existing burden," and as so incumbered the land was purchased by defendant. The evidence not only utterly fails to overcome this presumption, but in fact confirms and strengthens it by proof abundantly sufficient to support the findings of the court in favor of said reservation, or, in other words, that the agreement of June 8, 1904, "was not, and was not intended by the parties, to be the full agreement of the parties, * * * and the reservation and agreement therein [the deed] were not contrary to any agreement of the parties and was not in fraud of any right of the defendant," etc., and that plaintiff "had the right to include the reservation contained in the deed referred to in the pleadings herein in said deed," etc.

The foregoing observations virtually dispose of appellant's criticism of finding 10. The court therein found that the defendant "at all times had the means of knowledge of the contents of said deed, though he did not have the actual, personal knowledge thereof, till after its receipt and acceptance by him." The court elsewhere found that the reservation was included in said deed "with the implied knowledge and consent of defendant, but without his actual personal knowledge and consent," etc.

But it seems to us that there is another and conclusive answer to the defense interposed here, and that is, that a party will not be permitted to plead ignorance of the covenants of a deed executed to him, after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants. The presumptions are always in favor of the validity of a deed and its recitals. It is not, of course, claimed that the plaintiff fraudulently or otherwise prevented the defendant from giving the deed personal inspection and thus fully familiarizing himself with its precise provisions and covenants before he accepted and recorded it. The deed, as has been seen, was delivered for the defendant to the Stanislaus Abstract Company, and was recorded by a Mr. Perley, president of said company, for the defendant. The defendant testified that he did not read the deed after it was written or before or after its recordation until a short time before the commencement of this action, and that he knew nothing, from a personal inspection of the instrument, of its contents; the claim being that he had supposed and had reason and right to rely upon the supposition that the contents of the deed corresponded with his interpretation of the terms of the written agreement as to incumbrances. He further denied that the abstract company or any other person had any right to cause to be recorded a deed containing the reservation objected to; but Perley testified that he recorded the deed for defendant, "and he paid me for it." This witness further testified: "While I don't know that Mr. Caswell knew the contents of the deed, he was present and had an opportunity."

It is, as declared, not only true that "the presumption is in favor of the validity of every grant issued in the forms prescribed by law, and that it is incumbent on him who controverts, to support his objections" (Patterson v. Jenks et al., 2 Pet. 216, 7 L. Ed. 402; Payne & Develey v. Treadwell, 16 Cal. 228; Latham v. City of Los Angeles, 87 Cal. 518, 25 Pac. 673), but "every person is presumed to read the deed under which he holds, and a failure to read certain recitals contained in the deed cannot avail him as a defense when it is sought to charge him with notice." Devlin on Deeds, § 1002; Weisenberg v. Truman, 58 Cal. 63; Steez v. Kranz, 32 Minn. 313, 20 N. W. 241; Dargin v. Beeker, 10 Iowa, 571; Hamilton v. Nutt, 34 Conn. 501.

It is said in the last of the cited cases: "Men of ordinary prudence will use all reasonable means to ascertain the state and condition of their own titles. Hence, we may lay it down as a rule, founded upon the experience of mankind, that one who has knowledge of the existence of a deed, to which he has access, and which affects the title to property in which he is interested, will, in equity, be presumed to have knowledge of the contents of the deed. * * * Under our recording system a deed duly recorded is constructive notice to all the world; and the law conclusively presumes that every person interested has knowledge not only of the deed, but of its precise language, where that is material. * * * If a man will, under certain circumstances, be presumed to have knowledge of the contents of the deed of another, how much more reasonable is it to presume that he has knowledge of the contents of his own deed." And it is said in Wailes v. Cooper, 24 Miss. 228, that "it is in consonance with reason, that if the title deeds under which a purchaser derives title recite an incumbrance, he will be bound by that recital, and presumed to have had notice of it, whether he has read it or not. For the law will not permit him to deny notice by insisting that he has not read the deed."

From the moment of the filing of the deed here for recordation, the defendant was charged with constructive notice of all its recitals, but, according to his own testimony, he remained supine and apparently indifferent as to its precise provisions from the time it was filed with the recorder—December 24, 1904—until about "a month or two" before the trial of this action, which was in January, 1906. It is therefore very clear that his want of personal knowledge of the precise contents of the deed, prior to its execution, delivery, acceptance, and recordation, if, in truth, he was without such knowledge, was entirely due to his own inexcusable negligence in not fully posting himself, beforehand, on the terms of an instrument to which he was about to bind himself. His excuse that he relied upon plaintiff's written agreement with him and supposed that the deed would correspond therewith is no excuse at all. He had no right, as we have shown, to rely for personal knowledge of the recitals of his deed upon his own interpretation of the scope of said agreement. If such an excuse were available as a defense against the recitals of a deed, many such instruments would rest on exceedingly frail and insecure grounds and court calendars, as a consequence, would soon be congested with all manner of controversies arising out of the unmitigated ignorance of vendors and vendees as to exactly what covenants they intended should be included in the most solemn legal writings to which men may bind themselves—writings which the law, to avoid, as far as possible, future controversies in relation thereto, require and prescribe shall be executed under circumstances of the strictest circumspection, and the evidence thereof preserved in the most public and enduring form.

Other parts of the findings are challenged as not having sufficient support from the proofs, but to these assignments we have already, in effect, replied adversely to the contention of appellant. We have shown that the evidence sufficiently discloses that a ditch, constructed for irrigation purposes, was partly completed on the lands conveyed by plaintiff to defendant at the time of the conveyance. There is also enough support for the finding that "the lands mentioned in said complaint as conveyed to other parties could and can be conveniently irrigated from said ditch," and that "said lands and the land of plaintiff described in said complaint would have received water for such irrigation but for the acts of the defendant."

3. Some of the court's rulings on the evidence are objected to as erroneous and prejudicial. We have discovered no error in any of the challenged rulings, and see no reason for giving these assignments special consideration.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 376

In re JOHNSTON'S ESTATE. (Civ. 769.)

(Court of Appeal, Third District, California. Oct. 22, 1910.)

APPEAL AND ERROR (§§ 786, 787*)—DISMISSAL—LACHES.

Where appellant was guilty of unwarranted laches in prosecuting an appeal and it appears that the appeal was taken for delay and has been abandoned, it will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3128, 3129; Dec. Dig. §§ 786, 787.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the Estate of William Johnston, deceased. From a decree of distribution, Josephine A. C. Johnston appeals. Appeal dismissed.

C. M. Beckwith, for appellant Josephine A. C. Johnston. White, Miller & McLaughlin, for respondent for estate.

BURNETT, J. A decree of distribution in the above-entitled estate was rendered in the superior court of Sacramento county on the 4th day of August, 1908. A notice of appeal therefrom was given October 3, 1908. A proposed bill of exceptions was filed September 14, 1908, and amendments thereto proposed by respondent, the administrator of said estate, and served upon appellant on the 13th day of October, 1908. No other step has been taken and no other proceeding had in the prosecution of said appeal. Appellant has manifestly been guilty of unwarranted laches and delay in the premises, and the conclusion is justified that the appeal was taken for delay, and that it has since been abandoned.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The motion to dismiss, based upon the foregoing and other grounds, is not contested. There was, indeed, no appearance by appellant at the hearing.

The appeal is dismissed.

We concur: CHIPMAN, P. J., HART, J.

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14 Cal. App. 349

RIDEOUT v. NATIONAL HOMESTEAD ASS'N. (Civ. 802.)

(Court of Appeal, Second District, California. Oct. 18, 1910.)

1. EVIDENCE (§ 80*)—PRESUMPTIONS—FOREIGN LAWS.

In the absence of proof to the contrary, it will be presumed that the laws of Arizona are similar to those of this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

2. CORPORATIONS (§ 281*)—OFFICERS—SELECTION.

The organizers of a corporation cannot select its officers; such being the duty of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1187; Dec. Dig. § 281.*]

3. CORPORATIONS (§ 448*)—RATIFICATION OF CONTRACT MADE BY ORGANIZERS—PRESUMPTION.

Since a person suing on an unauthorized contract must show actual ratification, or some affirmative act from which it may be inferred, ratification by a corporation of a contract made by its organizers will not be presumed, even where it has received benefits therefrom, unless it is shown that it had actual knowledge of the specific contract out of which the benefits arose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789–1792; Dec. Dig. § 448.*]

4. CORPORATIONS (§ 448*) — UNAUTHORIZED CONTRACT—ESTOPPEL.

A corporation will not be estopped to disaffirm an unauthorized contract of its organizers by receiving the benefits thereof, unless it had knowledge of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789–1792; Dec. Dig. § 448.*]

5. CORPORATIONS (§ 407*)—PRESIDENT—POWER TO CONTRACT.

Where the minutes of the board of directors of a corporation authorized its president "to make any contract he saw fit, to employ whom he pleased," while such general authority could extend only to matters relating to the ordinary conduct of the corporate business, yet he could authorize a person to sell corporate stock for which he should receive commissions, as the board could properly delegate such power to the president.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 407.*]

6. BROKERS (§ 43*)—CONTRACT AUTHORIZING SALE OF CORPORATE STOCK—NECESSITY OF WRITING.

A contract authorizing the sale of corporate stock, certain land to be given to purchasers as a bonus, is not within Civ. Code, § 1624, subd. 6, providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission, shall be invalid, unless made in writing, etc.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by E. G. Rideout against the National Homestead Association. Judgment for plaintiff, and defendant appeals. Affirmed upon condition that the plaintiff, within 30 days, file his written consent with the clerk of this court that a certain amount be deducted from the judgment; otherwise the judgment shall be reversed.

Edw. L. Payne, for appellant. L. R. Wharton and Louis W. Myers, for respondent.

ALLEN, P. J. Plaintiff sought to recover upon an alleged contract with defendant corporation through which he claimed $389.50 on account of money paid out for the use and benefit of the corporation, and $1,900, less a payment of $525, on account of services rendered. The court found in favor of plaintiff for each of the amounts claimed; the judgment aggregating $1,764.50. From the judgment and an order denying a new trial, defendant appeals upon a statement settled and allowed.

The record discloses that the defendant corporation was organized under the laws of Arizona April 10, 1908; that the first meeting of the board of directors was held April 30, 1908; that prior to the organization of the corporation the promoters thereof authorized plaintiff to incur an indebtedness of $369.50; that after the filing of the articles of association, but before the first meeting of the board of directors, plaintiff personally paid the indebtedness so authorized by the promoters. There is nothing in the record tending to show any affirmative act by the board in connection with this indebtedness or its payment, nor any resolution or minutes in the meetings of the board from which ratification can be claimed. Nor is there anything in the record indicating that the corporation had any agents or any one authorized to transact business in its name, other than the board of directors, before the 30th of April. The evidence in the record to the effect that the articles of incorporation named the officers may be disregarded. In the absence of proof to the contrary, it will be presumed that the laws of Arizona are similar to our own, and in this state the selection of the corporate officers is not a matter within the power of the organizers, but is a duty devolving upon the board of directors.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Respondent's contention is that the services being for the benefit of the corporation, and the corporation having accepted such benefits, it is either estopped to deny the authorization, or that the acceptance of such benefits amounted to a ratification. It is incumbent upon a party claiming a resulting benefit to show actual ratification, or some affirmative act from which it may be inferred. Ratification will not be presumed, even when the corporation has received benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear (Pacific Bank v. Stone, 121 Cal. 202, 53 Pac. 634), and the same knowledge is essential in considering the question of estoppel. Gribble v. Columbus Brewing Co., 100 Cal. 71, 34 Pac. 527. The most that can be claimed in support of ratification or estoppel, from this record, is that two members of the board of directors had knowledge of the contract and the services, but nothing appears showing such knowledge upon the part of the other member of the board. In addition to this, the two members having notice were interested parties to the contract. We are of opinion, therefore, that neither ratification nor matter amounting to an estoppel as against the corporation appears in the record. The corporation, then, not having authorized the $389.50 payment, nor having ratified the contract or payment, it must follow that there is no evidence in the record to support the finding of the court that this money was laid out and expended by plaintiff at the instance and request of the corporation, but, on the contrary, it affirmatively appears that the same was a debt of the promoters for which the corporation is not liable.

There is evidence in the record ample and sufficient in support of the findings of the court with reference to the indebtedness arising on account of the services rendered after June, 1908. The contract with reference to these services was made by the president, and it is shown that the minutes of the board authorized the president "to make any contract he saw fit, to employ whom he pleased." While such general authority could only extend to matters relating to the usual and ordinary conduct of the corporate business, yet the contract under consideration here was a contract the authority to make which could properly be delegated by the board to the president.

It is insisted by appellant that the contract with plaintiff, which was one for the payment of a weekly salary and commissions on sale of corporate stock, was invalid under the provisions of subdivision 6 of section 1624, Civ. Code. This subdivision only relates to agreements authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission. The mere fact of plaintiff being authorized to sell corporate stock under an agreement with the purchasers that certain land should be conveyed in the nature of a bonus to such purchasers does not bring the contract within the purview of the subdivision last cited. Plaintiff's employment was not to sell land, nor was he to receive any commissions or brokerage on account thereof; on the contrary he was to receive a commission on account of the sale of corporate stock as an incident to his general employment upon a salary as an agent of the corporation. We think this contract was such as might rest in parol, and that the judgment for the amount unpaid, with reference to the service under such contract, was warranted.

In our opinion, the entire judgment as rendered exceeded the amount which should properly have been awarded to plaintiff to the extent of $389.50, and it is ordered that if the plaintiff, within 30 days from the filing hereof, shall file with the clerk of this court his written consent that the judgment of the superior court be modified by deducting the sum of $389.50 therefrom, leaving the judgment to stand for $1,375, together with interest thereon from August 4, 1909. and costs as therein provided, said judgment shall be modified accordingly and the judgment and order denying a new trial affirmed. Otherwise, and in case plaintiff fails to file such consent in writing, the judgment shall be reversed. In any event, it is ordered that the appellant recover its costs on this appeal.

We concur: SHAW, J; JAMES, J.

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14 Cal. App. 353

McPHERSON v. ALTA IRR. DIST. et al.

(Civ. 729.)

(Court of Appeal, Third District, California. Oct. 18, 1910.)

1. JUDGMENT (§ 618*) — RES JUDICATA — DEFENSES BARRED.

The defendant, an incorporated irrigation district, had been ordered in a former judgment to place a waste or weir of prescribed dimensions at the intersections of its ditch with a stream for the purpose of preventing an overflow, and had been enjoined from placing boards in the wasteway and from preventing their removal if so placed. The defendant failed to comply with the order of court, and plaintiff, who was a successor in interest of the previous plaintiff, brought action to recover for damages to his land and trees, caused by an overflow of the ditch. *Held*, that the previous judgment was res judicata as between parties in the later action as to the objection that the enforcement of the injunction would impair or destroy the usefulness of the canal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1131; Dec. Dig. § 618.*]

2. WATERS AND WATER COURSES (§ 247*)—IRRIGATION DISTRICTS — CONSTRUCTION AND MAINTENANCE OF WORKS — INJURIES — EVIDENCE.

In an action against an incorporated irrigation district for injuries resulting from the construction and maintenance of its works, evidence *held* sufficient to sustain findings that defendants had violated a previous injunction against obstructing a waste weir, and claimed the right to do so, and would continue so to do unless restrained.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

3. APPEAL AND ERROR (§ 169*)—ISSUE NOT RAISED—REVIEW.

An issue raised for the first time in the appellate court will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. § 169.*]

Appeal from Superior Court, Tulare County; P. W. Bennett, Judge.

Action by J. W. McPherson against the Alta Irrigation District and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

Bradley & Farnsworth and Power & McFadzean, for appellants. Lamberson & Lamberson, for respondent.

BURNETT, J. The defendant Alta irrigation district is a public corporation, organized under what is commonly known as the "Wright Act,"† and the other defendants were directors of said corporation during the time when the acts complained of were committed. As stated by respondent, the plaintiff is the successor in title and estate to the Visalia Savings Bank. By the latter an action was begun in 1897 in the superior court of Tulare county against the said district, in which a judgment was obtained by plaintiff, providing, among other things, that the defendant "forthwith place on the upper side of its said ditch at the intersection of said ditch with the principal channel of said creek (Sand creek) a suitable wasteway or weir for the reception of said waters of said stream which may flow down the same at times of high water, and that said wasteway be at least 100 feet in width, and that said defendant forthwith place on the lower side of its said ditch at said point a wasteway for the purpose of permitting the waters of said stream to escape from said ditch into the channel of said stream below said ditch and that said wasteway be at least 100 feet in width." It appears that the Alta irrigation district did not comply with the order of the court to the extent of placing a wasteway of sufficient width to enable the waters of the ditch to cross the canal. One was constructed of the width of 40 feet on the upper side and but 20 feet on the lower side of said canal. This was insufficient to carry the water at times, and, besides, the flow was obstructed by boards placed in the lower opening. The result was that water and sand filled up the creek channel and the water overflowed the lands of plaintiff and killed a large number of his trees, to his damage in the sum of $600, as found by the court. Plaintiff was also awarded an injunction restraining the defendants from putting or maintaining any boards in said wasteway "in the south bank of the ditch or canal of the defendant Alta irrigation district where the said ditch or canal intersects and crosses the channel of Sand creek near the south boundary line of the land of plaintiff and from keeping or maintaining the same therein, and from preventing the plaintiff, his agents and employés, from removing said boards from said wasteway should said boards at any time be placed therein, at all times when the waters flowing down the channel of said creek flow as far as to the said ditch or canal of said defendant the Alta irrigation district at the point of location of said wasteway."

There is evidence that the overflow of plaintiff's land and the damage to his trees was caused by the acts of defendants hereinbefore specified. We have therefore clearly a case of the violation of a valid order of the said superior court and also of a failure to comply with a statutory duty imposed by section 38 of said Wright act, providing that "the board of directors shall have power to construct the said works across any stream of water, water course, street, avenue * * * which the route of said canal or canals may intersect or cross, in such manner as to afford security for life and property; but said board shall restore the same when so crossed or intersected to its former state as nearly as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness." The injury to plaintiff being the direct result of the breach of an obligation on the part of defendants and the evidence showing that the award was not excessive, the judgment is manifestly just and should be upheld, unless a reversal is demanded by some prejudicial error appearing in the record. Nothing of the kind is pointed out, and we cannot be expected, of course, to make an independent investigation to discover some ground not designated by counsel for interference with the action of the court below.

Appellants complain that the enforcement of the injunction will impair or destroy the usefulness of the canal, but that question was determined by the former adjudication, and said judgment is conclusive between the parties here. Besides, no reference is made to any part of the transcript disclosing any evidence to support the contention.

The nearest approach to any definite assignment of error in the brief of appellants is the specification that finding 1, to the effect that the board of directors of the district maintained boards in the wasteway by force of arms from February 17 to May 20, 1907, and that they refused to permit these boards to be removed, and finding 3, that they believed that they had a right to keep the boards in the wasteway at all times, that they would continue to do so, and would continue to prevent the plaintiff from taking them out at all times when there was water in the channel of said creek, unless restrained by injunction, are unsupported by the evidence. Reference is made to the testimony of plaintiff that Mr. Toler, the ditch tender, took the boards out on each occasion when the waters of Sand creek rose to a great height, that he was there to take them out when the waters got so high in Sand creek that the Alta canal would not carry it, and that it was plaintiff's understanding that Mr. Toler was acting under instructions from the managers of the Alta in doing what he did. It is manifest, however, that some of these particular findings may be disregarded, as it is clear that defendants were maintaining said boards in said wasteway, and that they intended to maintain them in the future, and that plaintiff's rights were thereby invaded and his property injured. These latter considerations found by the court are sufficient to support the judgment. But the findings assailed are entirely justified by certain facts detailed by the witnesses as follows: The plaintiff removed the boards on several different occasions and they were put back by the defendants, and guards were stationed there day and night, relieving each other, from April 18th to March 20th. On April 19th plaintiff attempted to take the boards out, but was prevented from doing so by the said Toler. The attitude of the board is further shown by the testimony of one of the defendants, H. R. McGee, that "nobody was ever injured by keeping the boards in the wasteway either. I know Mr. McPherson complained about that. He complained that injury was done by keeping those in the wasteway, but I know it was not a fact. We could very easily have obviated that difficulty and put him in the wrong by opening the wasteway. I didn't do it because I didn't want to. I don't understand that is the law." There is evidence also that Mr. McGee said he would keep the waters of Sand creek in the ditch if one-half the men in Orosi lay in jail while the other half kept it there. The whole conduct of defendants, indeed, shows that they claimed the right to remove and replace the boards at their own volition and in accordance with their own judgment as to the necessities of the case. The findings of the court, however, amply supported by the evidence, were opposed to this view.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†St. 1887, p. 29; St. 1891, p. 244.

The suggestion of appellants that as the ditch had been permitted to remain across the channel of Sand creek for a great number of years, plaintiff must be deemed to have acquiesced in the existing condition of things, is satisfactorily answered by respondent as follows: "This contention cannot prevail for the reason that there is no evidence upon this subject as to whether or not the ditch had been permitted peacefully to remain in its condition as shown by the evidence at the time the injuries were committed or otherwise. It is shown by the record that an action had been commenced some years ago by the Visalia Savings Bank to compel the district to place a wasteway through the canal for the purpose of permitting the waters of Sand creek to flow through the same, but there was no evidence by either side as to whether the keeping of the ditch and its banks across said channel had been permitted in a peaceful manner for any length of time whatever. Evidence of interruption by cutting the banks of the ditch for the purpose of allowing the waters of Sand creek to flow through the same could not have been introduced by the plaintiff in this case in chief, nor could it have been introduced in rebuttal, because the defendants offered no evidence upon that subject, and there was neither plea in the answer, nor evidence tending to show the quiet or peaceable possession by the defendants of the canal in the condition in which it was found by the evidence in this case." If defendants had desired to rely upon such consideration, they should, of course, have put it in issue.

There is apparently no reason why we should disturb the conclusion of the trial court, and the judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

14 Cal. App. 363

MACLAY CO. v. MEADS et al. (Civ. 720.)

(Court of Appeal, Third District, California. Oct. 20, 1910. Rehearing Denied Nov. 19, 1910.)

1. APPEARANCE (§§ 9, 24*)—OBJECTIONS TO COMPLANT—OBJECTIONS TO JURISDICTION—WAIVER.

Where defendants objected to a default judgment because it was unsupported by the complaint, they thereby appeared generally and waived any objection to the service.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 52, 118–143; Dec. Dig. §§ 9, 24.*]

2. JUDGMENT (§ 158*)—DEFAULT—APPLICATION TO VACATE—AFFIDAVIT OF MERITS.

Where defendants applied to vacate a default judgment and filed a demurrer to the complaint, it was not necessary that an affidavit of merits be filed; the motion not being based on Code Civ. Proc. § 473, permitting amendments, and authorizing the court to relieve defendants not personally served from certain judgments, etc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. PARTNERSHIP (§ 213*) — ACTION AGAINST FIRM—COMPLAINT.

The caption of a complaint described the defendants by name, with the addition, "individually and as copartners under the firm name and style of Petaluma Transportation Company," etc. The complaint did not allege that the transportation company was a partnership, except as stated in the caption, and by implication from a paragraph which charged that defendants were using the rented premises for wharfage purposes, either as agents of certain of the defendants named or some of them or others unknown to plaintiff constituting the Petaluma Transportation Company or as members of said partnership under the firm name and style of Petaluma Transportation Company. Other parts of the complaint alleged that defendants named were acting under the name of Petaluma Transportation Company, but whether such company was a partnership, association, or corporation did not appear. *Held*, that the reference to defendants as members of such transportation company was mere descriptio personæ, and hence the complaint stated no cause of action against the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 408, 409; Dec. Dig. § 213.*]

4. PARTNERSHIP (§ 219*)—JUDGMENT—PROCESS —SERVICE.

Where an action was brought against the members of a firm in their individual capacity only, service of summons on one member or on all does not constitute service on the firm, and, in order to bind all the members by any judgment obtained, service must have been made on all.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

5. PARTNERSHIP (§ 219*)—ACTION—SERVICE—JUDGMENT.

Where an action is against a firm, service on one or more of the members is sufficient to bind the firm, and the judgment obtained therein is binding not only on the joint property of all the associates, but also on the individual property of the party or parties served with process, as provided by Code Civ. Proc. § 388.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 429-445; Dec. Dig. § 219.*]

6. JUDGMENT (§ 18*) — APPLICABILITY TO PLEADINGS.

A judgment in favor of plaintiff is unsustainable, where it has no primary support in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37; Dec. Dig. § 18.*]

7. JUDGMENT (§ 147*) — VACATION—PERFORMANCE.

Where a judgment by default in an unlawful detainer proceeding providing for surrender of the premises and payment of treble the amount of rent found due against a firm and the partners individually was unsustained by the complaint in so far as it constituted a judgment against the firm, the fact that it had been performed in so far as it required a surrender of the premises did not constitute such a total extinguishment and performance thereof as would prevent the firm from maintaining a motion to have it set aside as to it.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 147.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by the Maclay Company against N. L. Meads and others, individuals and as copartners under the name of the Petaluma Transportation Company, and others. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

Lippitt & Lippitt, for appellant. W. H. Early, for respondents.

HART, J. This is an appeal from an order setting aside the judgment and default entered in favor of the plaintiff.

The action is for unlawful detainer, and was instituted on the 23d day of November, 1909, for the purpose of securing restitution of certain premises, situated in the city of Petaluma, Sonoma county, which were, by an instrument in writing, leased by the plaintiff to N. L. Meads, one of the defendants herein, for the term of one year, from the 1st day of July, 1908, at the monthly rental of $75, payable in advance on the 1st day of each and every month during said term, and for judgment for treble the amount of rent found by the court to be due. Section 1174, Code Civ. Proc.

The complaint alleges that said Meads "assigned said written agreement and lease to the Petaluma Transportation Company"; that "said defendants N. L. Meads, Chas. P. Doe, G. L. Ray, and H. G. Cox, or some of said defendants, or others to this plaintiff unknown, constituted, and, at the time of said assignment of said lease constituted, the Petaluma Transportation Company," and that said defendants, or some of them, or others unknown to the plaintiff, "acting and assuming to act under the name and style of Petaluma Transportation Company, continue to hold possession of said premises as tenants of this plaintiff." It is further alleged that, although the right of said defendants to the possession of the premises expired under the terms of said lease on the 30th day of June, 1909, they "have continued and are now in the possession of said premises, as tenants of this plaintiff." The complaint further declares that "on the 27th day of September, 1909, and more than 30 days before the expiration of the month of October, 1909, the plaintiff gave notice in writing to the defendants, changing the terms of said tenancy, to take effect at the expiration of the month of October, 1909, increasing the rental of said premises to the sum of three hundred dollars for the month of November, 1909, payable on the 1st day of November, 1909." The defendants, so the complaint further avers, failed and refused to pay to the plaintiff the said sum of $300 on the 1st day of November, 1909, then due for rent of said premises, "pursuant to the lease from month to month between the plaintiff and defendants, as hereinbefore alleged, and pursuant to the said notice in writing changing the terms thereof," and that, by reason of the said default in the payment of said rent, there is due plaintiff from defendants the sum of $300, etc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The ninth paragraph of the complaint reads as follows: "That the premises hereinbefore described and leased by the plaintiff to the defendants as aforesaid, at all the times hereinbefore mentioned, have been used by the steamer Resolute and the owners thereof for wharfage purposes; said steamer Resolute and the owners thereof so acting and using said premises for wharfage purposes, either as agents of the defendants, N. L. Meads, Charles P. Doe, G. L. Ray, and H. G. Cox, or some of them, or others unknown to the plaintiff constituting Petaluma Transportation Company, or as members of said partnership under the firm name and style of Petaluma Transportation Company." Immediately upon the filing of the complaint, a summons, addressed to all the defendants named in the title of the action, was caused to be issued, and on the same day said summons was served on the defendants Meads and Ray. There also appears in the record before us an affidavit of a purported service of said summons on the Petaluma Transportation Company. This affidavit was by one Reuben G. Hunt, who alleged therein that on the 23d day of November, 1909, he "personally served a summons in the above-entitled action hereto annexed and made part hereof, on the Petaluma Transportation Company, one of the defendants therein named, by delivering to N. L. Meads, personally known to me to be a member of said partnership, a copy of said summons," etc. The summons, as the statute requires to be done in such case (section 1167, Code Civ. Proc.), commanded the defendants to appear and answer the complaint within three days after the service of said summons upon them, and notified them that, unless they did so appear and answer, the plaintiff would apply for the relief asked for in the complaint. None of the defendants thus served answered the complaint or otherwise appeared in the action within the time named in the summons and as prescribed by the statute, and accordingly, on the 27th day of November, 1909, the plaintiff applied for a default, which application was granted and judgment thereupon entered against the defendants Meads, Ray, and the Petaluma Transportation Company, adjudging plaintiff to be entitled to the possession of the demanded premises, annulling and forfeiting the lease, and for treble the amount of the rent ($300) alleged to be due.

On the 29th day of November, 1909, the defendants appeared and served and filed a notice of motion to set aside the default entered against them, and at the same time served and filed a general demurrer to the complaint. This motion was made upon the grounds: (1) That said default was entered by the clerk of the court contrary to section 1169 of the Code of Civil Procedure; (2) that the defendant Petaluma Transportation Company was not served with summons. On the 3d day of December, 1909, the plaintiff caused to be issued a writ of restitution, directed to the sheriff of Sonoma county, who executed said writ by placing the appellant in possession of the premises concerned here, and on the 6th day of December, 1909, said officer made a return to that effect on said writ to the court. On the last-mentioned date the motion of defendants to set aside the default was heard and denied by the court; permission, however, being granted defendants to notice and file a motion to vacate and set aside the judgment. Thereafter defendants served and filed a motion to vacate the judgment on the following grounds: (1) That the court was without jurisdiction to enter the judgment; (2) that the judgment is not supported by the pleadings; (3) that the defaults of the defendants herein were not entered. This motion was heard by the court on the 13th day of December, 1909, and an order made granting the same on the 20th day of December, 1909. With the notice of the last-mentioned motion the defendants filed an affidavit of merits, made by the defendant Cox, in which it is alleged, among other things, that affiant is a member of the "copartnership in the Petaluma Transportation Company; * * * that this affiant was not served with summons and had no notice of said action served on him either by way of summons and complaint or otherwise; that affiant has consulted his attorney, W. H. Early, and is informed by his said attorney that he has a good and perfect defense to the said action on the merits which said defense is based on a certain indenture of lease, a copy of which said lease is hereto attached and made a part of this affidavit; * * * that affiant is informed by his said attorney that the said lease is in full force and virtue and a good and perfect defense to each and every part of said action on its merits." The lease so referred to appears to have been executed by plaintiff and the Petaluma Transportation Company, "by N. L. Meads, Mgr.," in the month of July, 1909, and purports to lease to the Petaluma Transportation Company the premises in dispute for the term of four years, "from and after July 1st, 1909, at the rent of $3,600.00, payable in monthly installments of $75.00, * * * in advance on the first day of each and every month during the term hereof."

1. By objecting to the judgment on the ground that it was unsupported by the allegations of the complaint, the defendants undoubtedly made a general appearance, and thus waived the objection that the court was without jurisdiction to render and enter the judgment because the defendants were not or might not have been served with summons. In Burdette v. Corgan, 26 Kan. 102, it is said: "The motion to vacate the judgment recited that the parties specially appeared and moved to set aside the judgment as void for several reasons—among them that the petition of the plaintiff did not state

facts sufficient to uphold the judgment. * * * In the first place, we remark that this appearance by the motion, though called special, was in fact a general appearance, and by it this defendant appeared so far as she could appear. The motion challenged the judgment, not merely on jurisdictional, but also on nonjurisdictional, grounds, and, whenever such a motion is made, the appearance is general, no matter what the parties may call it in their motion." The rule as thus stated is expressly approved by our Supreme Court in the case of Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418–423, 58 Pac. 941, 59 Pac. 296. See, also, Lowe v. Stringham, 14 Wis. 222; Gilbert-Arnold Land Co. v. O'Hare, 93 Wis. 194, 67 N. W. 38; In re Clarke, 125 Cal. 388, 58 Pac. 22; 2 Ency. of Plead. & Prac. 625, notes and cases cited. The filing of a demurrer and an affidavit of merits—the latter unnecessary, since, obviously, the motion is not based on section 473 of the Code of Civil Procedure (De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165)—is a move addressed to the merits by the defendants here, and is additional evidence of a general appearance, if, indeed, more evidence is necessary to show a general appearance than is disclosed by the objection to the judgment on the ground that it is not "supported by the pleadings." Indeed, said objection is itself, in effect, a demurrer to the complaint, and it is therefore very clear that the defendants thus challenge the judgment on a ground other than that of want of jurisdiction of the persons of the defendants.

2. But we think the complaint fails to state a cause of action against the defendant Petaluma Transportation Company, or, in other words, the action is not against said company. The caption of the complaint reads: "Maclay Company, a Corporation, v. N. L. Meads, Charles P. Doe, H. G. Cox and G. L. Ray, Individually and as Co-partners Under the Firm Name and Style of Petaluma Transportation Company," etc. From an examination of the complaint it is to be noted that nowhere therein does it even appear that the Petaluma Transportation Company is a partnership, except in the caption and by implication only in paragraph 9 thereof, heretofore quoted herein. The third paragraph declares that Meads, one of the defendants, and to whom the premises were originally leased, subsequently assigned said lease to the "Petaluma Transportation Company," without alleging the character of said company, whether a partnership, association, or corporation. Paragraph 4 alleges that the persons named as defendants in the caption of the complaint, "or some of them, or other persons unknown to plaintiff," constituted at the time of said assignment of said lease, the Petaluma Transportation Company, and that they still "have possession of said premises as tenants of this plaintiff." In other parts of the complaint it is averred that the defendants, Meads, Doe, Ray, and Cox, etc., are acting under the name of Petaluma Transportation Company, but whether said transportation company is a partnership or an association or a corporation is not therein made to appear. The caption of the summons is, we infer from the record, the same as the caption of the complaint. The summons is directed to the defendants named in the caption of the complaint in the following language: "The people of the state of California send greeting to N. L. Meads, Charles P. Doe, H. G. Cox and G. L. Ray, individually and as copartners under the firm name and style of Petaluma Transportation Company," etc., and directs them to appear and answer the complaint. The person who served the summons, as we have seen, made a return as to the Petaluma Transportation Company that he had personally served said summons on said company "by delivering to N. L. Meads, personally known to me to be a member of said partnership, a copy of said summons," etc.

The judgment is against "the said defendants, composing said partnership under the firm name and style of Petaluma Transportation Company for the sum of three hundred dollars, trebled as provided by statute, to wit, nine hundred dollars," together with costs, and for annulment and forfeiture of said lease and for restitution of said premises. It will be observed that, so far as the caption of the complaint is concerned, the action is not against the Petaluma Transportation Company, a partnership, but against the persons expressly named as individuals and members of said partnership and others fictitiously named. The words "and as copartners under the firm name and style of the Petaluma Transportation Company" do not, and cannot, make the said partnership a party defendant to the action. The words referred to are merely descriptive—that is, they do no more than unnecessarily describe or identify the particular persons proceeded against, in their individual capacities, whatever may have been the intention of the pleader in so using them. They, in other words, amount to no more than would the following language if employed in the caption of the complaint: "Maclay Company, etc., v. John Jones and William Smith, Individually and as Residents of the City of Petaluma." Surely, no one would for a moment contend, even if such a thing were possible, that such allegation even in the charging part of a complaint would or could be construed to include the city of Petaluma as a party defendant. Nor does it appear from the averments of the complaint that the transportation company was or is made a party. The nearest the complaint even comes to alleging that said transportation company is a partnership is, as seen, in paragraph 9 thereof. But this allegation, while perhaps sufficient, as against a general demurrer, to indicate that the transportation company is a partnership, does not make the action one against such partnership.

The case of Davidson v. Knox, 67 Cal. 143, 7 Pac. 413, bears a striking resemblance to the one at bar in all particulars. There the caption of the complaint contained the names of certain persons, "copartners doing business under the firm name of Knox & Osborne." The complaint alleged that said persons (naming them) "now are, * * * and have been, partners and associates, doing business under the firm name of Knox & Osborne, and as such partners and associates, owning, working and operating a certain quartz mine and quartz mill," etc. The prayer of the complaint, as here, asked for judgment against "said defendants." The caption of the summons was, as here, in the words of the caption of the complaint. The direction and notification to the defendants in the summons were the same as in the summons here. The judgment rendered and entered was against all the defendants, two of whom were not served with summons. The court said: "We are of opinion that this is an action against the individual partners doing business under the firm name of Knox & Osborne, on partnership contracts," etc. See sections 414, 388, Code Civ. Proc.

In Feder v. Epstein et al., 69 Cal. 456, 10 Pac. 785, the title of the action in the complaint was: "Moses M. Feder, Plaintiff, v. Samuel Epstein and Wolf Epstein, Partners, Under the Firm Name of Epstein Brothers, Defendants." The complaint alleged that the defendants "have been and now are partners under the firm name aforesaid." The prayer was for "judgment against said defendants," etc. The summons contained the same title as the complaint, and then followed: "The people of the state of California send greeting to Samuel Epstein and Wolf Epstein, defendants," and "concluded with a notice that, if the defendants failed to appear and answer the complaint, the 'plaintiff will take judgment against you,' etc. The sheriff returned that he served the summons 'on Epstein Brothers, by delivering to Samuel Epstein, one of said defendants, personally in the county of Ventura, a copy of said summons,' etc." Samuel Epstein failed to appear and answer, and a judgment of default was entered against him. Thereafter the plaintiff filed a motion for permission to so amend the judgment as to "make it a judgment against the firm of Epstein Bros., and to be enforced against the joint property of the firm as well as against Samuel Epstein and his separate property." The motion was denied, and the Supreme Court, sustaining this ruling, said: "We see no error in the ruling. The associates were not sued by their common name, but by their individual names, and the case was therefore not within the provisions of section 388 of the Code of Civil Procedure"—citing Davidson v. Knox, supra.

In the investigation of this proposition the case of Peabody v. Oleson, 15 Colo. App. 348, 62 Pac. 235 (not cited by either of the parties here), has come under our observation. The suit was against the individual members of the partnership and not against the partnership by name. The contention there was that under a section of the Colorado Code, in all respects similar to section 388 of our Code of Civil Procedure, the suit should have been brought against the partnership by its name, and that "there was no authority for a judgment against the individuals composing the firm." It was there held that, under the law of Colorado, a party had the right, in case of a partnership liability, either to sue all the members of the partnership by their individual names, thus binding them all to any judgment which might be obtained, or sue the partnership by the partnership name. And we do not say that either course may not be pursued in this state. But where, as here, the action is against the members of the partnership in their individual character, and not against the partnership by its partnership name, the effect of service of process or summons on one member, or on all the members, is not to summons the partnership but only the member or members upon whom such service is had and, in such case, in order to bind all the members of the firm by any judgment which may be obtained in the action, service of summons must be made on all. Of course, where the action is against the partnership, then, by the terms of section 388, supra, service of summons on one or more of the members of the partnership is sufficient, and thereby the judgment in the action is binding not only upon "the joint property of all the associates," but also upon "the individual property of the party or parties served with process." We entertain no doubt that, tested by the provisions of section 388 of the Code of Civil Procedure and the decisions to which we have directed attention, the complaint here falls far short of disclosing that plaintiff, however much it may have intended to do so, proceeded against the Petaluma Transportation Company. As in Davidson v. Knox, supra, and Feder v. Epstein, supra, so it is true here, that the defendants, though constituting, according to the averments of the complaint, the partnership named the Petaluma Transportation Company, "were not sued by their common name, but by their individual names," and the action was therefore against each member of said partnership in his personal, and not in his partnership, character.

It requires the citation of no authorities to show that a judgment in favor of plaintiff must have for its primary support a complaint which states a cause of action against the defendant. To undertake to rest a judgment upon an alleged complaint which is bad for want of sufficient facts would, of course, be no less an act of futility than an attempted defiance of the inexorable law of gravitation. The complaint here is, it is true, sufficient as against those individuals that are proceeded against, but it is no complaint against the transportation company, as to which a judgment rendered and entered thereupon would obviously be coram non judice.

But the point is made that the judgment cannot be vacated because it has been executed in part as to all the parties, including the transportation company, and upon this proposition our attention is invited to cases cited in the footnotes of 23 Cyc. 893. See Penfold v. Singleton, 36 Ga. 556; Skillings v. Mass. Ben. Ass'n, 151 Mass. 321, 23 N. E. 1136; Davis v. Blair, 88 Mo. App. 372; Foster v. Hauswirth, 5 Mont. 566, 6 Pac. 19; Galbraith v. Cooper, 24 N. J. Law, 219; Alverson v. Alverson, 2 R. I. 27; Enders v. Burch, 15 Grat. (Va.) 64. But an examination of these authorities will show that in each case there was, before the motion was made, a "total extinguishment of the judgment by a full and complete performance of its mandates and directions" (Davis v. Blair, supra), and therefore the judgment, which in each case was for money, became functus officio. It cannot be said that there has been "a full and complete performance of the mandates and directions" of the judgment here. According to the record only that portion of the mandates of the judgment restoring the premises to the plaintiff has been performed, while that portion awarding to plaintiff rent in the sum of $300, trebled, is "very much alive."

We think the court made no error in granting the motion as to the Petaluma Transportation Company, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 347

MULLER et al. v. MULLER et al. (Civ. 849.)

(Court of Appeal, First District, California. Oct. 18, 1910.)

1. PARTITION (§ 77*)—PARTITION IN KIND—DISCRETION OF COURT.

In partition, the land should be partitioned in kind, unless such partition cannot be made without great prejudice to the owners; the matter of a sale being in most cases one of discretion in the trial court.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211–223; Dec. Dig. § 77.*]

2. PARTITION (§ 77*)—SALE.

In partition of a city lot fronting 90 feet on one street and 57½ feet on another, wherein the three plaintiffs owned an undivided five-eighths interest, incumbered by various mortgages and liens, and the three defendants owned an undivided three-eighths, and several witnesses testified that the lot could be sold as a whole for a much better price than if subdivided, and that, if subdivided into two lots, their combined value would not equal the value of the lot as a whole, there was no abuse of discretion in ordering a sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211–223; Dec. Dig. § 77.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Partition action by John H. W. Muller and others against George A. Muller and others. From an interlocutory decree ordering a sale of the real estate, defendants appeal. Affirmed.

Garber, Creswell & Garber, for appellants. E. J. Talbott and Wm. J. Herrin, for respondents.

COOPER, P. J. This appeal is from an interlocutory decree in partition by which a sale of the real estate described therein is ordered. The trial court found "that the real estate described in the complaint and hereinafter is so situated that actual partition thereof cannot be made without great prejudice to the plaintiffs and the defendants, the owners of said real property." The only question raised is as to the sufficiency of the evidence to sustain this finding.

We have examined the evidence, and conclude that it is sufficient to support the finding. The land is a lot in the city and county of San Francisco, fronting 90 feet on Mission street and 57½ feet on Eleventh street. The plaintiffs own an undivided five-eighths interest, incumbered by various mortgages and liens, and the defendants own an undivided three-eighths interest therein. Several witnesses testified that the lot would sell much more readily and for a much better price if sold as a whole than if it were subdivided, and that if it were subdivided into two lots the combined value of the two lots would not be as great as the value of the lot as a whole. The rule is that the land should be partitioned in kind, unless such partition cannot be made without great prejudice to the owners. The courts favor a partition in kind where it is practicable, and this for the reason that the owners of real estate should not be deprived of their title thereto through a sale, unless such sale is necessary to prevent great prejudice to the owners. In most cases the matter is one of discretion in the trial court. Considering the size of the lot, the number of owners, and the testimony of real estate experts, we cannot hold that the court abused its discretion.

The decree is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14 Cal. App. 342

BILICKE v. JANSS. (Civ. 774.)

(Court of Appeal, Second District, California. Oct. 17, 1910.)

1. LANDLORD AND TENANT (§ 173*)—PREMISES —POSSESSION—DISTURBANCE OF POSSESSION —ACTS OF THIRD PERSONS.

Where a lease contained a covenant that the landlord should not be liable for damages to the lessee by the acts of other tenants and occupants, there was no constructive eviction because the acts of another tenant rendered the leased premises unfit for the purpose for which they were engaged.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 705–707; Dec. Dig. § 173.*]

2. LANDLORD AND TENANT (§ 172*)—PREMISES —POSSESSION—DISTURBANCE OF POSSESSION.

The mere fact that a landlord rents premises to a tenant whose occupancy disturbs the other tenants does not amount to an eviction in the absence of appropriate covenants in the lease. Thus a landlord who let part of his premises to a butcher who smoked meat upon them, to the annoyance of another tenant who engaged his premises for a physicians' institute, did not evict the latter, where the lease specifically provided that the landlord should not be liable for the acts of other tenants, etc.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695–703; Dec. Dig. § 172.*]

3. LANDLORD AND TENANT (§ 172*)—PREMISES —POSSESSION—DISTURBANCE—USE OF OTHER PREMISES OF THE LANDLORD.

In the absence of a covenant to that effect, a tenant has no right to dictate the landlord's possession of other portions of his premises, save that he shall not maintain a nuisance, nor let the same for a business which, notwithstanding reasonable care on the part of the tenant, would constitute a nuisance, so that a landlord who lets premises to a butcher, the smoke from whose shop annoys others, is not liable to other tenants, where there is no covenant to that effect.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695–703; Dec. Dig. § 172.*]

4. LANDLORD AND TENANT (§ 180*)—REVIEW— FINDINGS—IMMATERIALITY.

As a tenant cannot maintain a claim of constructive eviction because of the acts of another tenant unless the landlord is responsible for what the tenant does, a finding of the trial court that the lessor could reasonably have remedied the evil caused by the objectionable practices of another tenant, of which the first tenant complained, is immaterial, where there is no covenant or legal duty imposed on the landlord to remedy.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 180.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by A. C. Bilicke against P. Janss. From a judgment for defendant, plaintiff appeals. Affirmed.

Foster C. Wright, for appellant. Ward Chapman and L. M. Chapman, for respondent.

SHAW, J. Action to recover monthly installments of rent for July and August, 1907, upon a lease of a storeroom. Judgment went for plaintiff, from which defendant appeals upon the judgment roll alone, claiming the judgment is not supported by the findings.

The lease was made to one E. W. Raymond, and in consideration of its execution defendant agreed that if the lessee should not pay the rent specified in the lease in accordance with the terms and provisions thereof, he would pay the same on demand therefor. The suit is against defendant upon this guaranty. While several defenses are set up in the answer, the only one urged on the appeal is the alleged constructive eviction of the lessee from the leased premises by plaintiff. The question therefore presented is whether or not the facts found by the court, considered with the admitted covenants of the written lease made on the part of the lessee, show his eviction by plaintiff. The premises, which were leased for the period of 30 months, commencing July 1, 1906, and for the purpose of conducting the business of a physicians' institute, are situated in Los Angeles and described in the lease as "That certain storeroom known as and numbered 504 South Main street, comprising the space about seventeen feet wide and about sixty-seven feet in depth from the easterly line of said Main street, together with a space in the rear of these premises and on an elevation of about seven feet above the same, said rear space being approximately thirty-five feet wide, six feet deep to an alley." By the terms of the lease the tenant covenanted and agreed that the landlord should not be liable or accountable for "any damage arising from any act or neglect of any co-tenant or other occupants of the same building, or of any owners or occupants of adjacent or contiguous property."

These facts, omitting certain conclusions of law embodied in the findings, are, in substance, as follows: That underneath the premises covered by the lease, and forming a part of the building owned by plaintiff and under his control, was at all of the times mentioned a covered driveway, extending from a public alley in the rear of the building into and under the leased premises for a distance of about 50 feet; that said covered driveway was covered by the floor of a portion of the premises leased to Raymond; that abutting on and opening into said driveway were several storerooms forming a part of the same building so owned by plaintiff, and fronting on Fifth street; that at all of said times one of said storerooms was occupied as a meat market and butcher shop, the occupant thereof holding as a tenant of plaintiff under a lease of the same; that for a considerable period of time prior to January 1, 1907, and continuing to July 10, 1907, the lessee discovered that said leased storeroom was filled and permeated with a stench, foul odors and offensive smoke, which came from said covered driveway, seeping through the floor of said leased storeroom into said premises; that up to April 1, 1907, said odors and offensive smoke were caused by the acts of the tenant of said butcher shop due to the killing of poultry in the driveway and the trying out of lard in the room occupied as a meat market and butcher shop; that about April 1, 1907, upon complaint being made to the landlord, said butcher tenant, under instructions from the landlord, discontinued the killing of chickens in said driveway and the rendering of lard upon his premises, but from said date to the date of the abandonment of the premises by the lessee the tenant of said butcher shop "continued the smoking of meat on his own premises, erecting certain hoods and smoke pipes and vent pipes extending into and through said private alley or driveway; * * * that from time to time smoke and smells escaped therefrom into said driveway and continued to exude and go through the floor of said leased premises involved herein"; that said condition was reported to and known by plaintiff, who failed to remedy the evil conditions when he could reasonably have remedied them; that at the time of the execution of the lease the lessee, Raymond, examined the premises and found no foul odors or offensive smoke therein; that by reason of said offensive smoke and smells permeating the leased premises the same were rendered unfit for the uses specified in the lease and were, early in July, 1907, abandoned by the lessee, who removed his property therefrom.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Not only was there no covenant on the part of the landlord that the premises were fit and suitable for the purpose for which they were leased, but the storeroom was in use as a butcher shop and meat market at the time the lease was executed to Raymond, and he must be deemed to have accepted the lease with full knowledge of the conditions existing by reason of conducting a meat market and butcher shop in close proximity to the premises so leased by him. The lease imposed no duty upon the landlord to keep and maintain either the leased or other premises in a condition fit and suitable for carrying on the business of a physicians' institute. On the contrary, it expressly provided that, in so far as other tenants and occupants of the building were concerned, the landlord should not be accountable for any damages sustained by the lessee by reason of the acts of such other tenants and occupants. Hence, the finding that the leased premises were rendered unfit for the purposes for which they were leased did not in itself constitute an ouster. Kistler v. Wilson et al., 77 Ill. App. 149; Cougle v. Densmore, 57 Ill. App. 591. "The mere fact that the landlord rents premises to a tenant who carries on a business there incompatible with the convenient occupation of adjoining premises, also rented by the same landlord, does not amount to an eviction, and, in the absence of a provision to that effect in the lease, does not relieve the tenant who suffers from the nuisance from the obligation of paying rent under his lease." Gray v. Gaff, 8 Mo. App. 329. Clearly, the landlord was not responsible for the acts of the tenant smoking meat upon his own premises. If such acts of the butcher tenant constituted a substantial grievance, redress should have been had against the offending tenant, and not against the landlord. Seaboard Realty Co. v. Fuller, 33 Misc. Rep. 109, 67 N. Y. Supp. 146.

The court found that the private driveway extending under the leased premises was in the control of plaintiff. A fair interpretation of this finding is that plaintiff exercised like dominion over this private driveway that he did over one of the storerooms of the building. It was not appurtenant to the leased premises and was no part thereof. As against the lessor, in the absence of any express covenant in the lease touching the subject, the lessee had no right other than to insist that the landlord should not maintain a nuisance therein himself, nor let the same for some business which, notwithstanding the exercise of reasonable care on the part of the tenant in the conduct thereof, would, nevertheless, constitute a nuisance. Gray v. Gaff, supra; French v. Pettingill, 128 Mo. App. 156, 106 S. W. 575; McKinny v. Browning, 126 App. Div. 370, 110 N. Y. Supp. 562. Obviously, offensive smoke and odors could not have escaped from a properly constructed line of pipe extending through this driveway. That they did escape is conceded by appellant to have been due to the fact that the pipes and appliances were defective. It does not appear, however, that the landlord authorized the use of such defective means for carrying off the smoke and odors.

The facts as disclosed by the record fail to show that plaintiff was responsible for the evil conditions found to exist. "A constructive eviction from a leasehold cannot be claimed by a tenant because of the acts of another tenant of a portion of the premises, unless the landlord is responsible for what the tenant does." French v. Pettingill, supra. If not responsible, then the fact, as found by the court, that the lessor could reasonably have remedied the evil, is immaterial, for the reason that neither the law nor the covenants of the lease imposed upon him any duty to remedy it.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

14 Cal. App. 359

WOLFE v. LANGFORD et al. (Civ. 844.)

(Court of Appeal, First District, California. Oct. 19, 1910.)

1. Adverse Possession (§ 12*)—Sufficiency to Give Title—Actual Possession.

Actual possession of land under a claim of ownership without any paper title is sufficient to give title as against one having no right or title in himself.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 66; Dec. Dig. § 12.*]

2. Mortgages (§ 304*) — Release — Effect — Release by Absolute Deed.

A deed executed by a grantee in a prior deed, which was in fact a mortgage, to the grantor therein, and intended to operate as a release of the mortgage, conveys no title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 872; Dec. Dig. § 304.*]

3. Attachment (§ 180*)—Judgment (§ 788*)—Priorities — Unrecorded Deed — "Instrument."

Neither an attachment nor a judgment is an "instrument," within the meaning of Civ. Code, § 1107, making a grant conclusive against the grantor and all subsequently claiming under him except a purchaser or incumbrancer, who in good faith and for value acquired a title or lien by an instrument that is first duly recorded, so that one taking under an unrecorded deed held by a title superior to the right of one claiming under a subsequent attachment and judgment against the grantor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 563–575; Dec. Dig. § 180;* Judgment, Cent. Dig. §§ 1368, 1369; Dec. Dig. § 788.*

For other definitions, see Words and Phrases, vol. 4, pp. 3665–3668.]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by H. M. Wolfe against Arthur B. Langford and another, in which the unnamed defendant filed a cross-complaint. From a judgment for plaintiff and against cross-complainant, and from an order denying their motion for new trial, defendants appeal. Affirmed.

Will M. Beggs and R. C. McComish, for appellants. Wm. A. Bowden, for respondent.

HALL, J. Plaintiff brought this action to obtain a decree, enjoining defendants from enforcing a writ of execution against a certain piece of real estate alleged to belong to plaintiff. Defendant, Fidelity & Deposit Company of Maryland, besides answering the complaint, filed a cross-complaint for a decree establishing that a certain judgment obtained by it against one George T. Dunlap is a valid lien against the said property. Plaintiff obtained judgment as prayed for, and the court denied any relief to defendants, who have appealed from the judgment and order denying their motion for a new trial.

Appellants insist that their general demurrer to plaintiff's complaint should have been sustained. It is insisted that although plaintiff alleges ownership in fee of the land from which it is sought to remove a cloud, yet as the complaint shows the specific facts showing the chain of plaintiff's title, the general allegation of ownership must be considered only as a conclusion of law, and the specific facts alleged must be looked to only. In this connection it is claimed that plaintiff, by the allegations of his complaint, deraigns title from George T. Dunlap, but does not allege any title in said Dunlap. But if we concede everything claimed by appellants as to want of title in Dunlap the complaint otherwise states facts to show a good title in plaintiff. Besides stating a chain of title from Dunlap, plaintiff also pleads facts that make a good title in him by prescription. The demurrer was properly overruled.

The defendant, the Fidelity & Deposit Company of Maryland, obtained a money judgment against George T. Dunlap, which was duly docketed on the 3d day of June, 1903. It is by virtue of this judgment that said defendant claims a lien against the land described in the complaint, and it is the cloud caused by the levy of execution under such judgment that plaintiff seeks to have removed.

In regard to the title of plaintiff the court found that on the 3d day of June, 1905, said plaintiff entered into the exclusive possession of the said premises in said complaint described and of all thereof, and from said date up to the present time has continuously held and yet holds the open, notorious, continuous, uninterrupted, and exclusive possession of the said premises and of all thereof, claiming the same and all thereof in good faith and in his own right, and exclusive and adverse to the said defendant and to all the world. This finding is supported by the evidence, and is the only finding as to the title of plaintiff. According to the findings of the court plaintiff did not connect himself with any paper title at all. He simply had actual possession under claim of ownership. But such is a sufficient showing of title in a plaintiff as against one who establishes no title or right in himself. Morris v. Clarkin, 156 Cal. 16, 103 Pac. 180. As before stated, the only claim defendant asserts against the premises is by virtue of a judgment obtained and docketed against George T. Dunlap June 3, 1903. The court, however, found that defendant had no such lien.

The property in question was conveyed to Dunlap by one Godfrey May 15, 1897, and the deed duly recorded. On December 31, 1898, Dunlap, by deed of grant, bargain, and sale in terms conveyed to one Friant, who in turn by a similar deed, dated February 14, 1899, conveyed to the Bank of Gilroy, which in turn, on April 6, 1903, conveyed to Dunlap. The deed from Dunlap to Friant and the deed from Friant to the Bank of Gilroy were given as security for money loaned to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dunlap, and the deed from the bank to Dunlap was the result of the payment of such loans by Dunlap. These deeds were all duly recorded, but as the deeds from Dunlap to Friant and from Friant to the bank were in fact mortgages no legal title passed thereby. Likewise the deed from the bank to Dunlap, though in form a conveyance, in fact operated simply as a release of the mortgage. It conveyed no title to Dunlap.

On October 15, 1901, Dunlap, for a valuable consideration, conveyed the premises to one House, who went into possession under the deed, but the deed was never recorded. Defendant's judgment against Dunlap was docketed June 3, 1903, over two years after Dunlap had conveyed to House by the unrecorded deed. At the time of the docketing of the judgment Dunlap did not own the property in question. He had conveyed it by a grant perfectly good as against the grantor and every one subsequently claiming under him except a purchaser or incumbrancer who, in good faith and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded. Section 1107, Civ. Code. Neither an attachment nor a judgment is an instrument within the meaning of the section, and an unrecorded deed takes precedence over an attachment or judgment. Hoag v. Howard, 55 Cal. 564; Bank of Ukiah v. Petaluma S. B., 100 Cal. 590, 35 Pac. 170. The judgment only becomes a lien upon the real property of the judgment debtor owned by him at the time of the docketing of the judgment, or afterwards and before expiration of the lien acquired. Code Civ. Proc. § 671. Dunlap did not own the premises in question when the judgment was docketed, for he had previously conveyed them to House. Neither did he afterwards acquire title by the deed from the Bank of Gilroy, for this deed was but a release of a mortgage and conveyed no title. The court thus correctly found that the defendant, Fidelity & Deposit Company of Maryland, had no lien or claim upon the property described in the complaint.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(158 Cal. 690)

CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. v. SIERRA VALLEYS RY. CO. et al. (Sac. 1,759.)

(Supreme Court of California. Dec. 1, 1910.)

1. Limitation of Actions (§ 48*)—Coupons—Detachment from Bonds—Limitations Applicable.

In the absence of any provision to the contrary in bonds or the instruments securing them, interest coupons, consisting of a simple promise to pay to bearer at a given date and place a specified amount of interest, when detached from the bonds and transferred by the bondholder to others, are independent obligations, subject to the four-year statute of limitations, which commences to run from the date of their maturity.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 259–265; Dec. Dig. § 48.*]

2. Limitation of Actions (§ 15*)—Waiver—Provisions of Mortgage.

A provision of a railroad mortgage securing bonds that the railroad company, for itself, its successors, etc., waived the benefit of all valuation, stay, appraisement, or redemption laws respecting liens and mortgages to be foreclosed by action or suit, and all laws which, but for such provision, would prevent the absolute and unconditional sale of the premises conveyed, by a court or the trustee without suit, was not a waiver of the defense of limitations to interest coupons detached from the bonds.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 62–65; Dec. Dig. § 15.*]

3. Railroads (§ 180*)—Mortgages—Default—Foreclosure—Rights of Bondholders.

In the absence of any provision to the contrary in a railroad mortgage securing bonds, default may be taken advantage of by the holder of a single bond or coupon.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. § 180.*]

4. Railroads (§ 180*)—Mortgages—Foreclosure—Rights of Bondholders.

A provision of a railroad mortgage on default in the payment of any bond or interest coupon, continuing for six months after demand and presentation for payment, the whole principal sum mentioned for payment in all and each of the bonds should at the option of the holders of a majority in interest of the bonds then outstanding, or at the option of the trustee, forthwith become due and the lien foreclosed, was effective merely to authorize the acceleration of maturity of the bonds, and did not prevent the holder of detached interest coupons from collecting the same by suit or by foreclosing the mortgage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. § 180.*]

5. Railroads (§ 180*)—Mortgages—Interest Coupons—Default—Right to Sue.

A provision in a railroad mortgage securing bonds that no action should be prosecuted against the railroad company on any of the coupons annexed to the bonds, at law or otherwise, except by the trustee, unless the trustee after having been duly requested in writing, and having been fully indemnified, should fail and neglect for three months so to do, did not prevent the holder of matured and unpaid interest coupons from suing to enforce the same by foreclosure of the mortgage, or otherwise, since after the expiration of three months after demand such holder was entitled to sue in his own name, making the trustee a defendant in case of the latter's refusal to sue.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 605–609; Dec. Dig. § 180.*]

6. RAILROADS (§ 166*) — SECURITIES — MORTGAGE OR TRUST DEED.

Where an instrument, executed by a railroad company to secure bonds, was described as a mortgage in the bonds; contained no provision for reconveyance; required neither notice of sale by the trustee nor prescribed the manner thereof, and referred to "the lien or incumbrance thereby created," and in various references to its own terms and effects used the expression "this mortgage," it would be held to be a mortgage and not a trust deed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 516–518; Dec. Dig. § 166.*]

7. LIMITATION OF ACTIONS (§ 180*)—PLEADING—DEMURRER.

Though the defense of the statute of limitations may be raised by demurrer, where it appears on the face of the complaint that the claim is barred, the demurrer must specially state that the claim is barred; an allegation that the complaint is defective for want of facts being insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670–675; Dec. Dig. § 180.*]

8. LIMITATION OF ACTIONS (§ 180*)—WAIVER OF DEFENSE—FAILURE TO DEMUR.

Since the only ground of demurrer under which the defense of the statute of limitations may be raised by demurrer is "failure to state facts sufficient to constitute a cause of action," and such ground, by the express provisions of Code Civ. Proc. § 434, is not waived by a failure to demur, where defendants did not demur, but answered the complaint at once, pleading limitations, they did not waive it by failing to demur.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670–675; Dec. Dig. § 180.*]

Department 1. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by the California Safe Deposit & Trust Company, continued in the name of T. F. Dunaway, substituted trustee, against the Sierra Valleys Railway Company and others, in which C. R. Bowen filed a cross-complaint. From a decree dismissing the cross-complaint Bowen appeals. Affirmed.

Snook & Church and John W. Stetson, for appellant. E. D. Knight, E. R. Dodge, Warren Olney, Jr., L. N. Peter, and J. V. De Laveaga, for respondents.

SLOSS, J. In April, 1895, the Sierra Valleys Railway Company, a California corporation, having taken the statutory steps for the authorization by its stockholders of a bonded indebtedness, caused 1000 bonds of $1000 each, falling due in 20 years, with interest coupons attached, to be signed by its president and secretary. It also executed and delivered to the California Safe Deposit & Trust Company, as trustee, a mortgage or deed of trust of all its property to secure said bonds and coupons. Three hundred of the bonds were duly issued to Henry A. Bowen.

This action was commenced by the trustee to foreclose the security, it being claimed that the said trustee had exercised the option granted to it by the mortgage or deed of trust to declare the principal sum due in advance of maturity upon default, continuing for six months, in the payment of interest. Other breaches of the conditions of the instrument securing the bonds were alleged. The Boca & Loyalton Railroad Company and Cora Chambers Pool were made defendants, and were alleged to claim an interest in the property. It is alleged that Bowen, also named as a defendant, was the owner and holder of a number of overdue interest coupons, which had been detached from the bonds originally owned by him, said bonds having passed into the ownership of the Nevada-California-Oregon Railway, a corporation. Bowen answered and cross-complained, seeking a foreclosure and the payment to him of the amount due on his coupons.

The court found that certain coupons including those held by Bowen had matured more than four years prior to the commencement of the action, and that any claim thereon was barred by sections 335 and 337 of the Code of Civil Procedure. The material allegations of the complaint were found to be true, and a decree of foreclosure providing for payment out of the proceeds of the sale of the amount due on all bonds and coupons, except those found to be barred by limitation, was entered. From this judgment Bowen appeals. The only question presented is whether the court below was correct in holding that he had lost his right to relief by lapse of time.

The coupons in question were in the usual form, each consisting of a simple promise to pay to bearer, at a given date and place, the sum of $30, being six months' interest on one of the bonds. In the absence of any provision to the contrary in the bonds, or in the instrument securing them, it is undoubtedly the general rule that such coupons are independent obligations, and that, at least when they have been detached from the bonds and transferred to others than the holders of the bonds, the statute of limitations begins to run from the time of their maturity. Short on Law of Railway Bonds, § 75; Jones on Corp. Bonds and Mort. § 267; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; Clark v. Iowa City, 20 Wall. 585, 22 L. Ed. 427; Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886; Nash v. El Dorado County (C. C.) 24 Fed. 252; Huey v. Macon Co. (C. C.) 35 Fed. 481; Galveston v. Loonie, 54 Tex. 517; Threadgill v. Com'rs, 116 N. C. 616, 21 S. E. 425. The appellant claims, however, that a different rule has been established in this state by the decision in Meyer v. Porter, 65 Cal. 67, 2 Pac. 884, and the two companion cases of Roeding v. Porter, 2 Pac. 888, and Haysmeister v. Porter, 3 Pac. 123, decided in the same month as the Meyer Case, and based upon its authority alone. Meyer v. Porter was an appeal from a judgment denying a writ of mandate to compel the treasurer of the city of Sacramento to pay certain coupons out of funds in his possession. The trial court had sustained a demurrer to the petition for the writ. In the Supreme Court various objections to the granting of the relief sought were considered and overruled. The opinion concludes with these words: "And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute." There is no further discussion of the point, nor is there, in the report of the case, any showing of the facts upon which the bar of the statute was claimed to have arisen. We are not informed whether the coupons were independent obligations, negotiable and enforceable by others than holders of the bonds, nor whether, if so enforceable, a right of action had in fact accrued at such time as to make the bar of the statute applicable. Under these circumstances, we do not regard the isolated expression above quoted as binding this court to the doctrine that an action upon interest coupons is never barred by lapse of time until a right of action on the bond itself would be barred. On the contrary, we are inclined to take the view expressed by the United States Circuit Court of Appeals for the Ninth circuit in Mather v. City and County of San Francisco, 115 Fed. 37, 43, 52 C. C. A. 631, 639, where the following language was used in reference to the foregoing statement of this court in Meyer v. Porter: "It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not so understand the decision, although it is impossible, from the meager statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted it was intended only to affirm the well-settled rule that in the application of the statute of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty, the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties. City of Lexington v. Butler, 14 Wall. 282 [20 L. Ed. 809]." Although the distinction between specialties and writings not under seal had been abolished in this state, it is probable that the writer of the opinion in Meyer v. Porter had in mind the rule just referred to. To this extent, it is quite true that "the coupons partake of the nature of the bonds to which they belong," and the question whether an action on the coupons is barred must accordingly be answered by reference to the statute prescribing the period of limitation for an action on the bonds. This is all that was decided in Lexington v. Butler, supra, and City of Kenosha v. Lamson, 9 Wall. 483, 19 L. Ed. 725, although the opinions of the Supreme Court of the United States in these cases contained expressions which, taken alone, might have been, and, indeed, were by some, interpreted to mean that an action on the coupons was not barred until an action on the bonds would be. Such was not, however, the true meaning of the decisions, as is clearly pointed out in Clark v. Iowa City, supra, and other cases. In view of all this, we think there is nothing in Meyer v. Porter to prevent this court from applying the rule supported by reason, as well as by overwhelming authority, viz., that, in the absence of some special circumstance to the contrary, the period of limitation of an action on coupons begins to run from the date of the maturity of the coupons.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But, says the appellant, if this be the true doctrine, there are provisions in the mortgage or deed of trust taking the present case out of the general rule. He points in the first place to article 10, reading as follows: "It is further provided and agreed that the party of the first part (Sierra Valleys Railway Company), for itself, its successors and assigns, doth hereby absolutely and irrevocably waive the benefit or advantage of any and all valuation, stay, appraisement or redemption law or laws, respecting liens or mortgages to be foreclosed by action or suit, and of all laws now existing or hereafter passed, which but for this provision would prevent the absolute and unconditional sale of the premises hereby conveyed, by a court or by the trustee, without suit. * * *" This is claimed to constitute a waiver on the part of the debtor of the right to plead the statute of limitations. Assuming the effectiveness of such waiver, if the railway company had undertaken to make one, we do not find in the language quoted anything which purports to waive the defense in question. The provision is quite plain and has reference to matters not connected in any way with the statute of limitations.

The further point is made that under the terms of the instrument securing the bonds and coupons, the holder of coupons had no independent right to proceed by action to collect the amount of his coupons or to foreclose the security therefor. If this be so, the defense of the statute of limitations would, of course, not be applicable, since a claim cannot be barred by limitation until the lapse of the statutory time after the claimant had a right to proceed by action to enforce his demand. Swamp Land Dist. v. Glide, 112 Cal. 85, 44 Pac. 451. But we cannot agree with the contention of appellant that the instrument does prevent the holder of an overdue coupon from proceeding to enforce his right to payment by an action of foreclosure.

In the absence of any provision to the contrary, default may be taken advantage of by the holder of a single bond or coupon. Short on Law of Ry. Bonds, etc., §§ 376, 398; C. & V. R. R. Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47. The provision principally relied on by the appellant to show that such right did not exist here is found in article 2, and is to the effect that in case of default in the payment of any bonds or interest coupons, and if such default shall continue for six months after demand and presentation for payment, "the whole principal sum mentioned for payment in all and each of said bonds shall at the option of the holders of a majority in interest of said bonds then outstanding, or at the option of the party of the second part (the trustee), forthwith become and be immediately due and payable, and the lien or incumbrance hereby created may be at once enforced. * * *" It is argued that this provision prevents a foreclosure except upon the motion of the trustee or of a majority of the bondholders. But this is not the true meaning of the clause. The purpose of this provision is to enable a majority in interest of the holders of bonds then outstanding, or the trustee itself, in case of default in the payment of interest for six months, to accelerate the maturity of the bonds, and to enforce the payment of the principal sum due, although the time provided in the bonds for their payment shall not have arrived. It is true that a holder of coupons alone or of less than one-half of the bonds could not so advance the time of maturity of the principal, but there is nothing in this clause to prevent the holder of an overdue coupon from proceeding by appropriate action (in the name of the trustee, or, in case the trustee should decline to act, by bill in equity making the trustee a party defendant) to realize upon the security. "The right of a coupon holder to foreclose for default in the payment of interest is not affected by a provision in the mortgage that, if the interest shall remain unpaid for a given period, the principal shall become due, and that the trustees may, and upon the written request of a majority in amount of the bonds shall * * * within a reasonable time proceed to foreclose the mortgage. Such a clause is operative as a restriction upon the coupon holder's right to bring suit, only when it is sought to take advantage of the waiver as advancing the date when the principal becomes due." Short on Law of Ry. Bonds, etc., § 398; Beekman v. Hudson R. & W. S. R. Co. (C. C.) 35 Fed. 3. Van Loo v. Van Aken, 104 Cal. 269, 37 Pac. 925, is not in conflict with these views. In that case, the court held that the mortgage involved showed affirmatively that the parties intended that there should be no foreclosure until the maturity of the principal.

The appellant relies also upon the provision of article 8 as follows: "It is hereby further provided and agreed that no action shall be commenced or prosecuted against said Sierra Valleys Railway Company, party of the first part, upon any of the coupons annexed to said bonds or otherwise, at law or otherwise, except by the said trustee, unless the said trustee, after having been duly requested in writing, and having been fully indemnified as hereinafter provided, shall fail or neglect for three months so to do. * * *" It is apparent that this clause does not prevent the coupon holder from bringing an action. It expressly protects his right to do so in the event that the trustee shall, after proper demand made, fail for three months to bring an action. It is always in the power of the coupon holder to make such demand and he cannot by failure to make it extend indefinitely the period of limitation. It is true that his right of action is by this clause deferred for three months, after demand, and the statute should therefore not be held to run against him for this period after the maturity of the coupon. But allowing to the appellant the period of four years and three months after the maturity of each of the coupons sued upon, he would still, at the date of the commencement of this suit, have been too late to institute his action.

The appellant claims that the instrument providing security for the bonds and coupons is a deed of trust, rather than a mortgage, and from this promise draws the conclusion that the only sale that could be had was one by the trustee, rather than, as directed by the decree, one by a commissioner appointed by the court. We need not inquire whether this conclusion would follow, since we have no doubt that the instrument is to be construed as a mortgage. It is described in the bonds as a mortgage. The instrument itself has no provision for reconveyance; it prescribes neither manner of nor notice for a sale by the trustee; it refers to "the lien or incumbrance hereby created"; and, in various references to its own terms and effects, used the expression "this mortgage." There appears to be no good reason for holding that the instrument was not a mortgage, as it purported to be. See Earle v. Sunnyside Land Co., 150 Cal. 214, 227, 88 Pac. 920.

Finally, the appellant raises the point that the defense of limitation was waived by reason of the fact that the various cross-defendants did not raise this defense by demurrer, but set up the bar of the statute by answer.

The contention is that, under sections 433 and 434 of the Code of Civil Procedure, an objection specified in section 430 as ground of demurrer (except want of jurisdiction or failure to state facts), must, if it appears on the face of the complaint, be taken by demurrer, or be deemed to be waived. Tingley v. Times-Mirror Co., 151 Cal. 1, 13, 89 Pac. 1097. If this be the rule, it is clear that the defense of limitation does not come within it. This defense is not specified in section 430 as a ground of demurrer. While defendants have been permitted to demur on the ground that the action was barred, the only subdivision of section 430 under which this ground of demurrer could be brought was that "the complaint does not state facts sufficient to constitute a cause of action." But, inasmuch as the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, the party relying upon it must affirmatively set it up in his pleading. A demurrer merely stating that there is a want of facts will not suffice. Brown v. Martin, 25 Cal. 82; Bliss v. Sneath, 119 Cal. 526, 51 Pac. 848. Accordingly, there has grown up a practice, difficult, perhaps, to defend on logical grounds, of permitting a defendant to demur to a complaint on the ground that "it fails to state facts sufficient to constitute a cause of action, in this, that the alleged cause of action appears to be barred by the provisions of * * *." This is an exception to the general rule that no particular specification is required in a demurrer for want of facts. Kent v. Snyder, 30 Cal. 666, 672. But, notwithstanding the necessity for such particularity, the only ground of demurrer applicable is the failure to state facts sufficient, and this ground is, by the express provision of section 434, not waived by failure to demur. The true rule, under our practice, is, we think, that the defendant may, if the defect appears on the face of the complaint, set up the bar of the statute either by demurrer or by answer. If the complaint does not show that the statute has run, the defendant must plead his right by answer. In the present case, it appears that the cross-defendants did not demur at all, but came in at once and filed answers setting up the bar of the statute. It would be a harsh ruling to hold that, merely because they had claimed their privilege by answer rather than by demurrer, they had waived a defense which they had asserted at the earliest opportunity. We shall not so hold, inasmuch as the Code sections relied on by appellant do not require it.

The record presents no other points requiring notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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158 Cal. 646

In re CLAIBORNE'S ESTATE. (Sac. 1,864.)

(Supreme Court of California. Nov. 28, 1910.)

1. Wills (§ 577*)—Provisions—Effect.

If a will is ineffectual to dispose of property, a provision thereof that testator desired his property should be considered and treated as community property could not be carried out; but the property would be regarded as community or separate property, according to the facts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1257; Dec. Dig. § 577.*]

2. Wills (§ 577*)—Validity—Effect.

Testator, after revoking prior wills, provided that in the administration of his estate he wished all of his property to be treated and considered as community property, adding the clause, "So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes," and then nominated executors. *Held*, that such will should be construed as a valid disposition of testator's property, giving to the wife such portion thereof as she would take under the law of succession, if the property was community property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1257; Dec. Dig. § 577.*]

Department 1. Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Judicial settlement of the estate of Gilbert B. Claiborne, deceased. From a decree of final distribution, certain heirs appeal. Affirmed.

Geo. F. Buck and J. M. Kile, for appellants. D. M. Young and J. P. Langhorne, for respondents.

ANGELLOTTI, J. This is an appeal from the decree of final distribution in the matter of the estate of Gilbert B. Claiborne, deceased. The deceased died testate, his will being as follows:

"I, Gilbert B. Claiborne, of the city of Stockton, California, do hereby make and declare this my last will and testament, hereby revoking and declaring void all wills and codicils to the same by me heretofore made. In the administration of my estate it is my wish that all property shall be considered and treated as community property.

"So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes.

"I nominate and appoint Richard C. Minor, together with my wife, as executors and request that no bonds or undertakings be required of them or either of them.

"In witness whereof, I have written this wholly with my own hand and signed the same this 24th day of February, A. D. 1905, at Stockton, California.

"Gilbert B. Claiborne."

He left no descendants, and his only heirs at law were Marian F. Claiborne, his surviving wife, and the children of several deceased brothers. All the property left by deceased was his separate property. The lower court determined that under the terms of the will the surviving wife was entitled to have distributed to her an undivided three-fourths of all the property, and that the children of the deceased brothers were entitled to the remaining one-fourth. From the decree made in conformity with this determination, some of said children have appealed, claiming that the surviving wife is entitled to only one-half of the property and that the children of the deceased brothers of deceased are entitled to one-half of the property.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The theory of appellants is that deceased died intestate so far as any distribution of his property by will was concerned; the claim being that the only effectual part of his will was the provision appointing executors, and that the property passed under the law of succession as separate property, one-half to the widow and one-half to the children of his deceased brothers. It is clear that, if the will was not effectual to dispose of the property, the claim of appellants must be held to be well founded; for, despite the declaration in the will of the wish of the testator that his property should be considered and treated as community property, such property would have to be regarded and treated by the courts as separate property if found to be such (Estate of Learned, 156 Cal. 309, 104 Pac. 315; Estate of Granniss, 142 Cal. 4, 75 Pac. 324), and under the law of succession the separate property of deceased would pass as claimed by appellants (Civ. Code, § 1386, subd. 2).

It appears very clear to us, however, that the will should be construed as giving to the wife such portion of the property as she would take under the law of succession if the property was community property, which would be, under the circumstances of this case, the death of the husband without descendants, three-fourths of all the property. Estate of Boody, 113 Cal. 682, 688, 45 Pac. 858; section 1402, Civ. Code. It is an elementary rule in the construction of wills that no particular words are essential to create a legacy or devise, and that the essential thing is that the intention of the testator to thereby make a testamentary disposition clearly appears. Where the will clearly shows such an intention, the courts will carry it into effect, if this can be done consistently with the rules of law applicable. For instance, in Estate of Barclay, 152 Cal. 753, 93 Pac. 1012, a provision devising the residue of real estate to certain named parties "after my son * * * has been paid what he has paid for me at various times" was held to clearly show a legacy to the son to the extent of the amount of money he had paid out for the testator. In the will before us the testator, after declaring that he is making his will, declares: "In the administration of my estate it is my wish that all property shall be considered and treated as community property So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes." These are the only provisions of the will referring in any way to his property, and unless they are to be considered a testamentary disposition we have a case of total intestacy, a construction not to be favored if any other construction is reasonably possible. Civ. Code, § 1326; Le Breton v. Cook, 107 Cal. 410, 416, 45 Pac. 552. The theory of an intended testamentary disposition in favor of the wife is, in our judgment, the only reasonable theory that can be based on the language used. It cannot reasonably be denied, and learned counsel for appellants do not deny, that the will clearly shows the intention of the testator that his wife should be given on distribution such portion of his property as she would have taken if it were community property and he had died intestate.

This intention being made clearly to appear in the document which testator declares to be his will, we do not see that there is anything left to be said on behalf of appellants. The provision is as effectual as a testamentary disposition as it would have been had it read: "I give, bequeath, and devise to my wife so much of my property as she would have received if all my property was community property and I had died intestate." Learned counsel rely on the language, "So much of my will I make and declare this day to protect my wife, not yet having been fully advised of my further purposes," as showing lack of intent on the part of the testator to then fully dispose of his property; but, if we concede this to be so, the language certainly shows no lack of intent so far as disposition to the wife is concerned. It may be that, as to the one-fourth that was not to go to the wife, it could reasonably be held that there was no testamentary disposition. But as to the wife and the share she shall take there is no room for doubt as to the intention of the testator. Whatever might ultimately be done with the remainder, she was to have the portion already specified. Any other construction would make the act of the testator in executing the will an absolutely idle one so far as any protection to the wife was concerned. She would take under the will exactly what she would take without the will. But the will clearly shows the intention that she shall have something more than the portion she would take of the separate estate under the law of succession, and the amount that she shall take is clearly defined.

The decree appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

158 Cal. 699

BRODE et al. v. GOSLIN et al. (L. A. 2,677.)

(Supreme Court of California. Dec. 1, 1910.)

1. APPEAL AND ERROR (§ 494*) — RECORD — BILL OF EXCEPTIONS.

On appeal from orders denying a new trial and refusing to vacate a judgment, the orders need not be contained in any bill of exceptions or statement, as, under Code Civ. Proc. §§ 951, 952, copies of the orders certified by the clerk, together with a copy of the notice of appeal, are sufficient to sustain the appeal, though appellant may not succeed without a bill of exceptions or statement.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 494.*]

2. APPEAL AND ERROR (§ 339*)—TIME TO APPEAL.

An appeal from an order denying a motion to vacate a judgment, taken within 60 days after the making of the order, as allowed by Code Civ. Proc. § 939, subd. 3, is in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887; Dec. Dig. § 339.*]

3. APPEAL AND ERROR (§ 351*)—TIME TO APPEAL.

Under Code Civ. Proc. §§ 941a, 941b, authorizing, as an alternative mode of appeal, a notice of appeal, to be filed within 60 days after notice of entry of the judgment or order, and providing that if no notice of entry is given, the notice of appeal must, under any circumstances, be filed within six months after entry of the judgment or order, an appeal taken April 6th, from an order denying a new trial made January 10th preceding, where a notice of entry of the order was not served, was taken in time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 351.*]

4. APPEAL AND ERROR (§ 117*)—ORDERS APPEALABLE.

An appeal does not lie from the refusal of the trial judge to settle a bill of exceptions, on the ground that the same has not been presented within the time allowed by law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 117.*]

5. APPEAL AND ERROR (§ 117*)—ORDERS APPEALABLE.

An order denying an application by a party who has failed to comply with the law in the presentation of his bill of exceptions, for relief under Code Civ. Proc. § 473, authorizing the court to relieve one from proceedings taken against him through his mistake, etc., is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 117.*]

6. EXCEPTIONS, BILL OF (§ 53*)—COMPELLING SETTLEMENT—PROCEEDINGS.

A party who has not complied with the law regulating the presentation of proposed bills of exceptions is not entitled to have his proposed bill settled, unless he is relieved by the court from his default, as authorized by Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 53.*]

7. EXCEPTIONS, BILL OF (§ 53*)—COMPELLING SETTLEMENT—MANDAMUS.

Where a party has complied with the law regulating the presentation of bills of exceptions, and the court erroneously concludes that he has not, and refuses to settle the bill proposed, on that ground, the exclusive remedy is mandamus to compel the settlement.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80-88; Dec. Dig. § 53.*]

8. APPEAL AND ERROR (§ 655*) — RECORD — STRIKING MATTER FROM TRANSCRIPT—HEARING ON MERITS.

The court will not strike out matters from the transcript on the ground that the same are not contained in any bill of exceptions or statement, or authenticated in any manner allowed by statute or rules of the court, in advance of a hearing of the appeal on the merits; but if, on a consideration of the appeal, the matters are found to have no proper place in the record, they will be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 655.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. W. Brode and others against William G. Goslin, and others. From orders denying a motion for a new trial, and a motion to vacate the judgment, and refusing to settle the bill of exceptions, defendant, John G. Ritter, appealed. Respondents move to strike out certain matters contained in the transcript on appeal, and to dismiss the appeals. Motion to dismiss appeal from order refusing to settle bill of exceptions granted, and the other motions denied.

Randall & Gaines, for appellant. George H. Moore, for respondents.

ANGELLOTTI, J. Motion by respondents for an order striking out certain matters contained in the transcript on appeal, and also to dismiss appeals taken by defendant Ritter from an order denying his motion for a new trial, from an order denying his motion to vacate the judgment in said action, and from an order refusing to settle a bill of exceptions to be used on appeal.

The only grounds urged for the dismissal of the appeals from the order denying a new trial and the order denying the motion to vacate the judgment are that the appeals were not taken in time, and that the orders appealed from are not contained in any bill of exceptions or statement.

As to the latter ground. It is not necessary that the orders appealed from should be contained in any bill of exceptions or statement. Copies of the orders appealed from, certified by the clerk, together with a copy of the notice of appeal, are all that are requisite to sustain the appeal from such orders. Code Civ. Proc. §§ 951, 952. It may be that without a bill of exceptions or statement showing facts upon which error in making the orders is apparent, the appellant is not likely to succeed upon his appeal, but this goes to the question of the merits of the appeal and does not warrant a dismissal.

The order denying the motion to vacate the judgment was made February 21, 1910, and the appeal therefrom was taken April 6, 1910. This was within the 60 days allowed by subdivision 3, § 939, Code of Civil Procedure. The order denying a new trial was made January 10, 1910, and the appeal therefrom was not taken until April 6, 191 which was more than 60 days from the making of the order. The record does not show, however, that notice of entry of said order was ever served on appellant's attorneys of record (see Foss v. Johnstone, 110 Pac. 294, 296), and it was expressly admitted at the argument of this motion that no such notice had ever been given. In view of the provisions relating to an alternative method of taking appeals, appellant had 60 days from the giving of such a notice within which to take an appeal, provided that the appeal must in any event be taken within 6 months. Code Civ. Proc. §§ 941a and 941b. The appeal therefore was in time.

The settlement of a proposed bill of exceptions was refused by the judge of the trial court on the ground that the same had not been presented within the time allowed by law. It is claimed that appeal is not the remedy for such a refusal, and, in view of the now well-established rule in this state, this claim must be held good. We are not dealing with the case of a denial of a party's motion for relief under section 473, Code of Civil Procedure, where he has failed to comply with the law in the matter of presenting his proposed bill of exceptions. It appears to be well settled that an order denying such an application is appealable. There was no such application for relief in this case, but only a mere refusal of the trial judge to settle the proposed bill. If appellant had not complied with the requirements of the law in the matter of the presentation of his proposed bill of exceptions, he was not entitled to have the same settled, unless relieved by the court from his default, under the provisions of section 473, Code of Civil Procedure. If he had complied with the law, and the trial judge erroneously concluded that he had not so complied, and therefore refused to settle the bill, such wrongful refusal is not the subject of an appeal, and the proper and exclusive remedy for such wrongful refusal is mandamus to compel the settlement. Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176; Whipple v. Hopkins, 119 Cal. 349, 51 Pac. 535; Machado v. Kinney, 135 Cal. 354, 67 Pac. 331; Hudson v. Hudson, 129 Cal. 141, 61 Pac. 773; Miller v. American, etc., Co., 2 Cal. App. 271, 274, 83 Pac. 289. See, also, Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63; Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

Respondents also move for an order striking out and expunging from the transcript on appeal certain matters contained therein, which it is claimed cannot be considered on the appeal, because not contained in any bill of exceptions or statement, or authenticated in any manner allowed by statute or the rules of this court. This court cannot well entertain and consider motions of this character in advance of a hearing of the appeal on its merits. If upon a consideration of the appeal it be found that the matters referred to have no proper place in the record, they will be disregarded.

The appeal from the refusal of the trial judge to settle appellant's proposed bill of exceptions is dismissed. In all other respects, respondents' motion is denied.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

158 Cal. 650

PEOPLE v. GLASS. (Cr. 1,535.)

(Supreme Court of California. Nov. 30, 1910.)

1. Indictment and Information (§ 154*) — Defects—Waiver—Failure to Demur.

Under Pen. Code, § 1012, all defects appearing on the face of the indictment, save want of jurisdiction over the subject-matter, and that the facts stated do not constitute a public offense, are waived, unless the indictment be attacked for such defects by demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

2. Criminal Law (§ 970*)—Mode of Objection—Motions—Arrest of Judgment.

While, under Pen. Code, § 1185, defects in the indictment waived by failure to demur cannot be made a ground for arrest of judgment, the same objections that may be raised by demurrer may also be raised on motion in arrest of judgment if not waived by failure to demur.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445–2462; Dec. Dig. § 970.*]

3. Criminal Law (§ 1088*)—Appeal—Record—Demurrer—Statutes—Construction.

Pen. Code, § 1207, provides that when judgment on a conviction is rendered the clerk must enter the same in the minutes, and must, within five days, annex together and file the following papers, which constitute a record of the action: "The indictment or information, and a copy of the minutes of the plea or demurrer. *Held* that, there being no such thing as a minute of the demurrer, the word "and" must be substituted for "or," the statute meaning that the record must contain the indictment or information, the demurrer and a copy of the minutes of the plea, etc., therefore, on such judgment the demurrer need not be contained in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1088.*]

4. Bribery (§ 6*)—Indictment—Sufficiency.

Under Pen. Code, § 165, punishing one offering a bribe to any member of any board of supervisors, etc., with intent to corruptly influence such member, etc., an indictment charging defendant with giving one L. a bribe, with intent to corruptly influence said L. as such member of said board of supervisors in his action, etc., as such member of said board, etc., necessarily carried with it the fact of knowledge in defendant that L. was a member of the board, and an express allegation that defendant knew that L. was a member of the board was unnecessary.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5–8; Dec. Dig. § 6.*]

5. Indictment and Information (§ 110*) — Sufficiency — Following Statute — "Bribe"—"Unlawfully"—"Corruptly."

Pen. Code, § 7, subd. 6, defines the word "bribe" as anything of value or advantage, etc., given with a corrupt intent to influence "unlawfully" the person to whom it is given in his action, vote, etc., in any public or official capacity. Section 165 punishes one giving a bribe to any member of any board of supervisors with intent to "corruptly" influence such member in his action on any matters, etc. *Held*, that the use of the word "unlawfully" as qualifying "to influence" in section 7, adds nothing to the meaning of section 165, and hence an indictment for bribery charging an intent to "corruptly" influence, etc., by giving money, etc., was sufficient, though the word "unlawfully" was not used.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 5; Dec. Dig. § 110.*

For other definitions, see Words and Phrases, vol. 1, p. 867; vol. 2, p. 1630; vol. 8, pp. 7191–7193.]

6. Bribery (§ 6*)—Indictment—Sufficiency.

Under Pen. Code, § 950, subd. 2, requiring an indictment to contain a statement of the acts constituting the offense in ordinary language so that a person of common understanding could know what was intended, and section 959, subd. 6, substantially to the same effect, an indictment for bribery charging that on a certain day one L. was a member of the board of supervisors of the city and county of San Francisco; that there was then pending before said board a matter relating to a franchise for constructing, etc., a telephone system in said city and county, and an application made by the H. Telephone Company, and a bill and ordinance relating to the same, etc.; that on said day defendant did unlawfully, etc., give said L. as a bribe $5,000 with the corrupt intent to corruptly influence said L. as such member, etc., in his action and in his official vote in the aforesaid matter, etc.—was sufficient.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5–8; Dec. Dig. § 6.*]

7. Bribery (§ 6*)—Indictment—Sufficiency.

Under Pen. Code, § 165, punishing one who bribes, etc., a member of certain boards with intent to corruptly influence such member in his action on any matter before such board, an indictment showing that defendant gave a bribe with intent to influence L. in his vote and action as a member of the board of supervisors of, etc., on an application for a telephone franchise, sufficiently showed that the act intended to be influenced was an official one, the court knowing as a matter of law that such board may grant such franchises, and a vote by a member of the board on such an application being therefore necessarily an official act, though it did not specifically state what acts L. was to do or not to do.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5–8; Dec. Dig. § 6.*]

8. Criminal Law (§ 369*)—Evidence—Other Offenses—Collateral Facts.

The rule that evidence of the commission of a different offense cannot be admitted in proof of the offense for which defendant is on trial excludes all evidence of collateral facts or matters which are incapable of offering a reasonable presumption or logical inference as to the principal fact or matter in dispute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

9. Bribery (§ 10*) — Evidence—Motive—Intent.

In a trial of defendant for bribing one L., a member of the board of supervisors, with intent to influence his official action in the matter of granting a franchise to the H. Telephone Company, evidence that defendant or the company of which he was general manager attempted to prevent a rival company from obtaining a franchise in another city, and attempted to forestall competition in such city, tended only to degrade defendant and was inadmissible for the purpose of showing motive or intent.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 9; Dec. Dig. § 10.*]

10. Criminal Law (§ 371*)—Evidence—Other Offenses—Motive.

While evidence as to offenses other than the one for which defendant is on trial may be given to show motive, the motive must grow out of the collateral crime, it not sufficing that both crimes spring from the same motive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

11. Criminal Law (§ 1169*)—Appeal—Harmless Error.

Error, if any, in the admission of evidence was harmless, where accused was not prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

12. Criminal Law (§ 338*)—Evidence—Circumstantial Evidence.

Where circumstantial evidence is relied on to connect a defendant with a crime, much must be left to the discretion of the trial court in admitting it, and it is not necessary that each circumstance of itself would to every person appear to connect defendant with the offense, it sufficing if such circumstances, considered in relation to other facts and circumstances in evidence, may fairly tend to such result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 753; Dec. Dig. § 338.*]

13. Bribery (§ 7*)—Issues, Proof, and Variance.

Under an indictment charging the payment of $5,000 as a bribe, proof of the payment of such sum in two payments under an agreement to pay and to receive $5,000 presents no question of variance as to the thing paid as a bribe.

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 7.*]

14. Criminal Law (§ 369*)—Evidence—Collateral Matters — Other Offenses—Evidence Tending to Degrade.

The rule excluding evidence as to other offenses in criminal trials also exclude all evidence tending to degrade defendant, to arouse the prejudice of the jury, to divert their minds from the real issues in the case, or to persuade them by matters not judicially cognizable that defendant for reasons other than those contained in legitimate evidence was more likely to have committed the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

15. Bribery (§ 10*)—Evidence.

In a trial for bribing one L., a member of the board of supervisors, with intent to influence his official action in an application for a franchise for the H. Telephone Company, a witness testified that one R. was the boss of the board of supervisors, with a representative thereon who had distributed money to members of the board with reference to another ordinance, but it appeared that R. was not employed by defendant in furtherance of the conspiracy to bribe the supervisors regarding the H. Company, that he took no part in the matter of their bribery, and that his services were actually enlisted in behalf of an opposition company, testimony tending to show that defendant was responsible for the employment of R. by such company was inadmissible, its purpose being to degrade defendant and prejudice him in the eyes of the jury.

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 10.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

16. Criminal Law (§ 372*)—Evidence—Other Offenses.

In a trial for bribing one L., a member of the board of supervisors, with intent to influence his official vote on an application for a franchise, evidence that 10 of L.'s fellow members of the board were bribed in the same manner and by the same person as L. was admissible, to show that the specific act of bribery charged was but a part execution of a scheme contemplating the bribery of a sufficient number of supervisors to prevent the granting of the franchise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 833; Dec. Dig. § 372.*]

17. Criminal Law (§ 673*)—Trial—Instructions—Limitation of Evidence.

In a bribery case, where certain evidence was admissible only to show that the specific act of bribery charged was but a part execution of one conspiracy, it was error to refuse to instruct that the evidence was received for such purpose only, and that it could not be considered to show that defendant probably committed the crime charged by showing that at other times he had committed like crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872–1876; Dec. Dig. § 673.*]

18. Criminal Law (§ 673*)—Evidence—Other Offenses — Instructions — Limiting Purpose for Which Received.

When evidence of other crimes is admitted it should be carefully guarded by instructions so that its operation may be confined to the legitimate purposes for which it is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872–1876; Dec. Dig. § 673.*]

19. Criminal Law (§ 788*) — Trial — Witnesses — Refusal to Testify — Instructions.

In a bribery trial, where the closing argument of the prosecuting attorney was calculated to impress on the jury that the evidence a witness refused to give would have tended to convict defendant, and that the witness' refusal to tell what he knew was to protect crime, it was error to refuse instructions that the jury could not indulge in any presumption unfavorable to defendant because of the refusal of any witness to testify, and that the refusal of an alleged co-conspirator or agent of the conspiracy to testify should not be considered in determining the guilt or innocence of defendant, and the jury should not presume from such refusal that the testimony of the witness, if given, would be against the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1855; Dec. Dig. § 788.*]

20. Criminal Law (§ 785*)—Trial—Instructions—"Fears or Hopes."

In a criminal case, where the court read to the jury Code Civ. Proc. § 1847, providing that the presumption that a witness speaks the truth may be repelled by the manner in which he testifies, etc., or by evidence affecting his character for truth, honesty, or integrity, or his motives, etc., it was not error to refuse an instruction that in passing on the credibility of witnesses the jury may consider their motives, fears or hopes, if any have been proved, "fears or hopes," but expressing a modification of "motives," and adding nothing to the meaning of the section.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774–1781, 1889–1894; Dec. Dig. § 785.*]

Shaw and Angellotti, JJ., dissenting. Sloss, J., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Louis Glass was convicted of bribery, and from the judgment and an order denying a new trial, he appealed to the District Court of Appeal. Judgment and order reversed, and cause remanded for new trial, and on rehearing in the Supreme Court in bank, the same disposition of the case was made.

See, also, 99 Pac. 553.[1]

The opinion of Hall, J. (concurred in by Cooper, P. J., and Kerrigan, J.), in the District Court of Appeal, was as follows:

Defendant was charged by indictment with the crime of bribery, under section 165 of the Penal Code, and having been convicted of the charge he has appealed to this court from the judgment and the order denying his motion for a new trial. After his conviction, and before judgment was pronounced, the defendant made a motion in arrest of judgment, which was by the court denied. As this motion attacked the sufficiency of the indictment, it is proper that the ruling of the court thereon be first considered on this appeal.

The motion was based upon certain defects or alleged defects in the indictment. In this connection it is insisted by respondent that in the condition of the record in this case, this court can only consider whether or not the court had jurisdiction over the subject-matter of the indictment, and whether or not the indictment states facts sufficient to constitute a public offense. Sections 1012, 1185, Pen. Code. No demurrer is contained in the bill of exceptions, and the transcript as originally filed in this court did not, in the judgment roll, or "record of the action," as it is denominated in the statute (section 1207, Pen. Code) contain the demurrer. Upon suggestion of diminution of the record, this court permitted appellant to file a certified copy of the demurrer, reserving, however, for determination at the final hearing the question as to whether or not such demurrer may be properly considered as a part of the record on this appeal. All defects appearing upon the face of the indictment, save want of jurisdiction of the court over the subject-matter of the indictment, and that the facts stated do not constitute a public offense, are waived unless the indictment be attacked, for such defects, by demurrer. Section 1012, Pen. Code. Defects, waived by failure to demur, cannot be made a ground for arrest of judgment, but the same objections that may be raised by demurrer may also be raised on motion in arrest of judgment if not waived by a failure to demur. Section 1185. It is thus apparent that it is important for this court to be informed as to the contents of the demurrer, in order to determine whether or not the court erred in overruling the motion in arrest of judgment. The proper scope of the motion depends upon what objections were raised by the demurrer.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 9 Cal. App. xiii.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Respondent contends that the demurrer is no part of the record on appeal, and cannot be considered by this court unless contained in a bill of exceptions; citing People v. Long, 121 Cal. 494, 53 Pac. 1097, People v. Druffel, 3 Cal. App. 731, 86 Pac. 907, and sections 1172 and 1174, Pen. Code. On the other hand, appellant insists that the cases cited have no application to a case where a judgment on conviction is rendered, and that under section 1207, Pen. Code, the demurrer in such case is a part of the record of the case, and as such must be transmitted to the appellate court after the taking of the appeal. Section 1246, Pen. Code.

In People v. Long, supra, the appeal was by the people from an order sustaining defendant's demurrer, and ordering that the case be resubmitted to the grand jury. There had been no judgment of conviction rendered, and the court pointed out that the minute entry of the order sustaining a demurrer could get into and become a part of the record on appeal only by virtue of section 1207. The court simply held that where there has been no judgment of conviction "the statute does not provide for a *judgment roll or a record of any kind*, except through a bill of exceptions." (Italics are ours.) The court did not attempt to determine in the Long Case what shall constitute the "record of the case," or the "judgment roll," as it is usually called by the profession, when a judgment of conviction has been rendered.

The case of People v. Druffel, supra, decided by this court, was, like the Long Case, an appeal by the people upon demurrer sustained, and perforce this court simply followed the doctrine of the Long Case.

On the other hand, People v. McPherson, 6 Cal. App. 266, 91 Pac. 1098, was an appeal by defendant after judgment rendered on a conviction, and the court there pointed out that the doctrine of People v. Long, supra, has no application to such a case, and proceeded to examine and pass upon the ruling upon the demurrer, although the same was not contained in any bill of exceptions, but appeared in the judgment roll only.

Section 1207 of the Penal Code provides that: "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, * * * and must within five days annex together and file the following papers, which constitute a record of the action:

"1. The indictment or information, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The written instructions given, modified or refused, with the indorsements thereon, and the certified transcript of the charge of the court; and

"4. A copy of the judgment."

It is the meaning of the language of subdivision 1 that is involved in this matter. It is contended by respondent that the word "demurrer" should be read as qualified by "a copy of the minutes of the." In other words, that the subdivision may be properly paraphrased thus: "The indictment or information, and a copy of the minutes of the plea or (and) a copy of the minutes of the demurrer." It may be that this meaning does conform most nearly to the strict grammatical construction of the clause, and yet we do not think it correctly gives the meaning of the clause as intended by the Legislature. It is perfectly obvious, we think, that the word "and" must be substituted for the word "or." It is hardly conceivable that the Legislature intended to invest a clerk, a ministerial officer of the court, with a discretion to select either a copy of the minutes of the plea, or "a copy of the minutes of the demurrer," as making a part of the record of the action. And yet this conforms strictly to the grammatical construction of the clause. "And" must be substituted for "or." What is meant by the word "demurrer," and by what, if any, words it is qualified, must be determined by the entire section, read in the light of its manifest purpose, and other provisions of the law bearing upon the subject.

The primary purpose of this section is evidently to cause to be annexed together, and thus preserved in the form of a judgment roll, such papers as shall show what issues were presented for determination, and the result of such determination. The first pleading in a criminal action, brought in the superior court, is the indictment or information, which must be in writing. The original indictment under section 1207, Pen. Code, clearly becomes part of the judgment roll. The next pleading is the demurrer, and this also must be in writing. The demurrer must be in writing and filed. Section 1005, Pen. Code. Strictly speaking, there is no such thing as a minute of the demurrer. It speaks for itself. Doubtless the clerk must enter in his minutes the fact of its presentation and filing and the action of the court thereon. Section 1007, Pen. Code. But none of these minute entries can in strictness be properly called a minute of the demurrer. There is no such thing as a minute of the demurrer. The demurrer speaks for itself.

The next pleading is the "plea," and may be of four kinds (section 1016, Pen. Code), and is not in writing, but must be oral, and entered upon the minutes of the court in certain prescribed forms. Section 1017, Pen. Code. The form of each plea that may be made to an indictment being given by the statute, the clerk can have no difficulty in making the proper minute entries. The pleas being oral, the only way they can become a part of the judgment roll is by putting into the judgment roll a copy of such minutes. These in connection with the indictment or information, show what issues of fact were presented for determination. On the other hand, as the demurrer, like the indictment, must be in writing and filed with the clerk, there is no reason why it may not be, like the original indictment, put into the judgment roll as an original document, and thus, in connection with the indictment, show what issues of law were presented for determination. We think that such is the meaning and purpose of the section under discussion. To so hold does not entail any great departure from the strict grammatical meaning of the language employed, and produces a result reasonable and consistent with the manifest purpose of the section read as a whole. Certain it is that when the Legislature provided that the clerk should annex together and file "The indictment or information, and a copy of the minutes of the plea or (and) demurrer," it intended that some document relating to the demurrer should be annexed and filed as a part of the judgment roll. It could not have meant "a copy of the minutes of" the demurrer, for, as we have seen, the law makes no provision for any minutes of the demurrer. There are minutes of the plea expressly required to be entered, but there are, properly speaking, no minutes of the demurrer provided for. The demurrer must, like the indictment, be in writing and filed. The minute entry of the action of the court allowing or disallowing the demurrer (section 1007, Pen. Code), is in no proper sense a minute of the demurrer.

While the legislative purpose is clumsily expressed, we are satisfied that it is sufficiently clear that the record of the action, or judgment roll, as it is commonly called, should contain the indictment or information, the demurrer, and a copy of the minutes of the plea, together with the other papers provided for in subdivisions 2, 3 and 4 of section 1207, Pen. Code. To read the word "demurrer" in section 1207 as qualified by "a copy of the minutes of the" would be to convict the Legislature of requiring the clerk to put something into the judgment roll that has no existence under the law, for, as we have before said, there can be no "minutes of the demurrer." There may, however, be a demurrer, and it is this that the law intends shall be annexed to the indictment, and form a part of the record of the action.

We do not think there is anything in sections 1172, 1173, and 1174, Pen. Code, that militates against the conclusion we have reached as to the scope of section 1207, Pen. Code. Sections 1172 and 1173 enumerate seven classes of decisions of the court to which exceptions may be reserved, among which are the decision of the court in allowing or disallowing a demurrer, or in granting or refusing a motion in arrest of judgment. Section 1174 fixes the time and the procedure for the settlement of a bill of exceptions upon any of these decisions, but throw no light upon what matters become a part of the "record of the case" without being included in the bill of exceptions. This is provided for by section 1207, under which, as we have shown, the indictment, the demurrer, and the plea, as set forth in the copy of the minutes of the plea, are a part of the record of the case.

This brings us to the consideration of the action of the court in denying defendant's motion in arrest of judgment. This motion is set forth in the bill of exceptions, and was based upon the same objections to the indictment as were made by the demurrer appearing in the judgment roll. It thus appears that none of the objections raised on the motion had been waived by a failure to raise such objections by demurrer. Section 1185, Pen. Code.

The indictment is framed under section 165 of the Penal Code, and, omitting the formal parts, is as follows: "That on the 15th day of March, A. D. 1906, one Thomas F. Lonergan was, and at all times herein mentioned has been, a duly elected, qualified and acting member of the board of supervisors of the said city and county of San Francisco, state of California; that there was then and there pending before the said board of supervisors a matter and subject relating to a franchise for constructing, maintaining and operating a telephone system in the said city and county of San Francisco, and an application made June 12, 1905, by the Home Telephone Company of San Francisco, a corporation, for such franchise, and a bill and ordinance relating to the same, which said ordinance was on the 1st day of October, 1906, passed and adopted by the said board of supervisors, and was entitled an Ordinance 'Granting to the Home Telephone Company of San Francisco a franchise to construct, maintain and operate a telephone system in the city and county of San Francisco, and to construct, maintain and operate through, along, under and in the public streets, alleys and highways of said city and county poles, wires, cables, underground conduits and other appliances for the purpose of transmitting sound, signals and conversation by means of electricity or otherwise;' that on the said 15th day of March, A. D. 1906, at the said city and county of San Francisco, state of California, and while the said matter and subject were pending before the said board of supervisors, the said Louis Glass did willfully, unlawfully, feloniously and corruptly give to said Thomas F. Lonergan, while the said Lonergan was such member of the said board of supervisors, a bribe, to wit, the sum of five thousand ($5,000) dollars, in lawful money of the United States of America, as a bribe, with the willful, unlawful, felonious and corrupt intent in him, the said Louis Glass, to corruptly influence said Thomas F. Lonergan as such member of said board of supervisors, in his action, and in his official vote, opinion, judgment and action, as such member of said board of supervisors, in and upon the aforesaid matter and subject then pending before said board of supervisors as aforesaid, and which was afterward to be considered, and was considered, by said board of supervisors," etc.

It is first objected that it is not alleged that defendant knew that Lonergan was a member of the board of supervisors. The statute under which the indictment was drawn (section 165, Pen. Code) does not expressly require that the defendant know the person bribed to be a member of any board of supervisors. The language of the statute in this regard is "with intent to corruptly influence such member in his action on any matter or subject pending before, or which is afterward to be considered by, the body of which he is a member." The language of the indictment carefully follows this language of the statute, and we think is all that is required in this respect.

The allegation of the indictment that the bribe was given to Lonergan by defendant "with intent in him, the said Louis Glass, to corruptly influence said Thomas F. Lonergan, as such member of said board of supervisors, in his action, and in his official vote, opinion, judgment and action, as such member of said board of supervisors," necessarily carries with it the fact of knowledge in Glass that Lonergan was a member of such board. To a person of common understanding, when it is charged that a defendant gave money to a member of a board of supervisors with intent to influence him as such member of said board of supervisors in his official vote, judgment, and action as such member of said board of supervisors, it clearly appears that said defendant knew such person to be a member of said board. This is the view taken of a similar allegation, drawn under a similar statute, in State v. Dankwardt, 107 Iowa, 704, 77 N. W. 495. The case of State v. Howard, 66 Minn. 309, 68 N. W. 1096, 34 L. R. A. 178, 61 Am. St. Rep. 403, does support the contention of defendant, but though it was cited in State v. Dankwardt, supra, it was not there followed. Neither do we think it should be followed. The other cases cited by defendant on this point are cases for uttering forged instruments, assaults on public officers, and the like, where there was nothing in the indictment that necessarily or at all imported knowledge on the part of the defendant of the forged character of the instrument, or the official character of the person assaulted. In the case at bar the language of the indictment not only follows the language of the statute, but, to a person of common understanding, necessarily imports knowledge on the part of the defendant of the official character of the person bribed.

It is next urged that the indictment fails to state an offense because it is not alleged that the money was given to influence "unlawfully" said Lonergan as such member of said board. The language of the indictment is "with the willful, unlawful, felonious and corrupt intent in him, the said Louis Glass, to corruptly influence said Thomas F. Lonergan," etc. This fully covers the language of section 165, Pen. Code, which is: "Every person who gives or offers a bribe to any member of any * * * board of supervisors * * * with intent to corruptly influence such member in his action on any matter," etc. The word "unlawfully" is not used in this section to qualify the verb "to influence," but the word "corruptly" is used instead. But this section does not specify of what the bribe may consist, and appellant points to subdivision 6 of section 7, Pen. Code, as defining "bribe." It is there said: "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote or opinion, in any public or official capacity." It is manifest that the principal and particular purpose of this provision of the statute was to define the word "bribe" used as a noun, and to indicate what things may be given or accepted as a bribe. Section 165 relates particularly to the bribery of members of boards of supervisors and similar boards. The use of the word "unlawfully" as qualifying "to influence" in subdivision 6 of section 7, adds nothing to the meaning of section 165. It is inconceivable that any officer may be corruptly influenced in his official action by the giving to him of money without unlawfully influencing him. If defendant had the intent to corruptly influence Lonergan, as a member of the board of supervisors, by giving him money, he had the intent to unlawfully influence him in so doing. There can be no corrupt influencing of a member of a board of supervisors in his official action, by the giving to him of money, which is not an unlawful influencing of such member. There can be no intent to corruptly influence an officer in his official capacity, by giving to him money, that is not an intent to unlawfully influence such officer in such action. The contention of appellant upon this point cannot be sustained.

The indictment is also attacked for uncertainty in several particulars. Under this head it is claimed that it does not state with certainty what matter and subject was then pending before the board of supervisors, or with what intent the bribe is alleged to have been given. While the indictment in this regard is not a model to be commended, we think that from the language of the indictment any person of common understanding would know that an application, made June 12, 1905, by the Home Telephone Company of San Francisco, a corporation, for a franchise for constructing, maintaining, and operating a telephone system in the said city and county of San Francisco, was pending before said board, and that the bribe was given with intent to influence said Lonergan in his action as a member of said board on said application, and in this respect the indictment is sufficient. Section 950, subd. 2, Pen. Code; section 959, subd. 6, Pen. Code; People v. King, 125 Cal. 370, 58 Pac. 19. It is equally clear that the indictment charges that the matter in regard to which the offense was committed was not only then pending, but was afterwards to be considered. A matter may be "to be afterwards considered" that is pending at a given time.

It is next urged that the indictment fails to state what acts Lonergan was to do or omit to do. In considering this objection it may be well to examine the statute with care. It is divided into two parts—the first is directed against a person who bribes or offers a bribe to a member of certain designated boards, with intent "to corruptly influence such member in his action on any matter or subject pending before, or which is afterwards to be considered by, the body of which he is a member." It appears from the indictment that the bribe was given with the intent to influence Lonergan in his vote and action as a member of said board of supervisors on the described application for the described franchise, and, we think, sufficiently shows that the act intended to be influenced was an official act. We know as a matter of law that the board of supervisors of the city and county of San Francisco has jurisdiction to grant franchises to maintain and operate telephone systems in said city and county. A vote by a member of said board as such on an application therefor would necessarily be an official act. To require the pleader to state with extreme particularity the manner in which it was intended that the person bribed should act or vote in such cases as this would often defeat the purposes of the act. In the case of People v. Ward, 110 Cal. 369, 42 Pac. 894, cited by appellant, the defect in the indictment was that it charged that defendant did give a "bribe," without in any way specifying in what the bribe consisted. The indictment thus failed to state the facts as to the bribe, in accordance with subdivision 6 of section 7, and it was for this defect that the indictment was held to be bad. No such defect appears in the indictment in the case at bar. The motion in arrest of judgment was properly denied.

Over the objections of appellant the court permitted the prosecution to introduce evidence as to acts and doings of the Home Telephone Company of Oakland and its officers and agents. The effect of this evidence was to show that in 1902 one Mr. Beasley, an attorney of San Jose, acquired a franchise to operate and maintain a telephone system in the city of Oakland, where the Pacific States Telephone & Telegraph Company, of which defendant was vice president and general manager, had a telephone system, operated in connection with its system throughout the state; that Beasley was induced to procure such franchise by one Halsey, who was a general agent of said Pacific States Telephone & Telegraph Company. This franchise was eventually assigned to the Home Telephone Company of Oakland. All the expenses of this telephone company, amounting to from $12,000 to $15,000, were furnished by Mr. Halsey. The evidence tended to show that the purpose of organizing this company, and procuring such franchise, was to forestall competition and opposition to the Pacific States Telephone & Telegraph Company.

Also, over the objection of appellant, the court permitted the prosecution to introduce a large amount of evidence in regard to proceedings had before the city council of the city of Oakland in the matter of the application of the Home Telephone Company of Alameda county to obtain a franchise for a telephone system in the city of Oakland. This evidence tended to show that the Pacific States Telephone & Telegraph Company, through its employés and an attorney employed for that purpose, opposed such application, and that its president, Mr. Sabin, who died before the bribery charged in this case occurred, signed a statement, which was read before the city council of Oakland, objecting and protesting against the granting of a franchise to the Home Telephone Company of Alameda county. At the instance of the local attorneys of the two companies a visit was made by certain members of the city council of Oakland to the city of Los Angeles, to examine the operations and workings of the different systems used in that city, and the expenses of such trip were borne equally by the two companies. It was shown that Mr. Glass met two of the councilmen of the city of Oakland at a lunch, arranged by the attorney of the Pacific States Telephone & Telegraph Company, and explained to them the merits of the system of his company (the manual system) over the system of the other company (the automatic system). Much other testimony concerning the Oakland proceedings was given over the objection of appellant. It is not suggested by any one that any of the proceedings in Oakland involved any criminal act by any person. Appellant does contend, however, that it was all irrelevant to the offense charged against defendant, and for which he was on trial, to wit, the bribery of Lonergan, as a member of the board of supervisors of the city and county of San Francisco, and for that reason should not have been permitted. It appears to us to be so. As a general rule, evidence of the commission of a different offense cannot be admitted in proof of the offense for which the defendant is on trial, and this rule excludes all evidence of collateral facts or matters which are incapable of offering a reasonable presumption or logical inference as to the principal fact or matter in dispute. People v. Lane, 100 Cal. 379, 34 Pac. 856; People v. Hurley, 126 Cal. 351, 58 Pac. 814; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am.

St. Rep. 851; People v. Tucker, 104 Cal. 440, 38 Pac. 195.

People v. Sharp, supra, is a very pertinent case in support of the contention of appellant. In that case the defendant was on trial for giving a bribe to a member of the common council of the city of New York, with intent to influence him as such member regarding an application for a franchise to construct a street railway desired by defendant. The trial court allowed evidence of an attempt to bribe an attaché of the Legislature concerning a bill that would eventually aid him in procuring the franchise concerning which he was charged with bribing the New York councilman, or, as stated in the argument addressed to the court: "Jacob Sharp was accused and brought to trial for bribing the aldermen of the city of New York, and by that means procuring the grant of a valuable right. Evidence was offered to show that not long before he had attempted to bribe another official person to do an act which, as he thought, would promote the scheme which he had so long pursued." The court held the action of the trial court to be error.

The case of People v. Hurley, 126 Cal. 351, 58 Pac. 814, is also a bribery case. Defendant was a member of a nominating convention, and was charged with offering to receive a bribe from one Imrie to vote for him for the nomination for school superintendent. The court allowed evidence that he offered to accept a bribe as a member of the same convention from another candidate for the same office, and for this error alone the judgment was reversed. The court said: "The court erred in receiving the testimony. There was no connection between the interview with Miss Thompson and that with Mr. Imrie. The only effect would be to show that he was likely to ask other candidates for a consideration for his vote or influence, or, as said by the district attorney, 'it will tend to show whether or not he approached this other candidate'; but if it had that tendency it was only because he had shown himself capable of perpetrating such offenses. There is no necessary or logical connection between the two cases." So in the case at bar, there is no necessary or logical connection between the fact that defendant, or the company of which he was general manager, attempted to prevent a rival company from obtaining a franchise in Oakland, and that he or his company attempted to forestall competition in Oakland, and the offense charged that he bribed a member of the board of supervisors of the city and county of San Francisco to prevent a rival company from getting a franchise in the city and county of San Francisco.

The attorneys for the prosecution concede that the evidence did not tend to show that the defendant committed any crime in connection with the attempt to forestall and prevent competition in Oakland, but they claim that the evidence was admissible for the purpose of showing defendant's motive. To this we cannot agree. By no reasonable hypothesis can it be said that the proceedings in Oakland furnish or prove a motive for the bribery of Lonergan. There was no causal connection between the two proceedings. Undoubtedly the primary motive for the several different proceedings was the same, to wit, the advancement of the interests of defendant's company by preventing competition. But the connection between such motives is no different from the connection that exists between the motives for several distinct larcenies committed by the same person, the motive in each case being pecuniary gain for the perpetrator of the larcenies. The defendant had the right to be tried upon the issue made by the indictment and his plea of "Not guilty," and to have all irrelevant and immaterial matters excluded from the jury, as its only effect would be to cloud the issue and injure defendant. The rule that the evidence shall be confined to the point in issue is elementary even in civil cases. In criminal cases, where the liberty of the defendant is involved, and where collateral matters often influence the jury, the necessity for the rule is much stronger. The defendant is expected to come into court prepared to meet the charge in the indictment, but cannot expect to be prepared with evidence as to any collateral matter. The rule is well established that such evidence is not admissible unless it conduces to the proof of a pertinent hypothesis which, if sustained, would logically influence the issue. To admit evidence of collateral matters that do not tend to prove either the issue, the motive, the guilty knowledge, or the probability of a theory, or the identity of the defendant, would be but to oppress the defendant by trying him on a case as to which he has not been notified, and for the trial of which he is not prepared. The indictment charges the defendant with giving a bribe in March, 1906, to a supervisor in the city and county of San Francisco. Any person of ordinary understanding would at once say that defendant had no notice by the indictment as to the many acts and the conduct of the Home Telephone Company of Oakland, in another county, which took place in 1902.

That evidence as to offenses, other than the one for which defendant is being tried, may be given to show a motive for the commission of the crime is not doubted. But the motive for the commission of the crime charged must grow out of the collateral crime. Such are People v. Cook, 148 Cal. 341, 83 Pac. 43; People v. Brown, 130 Cal. 594, 62 Pac. 1072. It is not sufficient that both crimes spring from the same motive. If so, one charged with a particular larceny might be proved guilty of many other larcenies, for all spring from the same motive—the desire for gain. So, too, a collateral crime may be proved against a defendant which shows the intent with which he did the act under investigation (People v. Wilson, 117 Cal. 688, 49 Pac. 1054; People v. Valliere, 123 Cal. 576, 56 Pac. 433), or that directly tends to show that the defendant committed the crime of which he stood charged (People v. Rogers, 71 Cal. 565, 12 Pac. 679).

There is nothing in People v. Craig, 111 Cal. 460, 44 Pac. 186, that supports the contention of respondent that this evidence was admissible. In the Craig Case defendant had testified that the killing of his wife, for which he was being tried, was accidental. To rebut this the people were allowed to prove that immediately after killing his wife he drove to the house of her father and mother, and at once deliberately killed them both. It was held that this, in connection with evidence of previous threats made by him against his wife and her family, tended to show that the killing of his wife was not accidental, but was in pursuance of a previous plan. The facts of the Craig Case bear no similarity to the conditions of this case in the matter now under discussion. The evidence as to the Oakland proceedings was clearly irrelevant to the charge upon which defendant was being tried, and the rulings permitting its introduction were clearly erroneous.

Upon the trial, evidence was given that 10 of Lonergan's fellow members of the board of supervisors were bribed in the same manner, for the same purpose, at about the same time, and by the same person, as Lonergan. Appellant insists that the court erred in allowing this evidence over his objections.

We have before stated that, as a general rule, evidence of a different offense may not be given against a person charged with a particular crime; but, as we have also before stated, there are exceptions to this rule. Where facts concerning the other offense tend in themselves to prove the defendant guilty of the offense for which he is being tried, they may be proven. The mere fact that such evidence tends to prove defendant also guilty of another crime does not exclude it, if relevant to the charge for which he is on trial. The evidence as to the bribery of the other supervisors, we think, is well within this exception to the general rule. It is not claimed by the people that defendant personally bribed Lonergan, or any other member of the board. Any money that was paid for such purpose was paid by one Halsey, who was shown to be a general agent of the Pacific States Telephone & Telegraph Company, with the special duty of attending to matters pertaining to opposition to the company. It was the theory of the people that the bribery of Lonergan was in pursuance of a conspiracy on the part of defendant and Halsey and one Zimmer, auditor of the company, to defeat the application of the Home Company by bribing the board of supervisors; that is, a working majority thereof. The bribery of Lonergan was but a part of the whole—was one step in a proceeding having one purpose and object. It was shown that checks of the company aggregating between $40,000 and $50,000 were drawn at the request of Zimmer about the latter part of February, 1906. To whom they were payable was not shown. No vouchers were furnished for these checks, and they were simply carried on tags. These tags, as well as the checks, were destroyed in the great fire of the following April. Statements of banks, however, showed that checks of the company aggregating $50,000 were paid, or the amounts thereof withdrawn from the accounts of the company as follows: Feb. 23, 1906, $5,000, $5,000, $10,000; Feb. 24, 1906, $10,000, $10,000; and Feb. 26, 1906, $10,000.

The statements from the banks show many other withdrawals, but these items are significant as being in round thousands, and as corresponding in the total to the amounts paid the supervisors. The evidence shows that for a few days only, but covering the 23d and 24th days of February, 1906, Halsey engaged three rooms in the Mills building. The application of the Home Telephone Company was to come up for action before the board of supervisors on Monday, the 26th day of February, 1906. (The board consisted of 18 members, and it required at least 10 to constitute a majority.) Lonergan testified that on Saturday, February 24, 1906, he visited Halsey at the rooms in the Mills building, found one Kraus, an assistant to Halsey, there in one room, scantily furnished, and was by him shown into an adjoining room, also scantily furnished, where he met Halsey, who gave him $4,000 in currency, and told him to vote to defeat the ordinance granting the Home Telephone Company a franchise. He took the money home and gave it to his wife, who testified that about that time her husband handed her $4,000 in currency. Eight of the other supervisors testified to going singly to Halsey's rooms in the Mills building a few days before the 26th day of February, 1906, and receiving money in currency to vote against the application of the Home Telephone Company for a franchise. Each went into Halsey's room alone, and was paid by Halsey in currency to oppose the application of the Home Telephone Company, and took his departure. No other person other than Halsey and the supervisor being paid was present at any payment. Two other supervisors were paid $5,000 in currency, each a little later, by Halsey for their friendship to his company, in the matter of the application of the Home Telephone Company. The total of the payments was $50,000, exclusive of $1,000 paid Lonergan some days prior to his visit to the Mills building. These payments were all made to carry out one plan and purpose—to secure a majority of the votes of the board of supervisors to defeat the application of the opposition company. Several of the bribed supervisors returned to Halsey in currency a part of their bribes, aggregating $7,500. It was shown that a similar amount ($7,500 or $10,000), also in currency, was returned to the cashier of the company by Halsey, and credited in reduction of the amounts charged on the tags above referred to. No rational person, with knowledge of the facts concerning the visits of, and payments to, the supervisors other than Lonergan, on learning that Lonergan also visited Halsey at the time he did, and where he did, and about the same time handed his wife $4,000 in currency, but would be impressed with the belief that Lonergan also obtained such currency from Halsey, and for the same purpose as his fellows; and this belief would be engendered without any direct evidence of any payment to Lonergan.

The facts testified to by these witnesses, in connection with other facts above mentioned, tended to show that Lonergan was bribed, and with money drawn from the funds of the Pacific States Telephone & Telegraph Company, by Halsey. "If several and distinct offenses do intermix and blend themselves with each other, the details of the party's whole conduct must be pursued." Lord Ellenborough in The King v. Whiley, 1 Lead. Crim. Cas. 185. The several briberies were to secure one result, and were part and parcel of one scheme. That the testimony in question was properly admitted is amply sustained by the following authorities: People v. Rogers, 71 Cal. 565, 12 Pac. 679; People v. Cook, 148 Cal. 341, 83 Pac. 43; People v. Craig, 111 Cal. 460, 44 Pac. 186; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; People v. Wood, 3 Parker, Cr. R. (N. Y.) 681; People v. Murphy, 135 N. Y. 455, 32 N. E. 138. The theory of the prosecution in offering said evidence, and of the court in receiving it, was that the evidence is sufficient to charge defendant with criminal responsibility for the various acts of Halsey; and the views we have expressed are based upon such theory, but we do not intimate our views as to the sufficiency of the evidence to support it.

Appellant urges that error was committed in overruling his objection to a question put to the witness King, a director of the Pacific States Telephone & Telegraph Company, as to whether he knew that a salary of $1,200 or $1,250 a month was paid to Abraham Ruef during the period covering the pendency of the application of the Home Telephone Company for a franchise, but as the answer was in the negative no harm was done by the ruling, even if it be conceded to have been erroneous.

The court did not err in allowing the district attorney, over the objection of defendant, to prove by Mr. Pillsbury the conversation held between him and the defendant concerning the employment of Mr. Ruef. Mr. Pillsbury was the head of the law department of the company; and in answer to the question objected to testified: "I called Mr. Glass' attention to something I had seen in the papers to the effect that Mr. Ruef was employed, or was to be employed, as attorney for the company, and asked him what there was in it, and he told me that Mr. Ruef was employed. That was about November, 1905. * * * I asked him if Mr. Ruef was employed. He said he was. I told him if Mr. Ruef was to be a member of the law department of the company that it would eliminate me from it, or to that effect, and he said Mr. Ruef was not employed to represent the company in connection with my department, and had nothing to do with it. That was the substance of it."

The evidence relied upon by the prosecution to connect defendant with the bribery of Lonergan was entirely circumstantial, and depended largely upon showing that he was connected with and a party to a scheme to bribe a working majority of the board of supervisors in relation to the application for the franchise which had been pending before the board for several months before the bribery was consummated.

Defendant had already drawn out from the witness Boxton evidence to the effect that Mr. Ruef was the boss of the board of supervisors, with a representative thereon who had distributed bribe money to the members of the board in reference to another ordinance. Another witness, Supervisor Phillips, testified that he had been offered a bribe by Halsey to stand by his company. Phillips answered that he could not do so unless released by the administration, or Mr. Ruef, and then left Mr. Halsey. Later in the day Halsey telephoned to him to come to the Mills building, which he did. Halsey then stated to him that from what he knew Ruef was favorable, and Phillips then agreed to stand with him, and received $2,500 in currency, and a promise of $5,000 when the Home Telephone ordinance was defeated. The prosecution had the right to contend that, from the conversation testified to by Mr. Pillsbury, the defendant was responsible for the employment of Ruef. Where circumstantial evidence is relied on to connect a defendant with a given crime, much must be left to the discretion of the trial court in admitting it. It is not necessary that each circumstance, of itself, would to every person appear to connect the defendant with the offense. It is sufficient if such circumstance, considered in relation to other facts and circumstances in evidence, may fairly tend to such result.

We do not think there is any merit in the contention made by appellant of variance between the crime charged and the crime proved. The claim of a variance as to the subject-matter for which the money was paid to influence Lonergan, is sufficiently answered by what we have said as to the sufficiency of the indictment.

As to the amount of money paid, the indictment charges a payment of $5,000. The proof showed a payment to Lonergan of $1,000 on one day, with a promise of $4,000 more, for Lonergan's friendship for the Pacific States Telephone & Telegraph Company, which was in fact paid a few days later. Proof of the payment of either $1,000 or $4,000 would have supported the substance of the charge in this regard. Proof of the larceny of $4,000 or $1,000 would sustain a charge of the larceny of $5,000. So it is perfectly clear to us that under a charge of paying $5,000 as a bribe, proof of the payment of such sum in two payments under an agreement to pay and to receive $5,000, as a bribe to do a certain thing, presents no question of variance as to the thing paid as the bribe.

Defendant requested the court to give to the jury certain instructions, numbered 4 and 5, as follows:

"(4) You have no right to indulge in any presumption or inference unfavorable to the defendant because of the refusal of any witness to testify, or the failure of any witness to testify for the prosecution."

"(5) The refusal of an alleged co-conspirator, or agent of the conspiracy, who has been placed on the witness stand, and refused to testify, should not be considered by the jury in determining the guilt or innocence of the defendant, and the jury should not presume from such refusal to testify that the testimony of the witness, if given, would be against defendant."

Both of these instructions state a correct rule of law; and that they were pertinent to the case is shown by the following circumstances: The case was submitted to the jury on the evidence introduced by the prosecution, no evidence being introduced by defendant. Evidence had been introduced tending to show that one E. J. Zimmer was the auditor of the Pacific States Telephone & Telegraph Company; that the checks, aggregating between $40,000 and $50,000, upon which the prosecution claimed the money had been drawn, with which Lonergan and his fellows had been bribed, were drawn by order of said Zimmer, and were delivered to him. When delivered to him the checks bore the signature of the treasurer of the company, but required to be further signed, by any one of the following names: "Henry T. Scott, President," "E. J. Zimmer, for the President," or "Louis Glass, Vice President." The prosecution called E. J. Zimmer as a witness, and put to him the following questions: "What were your duties as auditor?" "You testified fully before the grand jury in this matter, did you not, Mr. Zimmer?" "Mr. Zimmer, did you answer that question before the grand jury, that I have just asked you here, to wit, as to what your duties were as auditor of that company?" Mr. Zimmer refused to answer each of these questions, upon the ground that it would have a tendency to subject him to punishment for a felony. He was not compelled to answer.

In the closing argument the attorney of the people claimed that the evidence showed that Zimmer, Glass, and Halsey were each guilty of bribing Lonergan; and with reference to Zimmer he used this language: "Mr. Zimmer's name appears on the indictment as a witness before the grand jury. You have not heard what he testified to. You have not received any intimation of what he testified to, although I would have been justified, in making my opening statement in this case, to have said to you what I expected to prove by E. J. Zimmer, whom I called as a witness in this case. I did not do it, because I want to play the game square. I would have had a right to say what I expected to prove, because I had a right to expect that every citizen in the state of California would perform his duty and comply with the social compact by which he receives protection to his life, his property, his wife and his children. I had a right to expect that when Mr. Zimmer was called upon this stand as a witness, he would tell what he knew, and not protect crime by the claim that it might tend to incriminate himself. But, as I say, out of a spirit of fairness, I did not say anything in my opening statement as to what I did expect to prove by Mr. Zimmer, and therefore there is nothing before you." This language was well calculated to impress upon the jury that the evidence that Zimmer refused to give would have tended to prove the defendant guilty; that his refusal to tell what he knew was to "protect crime." No objection appears to have been made to these remarks of the district attorney, and we only advert to them because they emphasize the necessity that the requested instructions should have been given. In refusing to testify Zimmer was in the exercise of a clear right given to him by the Constitution of the state and the statute, for which under the law no inference against the defendant may be drawn.

The precise point involved in the refusal to give the instructions now under discussion was decided in People v. Irwin, 77 Cal. 494, 20 Pac. 60, where the court said: "The court also erred in refusing to instruct the jury that the refusal of the alleged conspirators, who had been placed on the witness stand and declined to testify, should not be considered by the jury in determining the question of guilt or innocence, and that the jury should not presume from such refusal to testify that the testimony, if given, would be against the defendant."

The language of the refused instruction numbered 5 is taken almost literally from the language above quoted. It contains a correct statement of the rule of law applicable to the condition of this case, irrespective of the remarks made by the district attorney, and these remarks made it all the more necessary that the requested instructions, or one embodying the rule stated, should have been given. The court erred in refusing to give the requested instructions. People v. Irwin, supra. See, also, People v. Opie, 123 Cal. 294, 55 Pac. 989; Phelin v. Kenderdine, 20 Pa. 354; Beach v. U. S. (C. C.) 46 Fed. 754.

The court did not err in refusing an instruction requested by the defendant, to the effect that, in passing upon the credibility of witnesses, the jury have the right to take into consideration their motives, fears, or hopes, if any have been proved. This was sufficiently given by the court in reading to the jury section 1847 of the Code of Civil Procedure. "Fears or hopes" but express an amplification of "motives," and really add nothing to the meaning of section 1847.

In addition to the points discussed in this opinion, appellant has urged that the evidence is not sufficient to support the verdict of guilty. Inasmuch as the judgment and order must be reversed for the errors above noted, and the case remanded for another trial, we do not deem it necessary to pass upon this question.

The judgment and order are reversed, and the cause remanded for a new trial.

D. M. Delmas, T. C. Coogan, H. C. McPike, and C. W. Cross, for appellant. U. S. Webb, Atty. Gen., William H. Langdon, Dist. Atty., Francis J. Heney, Asst. Dist. Atty., John O'Gara, Asst. Dist. Atty., and Wm. Hoff Cook, Asst. Dist. Atty., for the People.

HENSHAW, J. A hearing before this court was granted from the decision rendered by the Court of Appeal of the First appellate district. Upon due consideration we adopt the opinion and views of the Court of Appeal saving upon two propositions which will hereinafter be noted. Amplification of certain of the propositions discussed and decided by the Court of Appeal is called for in answer to the considerations pressed upon this court in the petition for rehearing.

1. A vast mass of evidence was introduced in this case which, for brevity, may be designated evidence touching the Oakland franchise. Admittedly, the transactions covered by this evidence, in point of time, long antedated any of the occurrences properly embraced within the charge of bribery. Admittedly, also, the transactions were entirely separate and distinct, the earlier one having no causal connection with the latter. By the Oakland evidence it was sought to be shown that the telephone company with which defendant Glass was connected, in an endeavor to prevent competition in the city of Oakland, and to exclude from that territory the Home Telephone Company, its competitor, and an applicant for a franchise, had itself, through a third person—"a dummy"—secured a franchise, and had aided and abetted in the organization of a corporation which did not enter the field of competition, and was not designed to enter the field of competition, but was organized and kept in existence for the purpose of holding the franchise and raising objection to the issuance of a third franchise to the Home Telephone Company, upon the ground that two companies were already in the field and that it was useless and injurious to them that a franchise should be issued to a third corporation. Most of what was done in this regard was done not by Mr. Glass but by Mr. Sabin, the then president of the company. To the repeated objections of the defendant's counsel to the introduction of this vast mass of testimony, the only reason assigned by the court for its admission is found in the statement that "it (the evidence) was all addressed to the question of the activities of this defendant in the corporation during the period that is material here." This language lacks in lucidity much to be desired. The only "activities" of the defendant which could be legitimately inquired into under this charge of bribery were activities having a bearing thereon and a connection therewith. The only "period that is material here" is the period from the formation of the alleged conspiracy to bribe the San Francisco supervisors down to and including the criminal accomplishment of the conspiracy upon which this charge of felony is based. It should seem unnecessary to state—but apparently it is not—that a multitude of acts, facts and happenings upon which men base their opinions and judgments of their fellow men do not come within the definition and scope of evidence as known to our law. If a man is informed, and believes his informant, that another man is dissolute, is a gambler, is an associate of known thieves, is a petty larcenist, and makes his home in a house of prostitution, he will justly look upon such a person with suspicion, will properly govern his dealings and relations with that person by this information, and would most naturally say, if he learned that the man had been arrested for burglary, that "it was to be expected." Yet, upon the trial of that man for burglary, no word of these matters would be admissible against him. Not because they would not have a tendency to show that a man of such character would be much more likely to commit the given offense than would a man of proven upright and honorable life, but because the law, for reasons good and sufficient unto itself, has declared that a man shall be put upon trial for but one offense, and that he shall not be embarrassed by being called upon to defend or exculpate himself, or to explain any damaging act or fact which is not embraced

within the charge he is called upon to meet. The law will not even permit a defendant's reputation to be assailed unless he shall himself have made that reputation an issue in the case. This, perhaps undue tenderness, goes to the extent that his guilt of petty offenses may not even be shown, and in his impeachment it may be established against him only that he has been previously convicted of a felony. It would, no doubt, have made most potently against this defendant in the minds of the jurors if, for example, it could have been shown that in this separate and distinct Oakland transaction he had bribed the councilmen there. But no one has been bold enough to assert that such evidence would be admissible, and the decisions of every court, including our own, are against its admissibility. Not only is the prosecution thus forbidden to prove another crime, but the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury. Commonwealth v. Jackson, 132 Mass. 16; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. As has been said, the language of the court holding that it was permissible to show "the activities of the defendant during the period that is material here" is not illuminating, nor is it adopted by the people in their briefs. By the people it is contended, first, that the evidence is admissible as showing identity of plan; second, as showing motive; and, third, if inadmissible, still, as the evidence did not tend to prove any other crime against the defendant, its admission was without injury. The people's brief declares it to be admissible as showing "identity and plan." We construe this to mean identity "of" plan, because, of course, the identity of the defendant was never for a moment in question. Identity of plan must mean a desire and effort upon the part of the Pacific States Telephone & Telegraph Company to exclude competition in Oakland, and the same desire and effort displayed to exclude competition in San Francisco. But indisputably there was no identity of plan. It is not contended that in any of the Oakland transactions any crime was committed, while the contention is that in the San Francisco transaction crime, and nothing but crime, was contemplated and perpetrated.

As to the second reason assigned—that of motive—there never was any doubt, never any question, never any suggestion from any source whatsoever, but that if this crime was committed, it was committed for the sole and single purpose of preventing competition. Indeed, the uncontradicted evidence of the supervisors, if direct evidence upon so plain a proposition was needed, was all to this effect. A boy of ten years might justly be regarded as gravely deficient in intellect who would need any enlightenment upon so plain a proposition. In fact, so far from the question of the motive ever having been in doubt, it would call for the acutest ingenuity to conceive of any other motive than this most obvious one. Yet, nevertheless, it is said that this vast mass of evidence, dealing with transactions wholly detached in time and place, is admissible as establishing the motive which prompted the defendant to commit an alleged crime, separate and distinct from the Oakland transactions in time, in place, and in methods. The real reason why the evidence was offered is most obvious. It was not offered to show motive. It was not offered to show identity and plan or identity of plan. These are the veriest pretences. It was designed to besmirch and degrade the defendant and to be made use of in argument, to show that the defendant had gone to the length of organizing a fraudulent corporation, and by secret device and artful chicane had endeavored to prevent honest competition; that the defendant had gone to the border line of crime in the Oakland transaction and found, that stopping there, his efforts to prevent competition were without success. What more natural, therefore, than that when the same problem arose in San Francisco, the defendant, finding even the efforts of fraud and trickery unavailable, should have stepped over the line and became a lawbreaker and a criminal? Such, we say, was the obvious purpose for which the evidence was introduced, and this the briefs of the people here on file establish. For in those briefs, while endeavoring to support the admissibility of the evidence on the grounds above stated, it is said that if "the evidence also casts suspicion on defendant he cannot be heard to complain." In the history of the transactions Glass is charged with having organized this "bogus" company. There is described the policy of the Pacific States Telephone & Telegraph Company employing political bosses and paying salaries to supervisors. It is directly stated that "the history of the contest waged against the Home Company in Oakland shows so clearly Glass' activity in his company's behalf; * * * these and many other circumstances lead irresistibly to the conclusion that Louis Glass, vice president, acting president, and general manager of the Pacific States Telephone & Telegraph Company, aided, abetted, advised, directed, and encouraged Halsey to pay the bribe to Lonergan." And, finally, again, quoting from the people's brief it is said, "To Glass, this experience in Oakland must have taught a bitter lesson. For one thing, Beasley's 'bogus' company had proved a losing investment—no small consideration, for the executive committee had listened very reluctantly when Glass had personally pleaded for its succor. But the lesson stamped indelibly on his mind must have been that the Home Telephone Company could not be kept out of San Francisco except by drastic measures." That this evidence was potent for the purpose of degrading the defendant in the eyes of the jurors will at once be conceded. That it had a tendency to inflame the mind of the jurors against the defendant by showing that in the past he had resorted to the arts of trickery and fraud to prevent honest competition, is quite apparent. That men in the everyday affairs of life would have been influenced by such evidence is unquestionably true. But these things go to establish merely the wrong which its admission worked upon the defendant, and not its admissibility. It was not admissible. Clearly, in the everyday affairs of life, if it should be established to the satisfaction of a jury that upon another and distinct occasion a defendant had offered or solicited a bribe, it would have great weight with a jury in determining whether in the instance charged he had been guilty of the offense. It would establish, at least, that he was the sort of man who would be willing to do this criminal act. Such was the line of reason and argument here employed. Yet such matters are never legal evidence. In discussing precisely such a case, where evidence had been admitted against the defendant charged with bribery, of a former act of like character, the court of appeals of New York says: "The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. * * * Yet the inference drawn by the prosecuting officer, and permitted by the court, left it for the jury to say that the desire of Sharp, manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of a bribe in the other; hence that the two crimes had the same origin. * * * It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence. It did indeed cast a dark shadow upon the defendant's character. It not only tended very strongly to prove the defendant guilty; it was absolute proof, but it was of a different crime from that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned, as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and to mislead them. It was improperly received, and the exception to its admission well taken." People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

Of the third proposition that the evidence, even if erroneously admitted, was without prejudice to the defendant, the argument of the people adverted to in this brief should be sufficient to show the untenableness. But, moreover, the rule does not limit the exclusion of such evidence only to transactions which amount to crime. It includes all evidence which, as here, would have a tendency to degrade the defendant, to arouse the prejudice of the jury, to divert their minds from the real issues in the case, or to persuade them by matters not judicially cognizable, that the defendant, for reasons other than those contained in legitimate evidence, was more likely to have committed the offense. People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. Quite apposite in this connection is the following language of the Circuit Court of the United States in Miller v. Territory of Oklahoma, 149 Fed. 330, 79 C. C. A. 268, where that court says: "The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should sometimes be placed, instead of imputing the reversal of convictions by the appellate courts to what is properly termed 'mere technicalities.' The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

2. Upon the question of the admissibility of the testimony touching the employment of Ruef and the salary paid to him by the company of which defendant was manager, the Court of Appeal goes no further than to hold that the prosecution "had the right to contend that from the conversation testified to by Mr. Pillsbury the defendant was responsible for the employment of Ruef." It does not, however, saving in this inferential way, discuss or pass upon the admissibility of the evidence itself. It was clearly inadmissible, and the purpose of its offer was, of course, identical with the offer of the Oakland testimony—to degrade the defendant and prejudice him in the eyes of the jury. By the people it is argued that the evidence was admissible because "the defendant was the first to make Abraham Ruef a circumstance in the case"; that "the evidence was therefore admissible as tending to show prep-

aration." It is further stated that the evidence was admissible because it tended to show a connection between Halsey and Glass, and, finally, that it was admissible as tending to show the motive of the defendant in the bribery of Lonergan. "Ruef, being the boss of the board of supervisors, and the application of the Home Telephone Company being before the board, it is not believable that the desire of defeating that ordinance did not enter into the payment of that large salary to Ruef." But it is not contended even by the prosecution that Ruef was in any way employed in the bribery of the supervisors, or that the salary was paid to him for any such purpose. Not only is this so, but it is affirmatively made to appear that Ruef opposed the desires of the Pacific States Telephone & Telegraph Company and was actively instrumental in seeing that its rival, the Home Telephone Company, secured its franchise. Thus, it is said in respondent's brief: "It must have been clear to any observer, long before the caucus, that Ruef, despite his liberal monthly salary, was not favorable to the Pacific States. It seems from the record that the Home Telephone Company also spent money very freely."

It being therefore in evidence, and, indeed, asserted by the prosecution that Ruef was not employed by defendant in furtherance of the conspiracy to bribe the supervisors, that he took no part in the matter of their bribery, that his services were actively enlisted on behalf of the opposition company, what of bearing upon this case could this evidence of his employment establish, what could have been its purpose other than as has been said, the purpose of degrading defendant and inflaming the minds of the jurors against him? The reasons assigned for the admissibility of this evidence were without substantiality. Respondent asserts that the evidence was admissible because "defendant was the first to make Abraham Ruef a circumstance in this case." All that there is in this regard is that in the cross-examination of one of the people's witnesses, Supervisor Boxton, his testimony appears to the following effect: "The Republican boss of the board, Boss Ruef, and James L. Gallagher distributed money to the members of the board—a certain gratuity—with reference to the passage of that ordinance." The ordinance here referred to had nothing to do with telephone matters. It scarcely merits the reply that such a statement elicited upon cross-examination of a witness for the people is no justification for the introduction of the evidence to show that "Boss Ruef" was employed by defendant's company, and inferentially by defendant upon matters and things wholly disconnected with the charge under investigation. Nor can it be perceived why the evidence was admissible as tending to show any connection between Halsey and Glass, nor how it can show such connection. As to its being admissible to show the "motive of the defendant in the bribery of Lonergan," as has been said, it was never contended by the people that Ruef was employed by the defendant or by his company to bribe these officers, or that he took any part in such bribery, and how, therefore, evidence of the employment of Ruef could by any possibility show "the motive of defendant in the bribery of Lonergan" cannot be comprehended. The record itself, however, resolves all these questions and establishes that the real purpose was that indicated. When objection was made to the introduction of this evidence the following colloquy took place: "The Court: What is the purpose of that, Mr. Heney? Mr. Heney: The purpose is to show that Mr. Glass informed this witness that Abraham Ruef was employed by the company during that period of time." Here was the purpose of the offer, stated in simple and direct terms. It was to show the employment under the indicated circumstances as the "foundation of an argument" against the character of Glass, and to prejudice the jury against him by showing that he had taken Ruef into the employ of the company.

3. Under objection and exceptions of defendant, evidence was introduced of the bribery and the payment of moneys by Halsey to certain other supervisors. This evidence as to each of these transactions was admittedly evidence of a separate and distinct crime. It is so declared by the respondent. It was admissible, as contended for by respondent, and as discussed in the opinion of the Court of Appeal, not as proving separate and distinct crimes, but as showing that the specific act of bribery charged was but a part execution of one conspiracy, a scheme which contemplated the bribery of a sufficient number of supervisors to prevent the granting of the franchise. Indisputably the evidence was not admissible generally, nor was it admissible to show that the defendant probably committed the crime with which he was charged, by showing that at other times he had committed like crimes. The court itself upon this evidence declared as follows: "Evidence of alleged payments to other supervisors received as tending to show identity of plan and motive and to trace the alleged bribe fund of fifty thousand dollars, of which the five thousand dollar bribe alleged in the indictment herein was claimed to be a part." The reasons thus given are sound in point of law. They themselves establish that the evidence was before the jury for consideration for these limited purposes only. Being before the jury for these limited purposes, the evidence was of course not before the jury for any other purpose. Yet, when defendant proposed instructions directing the jury as to the limits within which the evidence could be considered by them, one and all, the court refused these instructions. The first was in the following language: "It is not proper to show that the defendant was

guilty of some other offense, for the purpose of raising a presumption, either of law or of fact, of his guilt in the case under consideration." The court refused to give this instruction upon the ground that it was "not justified by the evidence; no evidence received for such purpose." The instruction is unimpeachable in point of law. It is the exact language of this court in People v. Sears, 119 Cal. 267, 51 Pac. 325. The evidence, though admissible for but the limited purpose indicated, was by the court admitted generally. It was most proper, therefore, for the defendant's counsel to seek to have the jury instructed as to the sole purpose or purposes for which it could be considered. One of the purposes for which it could not be considered was undoubtedly the purpose embraced in the instruction. And yet the court refused to give it solely on the ground that, in its own mind, it had not received the evidence for that purpose. But how, unless the court informed the jury that it had not received it for that purpose, was the jury to know that it was not to be considered for that purpose? Surely, when the court confines its ruling to a general declaration that "the objection is overruled," the jury is not in a position to know, unless informed in terms by the court, that it is not to consider the evidence generally. Neither jury nor counsel thus being enlightened by the court as to the purpose for which it considered the evidence admissible, defendant's counsel proposed several other instructions upon the same subject. For instance, the following: "Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to those charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose." This instruction was refused by the court under its statement that "it was not warranted by any claim, theory, or evidence presented during the trial as to other offenses. Evidence not so limited or admitted to prove guilty intent." And yet, when we turn to the brief of the people, we find vigorous argument that the evidence was offered and was properly admitted to prove motive and guilty intent. In various other ways counsel for defendant, left groping in the dark, endeavored by pertinent instructions to have the court limit the consideration of this evidence of other crimes to specific purposes. One and all the court refused to give these instructions, and of its own initiative gave no instruction whatsoever limiting the purpose for which the evidence should be considered by the jury, notwithstanding that the court by its indorsement on the refused instructions declared that it was received only as tending to show identity of plan and motive and to trace the alleged bribe fund of fifty thousand dollars. On this appeal it is not contended that evidence of the other crimes was generally admissible to prove the crime charged, but the people rest upon the proposition that the refusal of the first instruction quoted was justified because it was upon a "mere abstract question of law," and that the refusal to give the other instructions was justified "because the evidence was not admitted for the sole purpose of proving guilty intent, motive or guilty knowledge," but was admitted "also to show a single design, purpose and plan, and to identify and connect the defendant with the bribery of Lonergan by means of the fifty thousand dollar bribe fund." As has been said, defendant's counsel could not know, and were not able to find out the specific purposes for which the court admitted the evidence, since it was by the court admitted generally. The court alone knew the limited purposes which, in its own mind, it believed justified the admission of the evidence. It became the plain duty of the court under these circumstances to have instructed the jury, and to have limited its consideration of the evidence to these specific purposes, and this duty became the more imperative when defendant's counsel were seeking, with all the knowledge they possessed, to have the consideration of the evidence so properly limited. "When evidence of other crimes is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the legitimate purposes for which it is competent." 12 Cyc. 631. In Commonwealth v. Shepard, 1 Allen (Mass.) 575, Bigelow, Chief Justice, says, speaking upon the admission of evidence of other offenses: "It is a dangerous species of evidence not only because it requires a defendant to meet and explain other acts than those charged against him and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single and legitimate purpose for which it is competent." In our state, in People v. Cook, 148 Cal. 334, 83 Pac. 43, it is said: "It was of the highest importance to the defendant in this case, as it always is to any defendant in any case in which evidence of a distinct offense has been admitted for the purpose of showing motive to commit the crime charged that the jury should be cautioned not to consider such evidence for any but the limited purpose for which it has been admitted, and we cannot see that the instruction as presented contained a single word beyond what the defendant had a right to request. The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis. This instruction as asked should have been given." The distinction between the Cook Case and the case at bar is that in the Cook Case the court did give an instruction, though it was characterized by this court as being "brief, general, and colorless." In the case at bar the court refused to instruct the jury upon the subject at all.

4. In addition to what the Court of Appeal says in its discussion touching the error of the trial court in refusing to give instructions proposed by defendant, to the effect that the jury had no right to indulge in any presumption or inference unfavorable to the defendant because of the refusal of any witness to testify, or the failure of any witness to testify for the prosecution, it is to be borne in mind that the argument of the prosecuting attorney against the defendant for the refusal of Zimmer to testify, contained not only a severe arraignment of the defendant, but implication and insinuation that the testimony if given would have been unfavorable to the defendant. The method which the defendant's counsel took to set the jury right upon this matter was the approved method—of proposing timely instructions to the jury to disregard the objectionable remarks. Johnson v. Union Pacific R. R. Co., 35 Utah, 285, 100 Pac. 390. It will be remembered that Zimmer refused to testify upon the ground that his testimony would incriminate, not Glass, but himself. Says the Supreme Court of the United States: "No inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. He was called by the government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted." Beach v. United States (C. C.) 46 Fed. 754. That the principles of law contained in the proposed instructions were unimpeachable is not questioned. In justification or excuse of the court's refusal, it is said only that injury was not worked to the defendant, because the substance of the instructions was contained in instructions which the court actually gave. But when reference is had to these instructions, the giving of which it is asserted saves the error, it is found that they amount to no more than this, that in varying form the jury is told that it is to consider only the evidence in the case, and is not to consider evidence which has been excluded or ordered stricken out by the court, and that the jury is cautioned to distinguish carefully between the facts testified to by the witnesses and the statements made by counsel as to what facts have been proved. It is inconceivable that any one can assert that such colorless and characterless instructions containing no direct reference to this subject, meet a case where the attorney for the people has been arguing, in violation of the law, as to what the witness would have testified to, if he had testified, and that the testimony would have been hostile to the defendant. If this, indeed, be the rule, then all antecedent authority and precedent must be cast aside, and notwithstanding the mandatory declaration of the Code that judges must instruct the jury on all pertinent matters of law, when requested so to do, and notwithstanding the concession here made that these were pertinent and important principles of law, it will suffice in the future to say that if the judge tells the jury that they are to consider the evidence, and only the evidence, admitted in the case, his full duty to a defendant has been performed. Let one instance of the working of such a rule as is here contended for suffice. The defendant exercising his constitutional right does not testify in his own behalf. The prosecuting officer argues vehemently that he fails to take the witness stand because he knows he is guilty, and that if he did take the witness stand, on cross-examination he would prove that he was guilty, and that the jury is therefore justified in finding him guilty, from the fact that he has failed to testify. Defendant's counsel proposes an instruction to the effect that no inference adverse to the defendant is to be drawn from his failure to testify. The court refuses to give this instruction, and this court, following the rule here contended for, would have to hold that the instruction of the court to the jury that it was to consider only the evidence adduced in the case embraced the matter of the proposed rejected instruction, and was therefore all that the defendant was entitled to. If justification for the court's refusal may be found in the one case, it may equally be found in the other. The illustration is no more extreme than is the matter at bar.

For these reasons, in addition to those given in the opinion of the Court of Appeal, the judgment and order are reversed and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

BEATTY, C. J. I concur in the judgment of reversal and in most particulars in the opinion of Justice HENSHAW. I shall, if other pressing duties permit, present my views in a separate opinion.

SLOSS, J. I concur in the judgment of reversal upon the ground, solely, that the court erred in admitting testimony concerning the Oakland transactions in 1902. This testimony related to matters extraneous and collateral to the main charge, and having, so far as I am able to see, no reasonably direct tendency to show the commission by the defendant of the offense charged, or a motive on his part for its commission. Nor can it be said that this testimony, if its admission was error, did not harm the defendant. Even though his conduct with regard to the Oakland franchise did not constitute a crime, it included acts which might well be regarded as discreditable. The natural effect of such testimony would be to prejudice his case in the minds of the jury.

On each of the other points discussed in the opinion of Mr. Justice HENSHAW, I agree with the dissenting members of the court that no prejudicial error was committed.

SHAW, J. I dissent from the judgment of reversal. The evidence of the conversation between Pillsbury and Glass showed the familiarity of the latter with the inside doings of the company, and was competent for that purpose, as was fully shown in Justice Hall's opinion. The evidence of the bribery of the other supervisors, as Justice Hall shows, tended directly to prove the giving of money to Lonergan, which was the specific crime charged. This takes it out of the rule requiring cautionary instructions as to evidence admitted for a limited purpose. The refusal to instruct specially as to the Zimmer episode was fully covered by the instructions given. Any intelligent juror would know therefrom that Zimmer's refusal to testify could not be considered. The misconduct and ulterior purposes of counsel for the prosecution, about which so much is said, is foreign to the case, so far as this court is concerned. Misconduct is not assigned as error.

With regard to the Oakland franchise, a mass of evidence was given concerning the previous course of the Pacific States Telephone & Telegraph Company toward the rival concern. Large quasi public corporations operating over an entire state are more like governmental bodies than like natural persons. They act in accordance with fixed, permanent rules and orders, akin to laws. Their methods cannot be judged by the same standards as those of individuals. The evidence as to the Oakland matters showed a settled policy and design by said company to vigorously oppose the competing company at all points, justifying an inference that there were rules and orders to that effect which its officers were expected to follow. Glass must have been aware of this, and it would naturally incite him to more than ordinary zeal in endeavoring to stamp out the beginnings of competition in his own company's most valuable territory, the city of San Francisco. It had a direct legal tendency to prove the motive to bribe the supervisors, if he was willing to resort to such practices, and it was admissible for that purpose. The fact that such motive would be obvious would not render proof of it incompetent.

I concur: ANGELLOTTI, J.

158 Cal. 721

BLAIR v. HAZZARD. (L. A. 2,147.)

(Supreme Court of California. Dec. 2, 1910.)

1. TRUSTS (§ 191*)—WILLS—CONSTRUCTION.

Where real estate was devised to trustees with power to sell, and directions to apply the proceeds to certain valid trusts, the trustees took the legal title with power to convey, subject only to administration.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 191.*]

2. TRUSTS (§ 200*)—CONVEYANCE BY TRUSTEE —DEEDS—UNTRUTHFUL RECITAL.

Where trustees had legal title to real estate, with power to convey subject only to administration, the fact that a deed untruthfully recited that the superior court had authorized them to sell the property, and that they were selling pursuant to and "in accordance with the authority, power, and discretion in the aforesaid decree and order" of the court, did not impair the validity of the deed.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 200.*]

3. EXECUTORS AND ADMINISTRATORS (§ 271*)—ADMINISTRATION EXPENSES—PROPERTY LIABLE—LAND CONVEYED BY TRUSTEES—ADVERSE POSSESSION.

Where trustees with power of sale under a will conveyed the property before the administration was closed, the grantee took title subject to administration to the same extent as the grantee of a devisee, as provided by Code Civ. Proc. §§ 1452, 1581; and hence could not acquire title by adverse possession as against the administrator with the will annexed, so as to relieve the property from the demands of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 271.*]

4. ADVERSE POSSESSION (§ 4*)—PROPERTY OF ESTATE.

Title by adverse possession cannot be acquired against administrators or executors.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 21, 22; Dec. Dig. § 4.*]

5. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION — MUNIMENT OF TITLE.

A decree of distribution of property belonging to a decedent's estate, and passing to an heir or devisee, is a muniment of title of the highest value.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.*]

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Robert Blair against George W. Hazzard, administrator with the will annexed of the estate of S. S. Clark, deceased, to quiet title. Judgment for plaintiff, and defendant appeals. Modified.

Haines & Haines, for appellant. Collier, Smith & Hoff, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. This is an action to quiet title.

In 1873 S. S. Clark died testate leaving real estate situated in the county of San Diego. His will was originally admitted to probate in Hamilton county, Ohio, and subsequently ancillary letters of administration with the will annexed issued from the probate court of San Diego county to Henry Pearce as sole executor. Henry Pearce continued so to act as the executor until his death in 1888. The land here in controversy was a part of the property of Clark's estate and by his will was devised to Henry Pearce, Christopher Cockrill, and Mary Clark, as cotrustees with the power of sale. Subsequent to the death of Pearce the surviving trustees sold the property to plaintiff for full value. At the time of their sale the property had not been distributed to them as trustees, nor has it since been distributed to them or to Blair as their grantee. In fact, upon the death of Pearce, administration of the estate was suspended until March, 1905, some 17 years after this sale, when appellant was appointed administrator. This administrator concedes the validity of the deed by the trustees to carry title to Blair, but insists that the title and right of possession were subordinate to the requirements of administration, that the title was taken subject to administration, and that thus the estate controls the title for the purposes of distributing the property and subjecting it to its proper share of the expenses of administration which, in this case, there admittedly being no creditors' claims, means merely administrator's fees, attorney's fees, and necessary probate fees. Thereupon plaintiff brought this action to quiet title, charging in two counts, first, title under the deed, second, by adverse possession. The defendant joined issued upon the asserted title by adverse possession, admitting legal title by virtue of the trustees' deed and alleging, as above set forth, that such title was taken in subordination to the statutory right of administration. The court found that the superior court of San Diego had never appointed Christopher Cockrill or Mary Clark, or either of them, trustees of the estate of Clark, and that it never made an order or decree authorizing or empowering them, or either of them, to make the conveyance, but that Blair paid for the property full value, believing that he was acquiring good and complete title thereto, that he entered under a claim of right based upon his deed and continued in possession of it, paying all taxes thereon and holding it under his claim of title adversely to the whole world. It concluded that Hazzard, as administrator, had no right, title, or claim upon the property for the purposes of administration, or for any other purpose whatsoever, and the decree followed accordingly. Upon this appeal, it is insisted that the trustees who executed the deed to Blair were devisees of the fee of the property, and they took the legal title thereto upon valid trusts and with power to sell, and that their sale carried title, notwithstanding it was not preceded by an authorizing order or followed by a confirmatory order of the court of probate. Over these propositions there is no controversy; the question in dispute being simply this: Did the title which plaintiff thus acquired, or his asserted title by adverse possession, relieve the land from its share of the burdens of administration?

By the bill of exceptions it is declared that the real property here in question "was devised * * * to Henry Pearce, Christopher Cockrill, and Mary Alnette Clark, as cotrustees with power to sell and with directions to apply the proceeds of said sale to certain valid trusts." The questions of the validity of the trusts and of the power to sell being thus eliminated, the trustees unquestionably took legal title with power to convey that title subject to administration. Jordan v. Fay, 98 Cal. 264, 33 Pac. 95; Martinovich v. Marsicano, 137 Cal. 354, 70 Pac. 459. The deed, it is true, recites that the superior court of San Diego made its order authorizing the trustees to sell, and further recites that they are selling "pursuant to and in accordance with the authority, power, and discretion, in the aforesaid decree and order of the superior court," and these recitals the court found to be untrue, but, nevertheless, that would not impair the validity of the trustees' deed which, in terms, is a deed, by the trustees of the estate of Sydney S. Clark, deceased, under the last will and testament of Sydney S. Clark, deceased, and which they could validly execute without order of court. Estate of Delaney, 49 Cal. 76; Estate of Williams, 92 Cal. 183, 28 Pac. 227, 679; Morffew v. S. F. & S. R. R. R. Co., 107 Cal. 587, 40 Pac. 810; Estate of Pforr, 144 Cal. 121, 77 Pac. 825; Estate of O'Conner, 2 Cal. App. 475, 84 Pac. 317. The deed is executed by the grantors as trustees and conveys the title which as devisees they took under the will of Clark. It will not be disputed that a grantee of a devisee under a will takes title subject to administration. Code Civ. Proc §§ 1452, 1581.

The case thus presented is one where the grantee believed he acquired absolute title to real property, since he would not have paid its full value otherwise, and where, in fact, he did acquire the title of the estate thereto, including the right of possession with the one statutory reservation, that the property was still subject to the demands of the estate and of its representatives for the purposes of the administration. The grantee enters under this deed; exercises the fullest dominion and control over it. He probably was in ignorance of the liabilities which the statute imposed upon his title, namely, that it was subject to the demands of administration, and thought that he was holding adversely to the whole world, including the estate from which his title was deraigned.

The question is, Can a devisee of an estate or a grantee of a devisee entering into possession of realty by virtue of title actually or colorably derived from the estate, and asserting title from no other independent source, acquire, under these circumstances, a title against the estate by adverse possession so as to relieve the property from the statutory requirement that it shall be subject to the demands of administration? This question must be answered in the negative. First, because to answer it otherwise would be to repudiate, indeed, to obliterate, the provisions of the Code which contemplate and declare that throughout administration and until the close thereof, whether the real property be in the possession of the executor or administrator or in the possession of devisees or heirs, it shall be subject to administration and chargeable with its proportionate share of the expenses of administration. If a sale becomes necessary, it may even be retaken from the heir or devisee and sold to the extinguishment of his title. It is to be remembered that it is merely through the indulgence of the present law that the heir or devisee is entitled to possession at all until after distribution (Meeks v. Hahn, 20 Cal. 628), and it was never in the contemplation of the law that by granting the favor to the heir or devisee of possession during administration, it should be made possible to set up in hostility to the estate a title by adverse possession which would thus defeat one of the primary objects of probate, namely, that all the property of the deceased, saving such as is exempt from execution, should be first chargeable with his debts.

From the very nature of the case, title by adverse possession cannot be acquired against the administrator or executor. Such a title would be as foreign to our law as would be the claim of a tenant that he had acquired title by adverse possession against his landlord while holding under strict tenancy. The entry of a devisee or heir under such circumstances and his holding after, as matter of law, cannot be in hostility to the estate's rights. By the very language of the law it is in subordination to those rights. The administrator's or executor's possession never has been and never will be construed as possession in hostility to the heir or devisee, per contra, the possession of the heir or devisee, while the estate is in the course of administration, can never be construed to be in hostility to the rights over that property with which the law clothes the estate. And from practical considerations it becomes also apparent that title by adverse possession cannot thus arise. Everything which the devisee in possession does by way of dominion, ownership, and exclusive control he has a perfect right to do, so far as the estate is concerned, and in the doing of these things he does not trench upon or interfere with any of the rights which the statute has reserved to the estate. There is nothing therefore, and can be nothing, to put the administrator upon notice that the devisee is claiming in hostility to him. The devisee may, as in this case, honestly believe that he is holding against all the world, including the estate, but in truth he is holding against all the world except the estate, since under the law his whole title is subordinate to the estate's rights. There is therefore, and can be in the nature of things, no such hostility between the legal rights of the devisee or heir in possession and the administrator or executor which can start the statute of limitations to running in favor of or against either. A decree of distribution is a muniment of title of the highest value. Through such decrees, and through such decrees only, can the titles of land be justly established. This court has upon many occasions countenanced and approved the completion of the administration of estates when that administration, after suspension, has been resumed for no other purpose than to enter a decree of distribution giving peace and security to title. Estate of Hinckley, 58 Cal. 518; Estate of Pina, 112 Cal. 14, 44 Pac. 332; Estate of Strong, 119 Cal. 663, 51 Pac. 1078; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Toland v. Earle, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100.

For these reasons the trial court is directed to modify its judgment in accordance with the foregoing, by holding that the property in the complaint set forth is still subject to the legal requirements of the estate of Clark, for the purposes of and in due course of administration.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.

158 Cal. 727

RANDOLPH v. LINDSAY. (L. A. 2,336.)

(Supreme Court of California. Dec. 2, 1910. Rehearing Denied Dec. 31, 1910.)

1. MINES AND MINERALS (§ 83*)—CONTRACTS.

Plaintiff, defendant, and another, in order to develop certain mines which they had acquired and conveyed to a corporation, erected a stampmill and, when the ore proved insufficient, plaintiff and defendant agreed that the company should work other mining territory in the vicinity of the mill, and that to enable it to do so, plaintiff and defendant would advance money from time to time, and that either would pay to the other any sums necessary to equalize between them the advances so made. On December 4th, plaintiff wrote defendant stating that he had advanced a certain amount over that advanced by defendant and requesting the latter to make payment equalizing such excess, or give notes therefor, to which defendant replied on December 6th, stating that he was not paying the company's debts without security and a plain understanding with the stockholders, and that he was surprised that plaintiff should assume to advance money on his account without his consent, as he was able to do his own advancing, and that he did not care to go any further with the deal looking to the purchase of a mine which plaintiff had stated in his letter, in connection with his request for payment by defendant, that he was contemplating purchasing for the company, without some thorough understanding. *Held*, that defendant's letter was a repudiation of any agreement made between him and plaintiff to equalize the advances made by them, and a refusal by defendant to be bound thereby in the future.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 83.*]

2. MINES AND MINERALS (§ 83*)—RESCISSION —EFFECT.

While defendant was not bound to continue the agreement for the equalization of advances between himself and plaintiff longer than he desired, he was bound thereby as to advances made after his letter rescinding the contract, which were incurred on account of obligations assumed before his repudiation thereof, or for the purpose of completing the transaction begun theretofore, which could not be abandoned without substantial loss.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 83.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Epes Randolph against Lycurgus Lindsay. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Harris & Swanwick and Hunsker & Britt, for appellant. Eugene S. Ives and Gibson, Trask, Dunn & Crutcher, for respondent.

SHAW, J. Appeals by defendant from the judgment and from an order denying his motion for a new trial.

The plaintiff sued to recover $26,784.62 alleged to be due for money paid by plaintiff for the defendant under two special contracts. It is contended by the appellant that the findings as to the amount due plaintiff are not sustained by the evidence.

Randolph, Lindsay, and one Mackay, acquired certain gold mines in Mexico, which they conveyed to a corporation organized by them named the Llanos de Oro Mining & Milling Company, with a capital stock of $4,000,000, divided into 400,000 shares of the par value of $10 each. In consideration of the conveyance of the mines, the three parties received the entire capital stock of the company in equal shares. In order to get the gold from the mines, it was necessary to expend a large amount of money in the erection of a stampmill and in development work. Randolph and Lindsay, as managers of the company, undertook to raise the required funds by means of notes of the company. It was agreed between the three that in placing these loans each payee was to receive, as a bonus, four dollars in stock for each dollar loaned, the stock required for that purpose being contributed in equal amounts by the three interested parties. Mackay, however, was not expected to, and did not, procure any loans or otherwise aid in financing the concern. The sum of $446,300 was raised in this manner and expended on the mines prior to April 21, 1906. The stampmill was not finished, and it was necessary to raise more money to carry the enterprise to completion and fruition. Randolph had already advanced for the company sums amounting to $20,250. The complaint alleges, and the court finds, that on or about April 21, 1906, the plaintiff and defendant agreed with each other that the corporation should continue to carry on its business and plans of development and equipment, and that to enable it to do so they would advance for it the necessary funds, share and share alike, and would pay, share and share alike, any and all debts of the company incurred by reason of carrying on its business and plans aforesaid, and that each would pay to the other whatever sum of money was necessary to equalize their respective advances. It is claimed by the appellant that this does not cover the amounts previously advanced by Randolph, as aforesaid, which amounts were included in the judgment. As we have concluded that the judgment and order must be reversed for other reasons to be presently stated, we need not consider this point. We state the facts aforesaid because they tend to explain the subsequent transactions.

In July or August, 1906, the mill was completed and upon a thorough milling test of the ore it turned out to be too poor to be worth working. In other words, the enterprise proved to be a failure. The mines were shut down. It is alleged, and the court, in effect, finds that to meet this emergency and retrieve the disaster as far as might be, the plaintiff and defendant, in October, 1906, agreed with each other that the company should explore and seek for mines or mining territory in the vicinity of the mill, which could be treated profitably by the mill, or which could be purchased, leased, or used in connection therewith, and that they would advance to the company, from time to time, such money as might be required therefor, share and share alike, would pay, equally, all debts of the company incurred in so doing, and that either would pay to the other whatever sums were necessary to equalize between them the advances so made for the company.

The findings as to the amounts advanced by Randolph included the sum of $23,294.82, composed of numerous items of advances made by Randolph from December 24, 1906, to July 16, 1907. It is contended by the appellant that the agreement of October, 1906, was abrogated by him on December 6, 1906, and that he is therefore not bound to equalize the advances of Randolph made after the said date. This claim appears to be well founded. On December 4, 1906, Randolph sent a letter to Lindsay containing a statement showing that he, Randolph, had advanced for the company to that date, under both agreements, a total sum of $69,812.87, and that Lindsay had advanced only $31,230, Randolph's excess being $38,582.87, and asking Lindsay to advance immediately as much to equalize them as he could spare, or to make a 12-months' note for the difference, so that the money could be raised on it for the company's use. He also said he was taking steps to procure the Cerro Colorado mine for the Llanos Company. On December 6, 1906, Lindsay answered by letter, saying, "I am not paying Llanos debts without some security and a plain, fair understanding with the stockholders. * * * I am surprised that you should assume to advance money on my account and without my consent. I am able to do my own advancing * * * Referring to the Sierra Colorado mine, would say, after your letter to-day, I do not care to go any further with the deal, or any other deal, without some thorough understanding." This was a repudiation of the agreement which Randolph claimed to exist and upon the faith of which he had been acting. It implied a denial of the making of such agreement, and it was, in effect, a refusal to be bound by it in the future. In his testimony Randolph refers to the letter of December 6th as a letter "repudiating all our arrangements." Randolph replied by letter on December 14, 1906, to the effect that he had been of the opinion that a kind of copartnership was developing between them, but that if Lindsay's idea of the relations between them was different, as his letter indicated, the various matters could be readily adjusted. There were no further negotiations between them on the subject and Lindsay did not thereafter consent to be bound for any further advancements.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is nothing in the evidence to explain the purpose for which the subsequent advances by Randolph were made, except his general statement that the money was expended by him in pursuance of the agreement of October, 1906, and for the benefit of the Llanos Company, and that in paying out the several sums he relied on the promise of Lindsay to reimburse him to the extent necessary to make their advances equal. If any of the subsequent advances were made on account of obligations incurred before Lindsay's repudiation of the agreement, or in the completion of enterprises or transactions begun before, and which could not be stopped or abandoned without substantial loss, perhaps Lindsay would be liable to Randolph for one-half thereof, under the agreement, notwithstanding his withdrawal therefrom. As to such matters, he could not withdraw without a rescission. No rescission is pleaded in the answer and the evidence does not show an attempt to rescind. But there was nothing in the agreement that bound Lindsay to continue its existence longer than he chose. He could terminate it any time and thereupon he would be exempt from liability for future advances by Randolph for new deals or transactions. It was for Randolph to prove, if he could, that the advances subsequent to December 6th were made on account of previous obligations or previous uncompleted transactions or enterprises. The evidence is silent on the subject. The finding, so far as these items are concerned, is not sustained by the evidence.

Inasmuch as there must be a new trial, we consider it unnecessary to discuss or determine the other questions presented. They may not arise upon a second trial, and the issues may be changed.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

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158 Cal. 740

In re CHAPMAN'S ESTATE. (S. F. 5,301.)

(Supreme Court of California. Dec. 3, 1910.)

1. Executors and Administrators (§ 178*)—Rights of Widow—Monthly Allowances.

The court in probate proceedings ordered the payment of $40 a month to the widow as a family allowance, beginning March 6, 1907. The administratrix filed her final account on October 4, 1907, and on February 7, 1908, the court made a final order discontinuing the family allowance, after October 4, 1907, the date of the order settling the final account, and on October 9, 1908, the administratrix filed a supplemental account including an item for family allowance accruing from September 6, 1907, to October 6, 1908. *Held*, that the widow was entitled to the monthly allowance for the month ending October 6, 1907.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 178.*]

2. Executors and Administrators (§ 510*)—Presumptions—Insufficiency of Record.

Where the record on appeal from orders settling an administratrix's supplemental final account and directing distribution does not contain the evidence upon which the court acted in discontinuing a family allowance to the widow after October 4, 1907, the date of the order settling the administratrix's final account, the Supreme Court will presume that the family allowance for the month ending October 6, 1907, to which the widow was legally entitled, was included in the final account settled on October 4, 1907.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

3. Executors and Administrators (§ 194*)—Orders Appealable.

An order made by the court in probate proceedings after the administratrix's final account was settled, discontinuing a monthly family allowance to the widow, was appealable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 723; Dec. Dig. § 194.*]

4. Executors and Administrators (§ 510*)—Presumptions.

Since under Code Civ. Proc. § 1704, orders in probate proceedings need not recite the existence of the facts upon which the jurisdiction to make them depends, where the order discontinuing a monthly allowance to a widow recited that it was made upon good cause, and the record on appeal from orders settling the administratrix's supplemental final account and directing distribution does not show whether notice was given the widow of the order discontinuing the allowance, the rule which presumes on collateral attack that the court had jurisdiction to make an order unless the contrary appears from the record, applies, so that the Supreme Court will presume that notice of such order was given the widow.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

In Bank. Appeal from Superior Court, Santa Clara County; J. B. Welch, Judge.

In the matter of the estate of John Chapman, deceased. From orders settling the supplemental final account, and directing distribution of the estate, the widow appeals. Affirmed.

J. H. Russell and E. L. Rhodes, for appellant. Henry French, for respondents.

SHAW, J. This is an appeal by the widow of the deceased, who is also the administratrix of the estate, from orders settling the supplemental final account and directing distribution. The only ruling complained of is the refusal to allow credit in the supplemental account for the amount of the monthly family allowance which accrued during the period intervening between the date of the settlement of the final account filed with the petition for distribution and the date of the supplemental final account.

The deceased died on March 6, 1907, leaving surviving as heirs at law, besides his widow, a sister and the descendants of a deceased sister. The widow was duly appointed administratrix of his estate. On May 31, 1907, the court made an order for the payment of $40 a month to the widow, as a family allowance, beginning on March 6, 1907. On September 23, 1907, the administratrix filed her final account, and a petition for the distribution of the estate, alleging that the deceased left no children or surviving collateral relatives and that she, as his widow, was the only heir. On October 4, 1907, the final account was settled showing a balance of $2,741.95 for distribution, consisting entirely of money. The sister and descendants of the deceased sister appeared and contested the petition for distribution, and a delay of one year ensued before the matter of the contested heirship was decided. On February 7, 1908, the court made an order that the family allowance be discontinued from and after October 4, 1907, the date of the order settling the final account. On October 9, 1908, the widow, as administratrix, filed a supplemental account showing the expenditure of $73.52 in costs of administration and claiming credit for $520, on account of the family allowance accruing from September 6, 1907, to October 6, 1908. The order of October 9, 1908, appealed from, settled this account as presented, "with the exception of the item for family allowance," leaving a balance of $2,668.43 which was ordered distributed to the heirs.

On the facts as above stated it would appear that the widow was entitled, in any event, to the $40 for the month extending from September 6, 1907, to October 6, 1907. But, as no bill of exceptions showing the evidence upon which the court acted is presented, we must presume that the allowance for that month was included in the final account settled on October 4, 1907.

The appeal is based on the proposition that the order of February 7, 1908, discontinuing the family allowance from and after October 4, 1907, was absolutely void because the court had no power to make it. This contention is founded on the assertion that it was made ex parte, and without any notice to the widow. The record contains nothing to that effect. The order recites that it was made upon good cause, but neither the recital, nor anything else in the record before us, states anything at all on the question whether or not notice thereof was given. Orders in probate proceedings need not recite the existence of the facts upon which jurisdiction to make them depend. Code Civ. Proc. § 1704. The order was appealable and it has become final. The attack upon it was and is wholly collateral. The presumption in regard to such orders, upon such collateral attack, is the same as in other cases; the jurisdiction of the court to make them is presumed, unless the contrary appears from the record, or from competent evidence in a proper attack. Upon this record we must presume that the necessary notice was given, and that the order discontinuing the family allowance was valid and binding. That item was therefore properly rejected.

The orders are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

158 Cal. 731

POTRERO NUEVO LAND CO. v. ALL PERSONS CLAIMING ANY INTEREST IN OR LIEN UPON THE REAL PROPERTY HEREIN DESCRIBED, OR ANY PART THEREOF. (S. F. 5,130.)

(Supreme Court of California. Dec. 2, 1910.)

1. Records (§ 18*)—Lost Records—Actions—Affidavits.

St. Ex. Sess. 1906, c. 59 (McEnerney act), creates a system of procedure to establish title to real property where the public records have been destroyed, requiring an affidavit to be attached to the complaint containing a full and explicit showing of the period during which plaintiff has enjoyed his estate, and concerning the person or persons "from whom obtained," etc. *Held*, that an affidavit merely declaring that the title to the property was conveyed by the state to P. in 1855, and by him through divers mesne conveyances to plaintiff who was the owner and holder thereof, and has been for the last 10 years or more, did not fully show how long plaintiff had owned and enjoyed the property, nor describe or characterize the person from whom the title was obtained.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18.*]

2. RECORDS (§ 18*) — POSSESSION — ACTION — LANDLORD AND TENANT—RELATION.

St. Ex. Sess. 1906, c. 59 (McEnerney act), creates a system of procedure to establish title to real property, where the public records have been destroyed, by any person who claims an estate of inheritance, or for life in, and who is by himself or other person, holding under him in actual or peaceable possession of any real property. *Held* that, where certain land in controversy was granted to the city of San Francisco for 99 years by Act March 26, 1851 (St. 1851, c. 41), and thereafter the state's reversion in fee was conveyed to plaintiff's prior grantor subject to the remainder of the 99-year term as authorized by Act May 18, 1853 (St. 1853, c. 160), plaintiff held such an estate in the land as entitled him to sue to establish his title, though the technical relation of landlord and tenant did not exist between plaintiff and those in possession holding under the term.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18.*]

Melvin, Henshaw, and Lorigan, JJ., dissenting in part.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Potrero Nuevo Land Company against all persons claiming any interest in or lien on certain lands described in the complaint. From a judgment dismissing the complaint, plaintiff appealed. The judgment was reversed in department, after which a rehearing was had in bank, where the department's opinion was disproved, and the judgment affirmed.

See, also, 155 Cal. 371, 101 Pac. 12.

The following is the opinion in department of Melvin, J. (concurred in by Henshaw and Lorigan, JJ.):

"An action was commenced under the so-called McEnerney act to establish plaintiff's title to certain property in the city and county of San Francisco; to determine adverse claims to said realty; and for general relief. Upon motion the complaint was dismissed, and this appeal is taken from the order of dismissal. The grounds of the motion were: First, that the estate claimed by plaintiff is not an estate for the establishment of title to which an action of this kind may be brought; second, that plaintiff does not appear to be in the actual and peaceable possession by itself or its tenants holding under it, of the premises to which plaintiff seeks to establish its title; third, that the affidavit of plaintiff does not set forth or show when or from whom the Potrero Nuevo Land Company acquired its title to the described premises. The asserted title of plaintiff derived by mesne conveyances from one John Bensley was to an estate of inheritance in certain 'Beach and Water Lots,' the complaint alleging that the corporation plaintiff succeeded to such title after its sale by commissioners to Bensley under the act of May 18, 1853, and the supplemental statute of May 1, 1855.

"By the act of March 26, 1851 (St. 1851, p. 307), the state granted to the city of San Francisco the 'use and occupation' of certain 'Beach and Water Lots' for a period of 99 years from and after the passage of the act. By a subsequent statute of May 18, 1853 (St. 1853, p. 219), it was provided that commissioners to be appointed by the Governor should sell the remaining interest of the state in these lots 'after the expiration of the estate or term granted or mentioned' in said act of March 26, 1851. The act of 1855 (St. 1855, c. 181) wrought a change in the personnel of the board of commissioners. Plaintiff asserts title to the fee formerly held by the state subject to the tenancy for 99 years of the city and those deriving title under it. Defendants claim the right to the 'use and occupation' of various parcels of the property founded upon the act of 1851, and some of them also declare that they hold their portions of the land in fee.

"The lower court in granting the motion to dismiss held that, while plaintiff's estate was one of inheritance, it could not maintain the suit; that in addition to such an interest it must be in the actual and peaceable possession of the property; that the grantees of the city are not tenants of the state nor grantees of the state; and that, as no one will have possession under the reversionary right of the state until 1950, the plaintiff cannot now be in occupation of the property by its tenants or otherwise.

"We find ourselves unable to agree with these conclusions. The state having disposed of the fee, subject to the use and occupation for 99 years, its grantees or their ultimate successors in interest occupy the exact position of ownership formerly held by the state. Undoubtedly, the city and its successors to the estate for years hold the property subject to this reversionary interest. It makes no difference that their term is a very long one. They hold the land subject to the title in fee, precisely as they would possess it under a lease for a year or any other short term, because an estate for years is a leasehold interest, and is personal property. Jeffers v. Easton, Eldridge & Co., 113 Cal. 352, 45 Pac. 680; Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243. To be sure there was no contract of rental between plaintiff and defendant, but the sale of the term for years under the act of March 26, 1851, was in itself a contract of rental, and the state (the landlord) was entitled under the act to 25 per cent. of the money realized from such sale; but aside from this the relation of landlord and tenant may arise without rent reserved. Taylor in his work on Landlord and Tenant, § 14, says: 'The relation of landlord and tenant subsists by virtue of a contract express or implied, between two or more persons for the possession of lands or tenements.' And Martindale on Conveyancing, § 293, says: 'The relation of landlord and tenant may arise by implication or by the act or operation of law.' Section 1 of the McEnerney act provides that, 'Any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person holding under him in the actual or peaceable possession of any real property' may bring an action of this kind. St. Ex. Sess. 1906, p. 78. We see no logical escape from the doctrine that the relation of landlord and tenant exists; that the possession of the latter is that of the former; and that appellant has the right to maintain this action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"There is no merit in respondents' contention that the motion to dismiss was properly granted because appellant failed to disclose by its affidavit fully and explicitly 'the character of his estate, right, title, interest or claim in, and possession of property, during what period the same has existed and from whom obtained.' Section 5, McEnerney Act. The affidavit did show 'that said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him, through divers mesne conveyances, conveyed to said plaintiff, who is now the owner and holder thereof, and has been for the last ten years.' This, we think, was amply sufficient for the purposes of the remedial act here considered.

"The order from which this appeal is taken is reversed."

A. Everett Ball, for appellant. Page, McCutchen & Knight, C. Irving Wright, Thomas, Gerstle, Frick & Beedy, Stoney, Rouleau & Stoney, and F. J. Castelhun, for respondents.

HENSHAW, J. Appellant brought its action under the McEnerney act to establish its title to certain beach and water lots in the city and county of San Francisco. By the act of March 26, 1851, the Legislature granted to the city of San Francisco the use and occupation of said land for the term of 99 years from the date of the act. Under the statute of May 18, 1853 (St. 1853, p. 219), commissioners were appointed who should sell, and did sell, the remaining interest of the state in these lots "after the expiration of the estate or term granted or mentioned in the act of 1851." Plaintiff is the purchaser of the fee disposed of by the state in subordination to the 99-year term, tenancy or estate, and will not be entitled to actual possession as contradistinguished from any constructive possession, through the tenants of the 99-year term, until March 26, 1950. The court sustained a general demurrer to the complaint and dismissed the action. Plaintiff appeals, and there are presented for consideration two questions: (1) Whether under the facts stated plaintiff had a possession sufficient to satisfy the requirements of the McEnerney act (Lofstad v. Murasky, 152 Cal. 64, 91 Pac. 1008), and so to entitle it to prosecute this action; and (2) whether the affidavit required to be filed with the complaint satisfies the act, which exacts that such affidavit shall fully and explicitly set forth "the character of his (plaintiff's) estate, right, title, interest or claim in and possession of the property during what period the same has existed and from whom obtained."

The McEnerney act was emergency legislation, containing certain novel features. It is not, of course, to be condemned for these reasons, but they are sufficient to demand of the court scrupulous care in considering the provisions when the provisions themselves are attacked, or request is made that construction should be given to them. For these reasons a rehearing was granted from the department decision.

1. A fundamental provision of the act is that it is available only to such person as "by himself or his tenant or any other person holding under him is in the actual and peaceable possession of the land." Can it be said that the relation of landlord and tenant, within the meaning of the McEnerney act, exists between the owner of the reversionary fee and the owner of the 99-year term? In the very broadest acceptation of the meaning of the phrase "landlord and tenant" that relationship may be said to exist. But the question is whether it exists within the purview of the act. Thus Smith in "Landlord and Tenant," after mention of the fact that under the common law every one is a tenant, since there is no allodial property, proceeds as follows: "I need not, however, tell you who must be all familiar with the use of those terms, that when we speak of 'landlord and tenant,' even among lawyers, we use these words in a much narrower sense than that which I have just described. For instance, when we use the words 'landlord and tenant' we do not mean to express the species of relation which subsists between the sovereign and a subject, for instance, the Duke of Wellington, who holds his estates of her Majesty by the service of presenting yearly a banner in lieu of all other rents and services; nor do we, I think, ever intend to express the sort of relation that exists between the reversioner and the particular tenants under a settlement where no rent is reserved or any service rendered, although a tenancy doubtless exists between them. For instance, if I convey lands to A. in tail, keeping the reversion myself, there is no doubt that A. becomes my tenant, though I reserve not a sixpence of rent, nor ask for any covenant on his part to perform

any of the ordinary duties of a tenant, and though he might destroy my interest the next day if so minded. But though, as I have said, he is my tenant in strict law, this is not the sort of tenancy we mean when we use the words 'landlord and tenant.' It is very difficult to express in terms the precise idea which we attribute to those words. But I think I am not far wrong in saying that, when we speak of 'landlord and tenant' we have the notion in our minds of a tenancy limited in point of duration within some bounds not so extensive as to render the landlord's interest practically worthless and accompanied by some remunerating incidents to the reversion, such as a rent, or at all events a fine in lieu of one, and also by certain obligations such as covenants, or, where the tenancy is not evidenced by some instrument under seal, agreements for the performance of the duties usually required from persons taking the description of property demised; and as these are the sort of tenancies which give rise to the great mass of practical questions involved in the law of landlord and tenant, it is to these that I intend almost exclusively to direct my remarks." And, says Washburn (Real Property [4th Ed.] 315): "This relation of landlord and tenant does not embrace that between sovereign and subject, nor between the reversioner and him who enjoys the particular estate on which the reversion depends, where no rent is reserved, although a kind of tenancy subsists between them."

A consideration of the acts of the Legislature in disposing of these beach and water lots and of the decisions of this court in relation thereto make plain, we think, the fact that the relation of landlord and tenant in its true sense, even as used "among lawyers" does not exist. By the act of 1851 the state granted the use and occupation of these lands to the city and county of San Francisco for the term of 99 years, with authorization to the city to sell and dispose of its holdings, requiring only that, upon so doing, it should pay into the state treasury 25 per cent. of the moneys received from such sales. Clearly in this there was no design of establishing between the state and the city the relation of landlord and tenant, and less design than that relation should exist between the state and any person to whom the city in turn might convey its interest. The subsequent act of 1853 merely empowered commissioners to sell the state's interest at public auction. And still less apparent is any intent or design to create such a relationship by substitution of the purchaser at the auction for the state of California. In Holladay v. Frisbie, 15 Cal. 635, a creditor of the city had attached the city's interest in certain beach and water lots, and the question arose as to how the city's title to the 99-year term was affected by the provision that it should pay one-fourth of the proceeds of the property to the state. It was declared that this provision created a mere contractual obligation upon the part of the city, and was not a condition to the grant, and that "the interest of the city in the beach and water lot property is a legal estate for ninety-nine years." Such a decision is foreign to the conception that the relationship of landlord and tenant existed between the state and the city. It is concluded, therefore, that the relation of landlord and tenant, within the meaning of the McEnerney act, does not exist between the holder of the reversionary fee and the holder of the 99-year term in the beach and water lots of the city and county of San Francisco. And as the McEnerney act contemplates "actual possession" either by plaintiff, by his tenant, or by some person holding under him, and as plaintiff's possession is based wholly upon that of his asserted tenant for years, since such tenancy does not exist, it necessarily follows that plaintiff does not come within the purview of the act, and is not entitled, therefore, to maintain this action.

2. The affidavit accompanying the complaint in this instance declared merely "that said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him through divers mesne conveyances conveyed to said plaintiff, who is now the owner and holder thereof and has been for the last ten years and more." A requirement of a full and explicit showing of the period during which a plaintiff has enjoyed his estate, and a full and explicit showing of the person or persons "from whom obtained" is not met by the affidavit here presented. To say that one has owned an estate for 10 years and more is not fully and explicitly showing how long in fact he has owned and enjoyed it. And a statement that one acquired title by "divers mesne conveyances" from one John Bensley, to whom the state conveyed the property in 1855, is not a full and explicit showing, description or characterization of the person "from whom obtained." The provision of the statute requiring a full and complete statement in these particulars is manifestly designed for the benefit of the defendants, in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their own rights. For these reasons a full and fair compliance with the provisions is a just exaction from every plaintiff.

For the foregoing reasons, the judgment appealed from is affirmed.

I concur: LORIGAN, J.

SHAW, J. (concurring). I concur in the judgment solely on the ground that the affidavit accompanying the complaint is defective as stated in the second part of the foregoing opinion.

Upon the question first considered in the opinion, I am unable to agree with the conclusion there reached. The act is entitled: "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." The first section limits its application to instances where the public records of titles have been lost or destroyed by "flood, fire, or earthquake." Section 18 limits its application, in point of time, to proceedings begun under it before July 1, 1909, afterwards extended to January 1, 1911. It is well known that it was enacted to enable persons owning lands in San Francisco, where all the public records had been destroyed by the great fire of April, 1906, to obtain title of record, which would serve as a substitute for the destroyed record of the instruments on which the title depended. By its precise terms, a part only of which is quoted in the foregoing opinion, it declares that the relief provided therein may be obtained by "any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property" in the county. I agree that the procedure prescribed in the act should be followed closely. But with respect to the persons who may obtain its benefits, I believe that it should receive a broad and liberal construction, one that would include every person who might be benefited by the relief provided, rather than one which would exclude any such person or class of persons. The above language makes it applicable to the case of any person who claims an estate of inheritance and who, by himself or by another holding under him, is in actual and peaceable possession. The relation of landlord and tenant, in its narrow meaning, is not essential. One may be in actual possession by another holding under him, without that other person being his tenant in the ordinary sense and without the technical relation of landlord and tenant existing between them. One who holds a particular estate for years by grant, is, by a very common use of language, said to be holding under his grantor, although there is no obligation to pay rent in any form. In like manner, he would be holding under the grantee of the remainder. Such remainderman would be entitled to take advantage of the act to establish a record title to the remainder. If this were not so, then every landowner who may have conveyed to another an estate for years running beyond the time to which the act is extended, and who has not reserved any rent in the conveyance, is deprived of the benefits of the act.

We concur: ANGELLOTTI, J.; SLOSS, J.

MELVIN, J. (dissenting). I dissent and adhere to the department opinion previously prepared by me.

158 Cal. 702

SMITH v. CITY OF LOS ANGELES et al.

(L. A. 2,240.)

(Supreme Court of California. Dec. 1, 1910. On Rehearing, Dec. 31, 1910.)

1. TAXATION (§ 421*)—ASSESSMENT—VALIDITY —NONCOMPLIANCE WITH STATUTE.

An assessment is void which does not conform to Pol. Code, § 3650, requiring land to be listed by the assessor by township, range, section, or fractional section, and when it is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, not exceeding 640 acres in each tract.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

2. PUBLIC LANDS (§ 24*)—SURVEY.

Rev. St. § 2395 (U. S. Comp. St. 1901, p. 1471) requires public lands to be divided by north and south meridian lines, and by others crossing them at right angles so as to form townships of six miles square, and requires the townships to be subdivided into sections containing 640 acres each, by running each way parallel lines at the end of every two miles and by marking on each of such lines at the end of every mile, requires the sections to be numbered from 1 to 36 respectively, and also requires the plat to be made of the township and the fractional part thereof, and the subdivisions thereof. *Held* that, even after a principal meridian and a base line are established and the exterior lines of the township surveyed, the sections or subsections do not have a legal existence, until they are established by an approved survey under authority of Congress.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 31, 32; Dec. Dig. § 24.*]

3. TAXATION (§ 421*)—ASSESSMENT—IDENTIFICATION OF LAND ASSESSED—SUFFICIENCY OF ASSESSOR'S MAP.

Pol. Code, § 3658, requires the board of supervisors to furnish the assessor with maps, plat books, etc., for the use of his office which shall show the private land owned in the county, and, if surveyed under the authority of the United States, the divisions and subdivisions thereof. Section 3634 provides that if the owner fails to make a statement when requested, describing his land in parcels and subdivisions, the assessor may obtain an order for the survey of such land, defining the subdivisions. Section 3654 requires the map, books, etc., to be returned to the county assessor's office and kept there for future reference after delivery to the clerk of the board of supervisors for equalizing assessments, and provides that in the meantime the map, books, etc., must be left in his office for the inspection of persons interested. Section 3650 requires land to be listed by the assessor by township, range, section, or fractional section, and when it is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it. The assessor's map of land assessed, which was a part of a ranch, shows the outlines of only a part of the ranch, which were crossed by north and south and east and west lines, dividing the part platted into equal sections inside such outlines and into fractional sections adjacent to the exterior boundaries thereof, but such sectional lines were not founded on a survey by the owner, assessor, or otherwise, nor did it appear that they corresponded with the section lines outside the ranch, or to be located by any visible mark, being merely arbitrary lines drawn thereon, but the number of acres inclosed within some of the lines were marked on the map. *Held*, that the assessor's map did not identify the land assessed by sectional lines, metes or bounds, or otherwise, the sectional lines shown not representing an actual survey; and hence the assessment was void.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

4. Taxation (§ 810*) — Action—Sufficiency of Evidence.

In an action to quiet title to realty based upon title under a tax sale, evidence *held* to sustain a finding that the property assessed was not sufficiently identified by extrinsic evidence to enable the owner to determine from an inspection of the map what part of his land was attempted to be assessed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 810.*]

5. Taxation (§ 805*) — Sale — Redemption—Limitation.

Under Code Civ. Proc. § 315, prohibiting a suit by the people in respect to realty by reason of the right or title of the people thereto, unless such right or title accrued within 10 years before the action was begun, an action against a city to quiet title to land, claimed to have been sold under a void tax sale, was not void where less than five years had elapsed from the date of the sale to the state up to the commencement of the action.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

6. Taxation (§ 627*) — Assessment—Irregularities—Effect.

Under Pol. Code, § 3885, providing that no assessment or act relating to the assessment or collection of taxes shall be illegal for informality, or because it was not completed within the time required by law, a sale of land for taxes was not invalid because the delinquent tax list was published one day after the date required by section 3764, or because a statement attached to the published delinquent list was not verified by affidavit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1280; Dec. Dig. § 627.*]

7. Taxation (§ 627*)—Sale—Invalidity.

That the delinquent list did not comply with the form prescribed by Pol. Code, § 3764, did not render the tax sale invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1280; Dec. Dig. § 627.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. H. Smith against the City of Los Angeles and another. From a judgment for defendants, plaintiff appeals. Affirmed.

C. S. McKelvey and Smith, Miller & Phelps, for appellant. Leslie R. Hewitt, City Atty., and Emmet H. Wilson, Chief Deputy City Atty., for respondent city. J. W. McKinley, for respondent Griffiths.

PER CURIAM. The decision of the District Court of Appeal for the Second district, in this cause, was vacated and the cause transferred to this court, mainly for the purpose of further considering the sufficiency of the assessor's map, made under the provisions of section 3658 of the Political Code, as a means of identification to supply the defects in the descriptions of land in the assessment and the tax deeds. The trial court found that it was not sufficient and we are satisfied that we cannot disturb that finding. The opinion of Justice Allen, in the District Court of Appeal, is appended hereto and adopted as the opinion of this court.

Concerning the assessor's map we add the following: The section provides that the board of supervisors "must provide and furnish the assessor with the proper books, blanks, maps and plat-books for the use of his office. Such maps and plat-books shall show the private lands owned or claimed in the county, and if surveyed under the authority of the United States, the divisions and subdivisions thereof, with their acreage, according to such survey; if held under Spanish grant, the exterior boundaries of such grants, the divisions and subdivisions, and number of acres claimed." It also provides that the state board of equalization "may require such map and plat-books to be indexed to show owner's names, give correct description for assessment, show improvements and assessed value."

There is no evidence nor claim that the state board ever required any of these things. The copy of the map contained in the transcript shows that it does not comply with such requirements, if they were made, except that the number of acres inclosed by some of the lines marked thereon are indicated by figures followed by the letter "A." The map shows the outlines of a part of the Rancho Los Feliz, but not all of it. These are crossed by north and south lines and east and west lines, dividing the portion platted into squares of equal size inside and fractional parts of squares next to the exterior bounds. There is no evidence that these lines are founded on any survey or that the rancho was ever surveyed and subdivided into lots corresponding to these squares by the owner, or by the assessor, or at all. Section 3629 of said Code authorizes the assessor to exact a statement from each landowner containing an exact description of his lands in parcels and subdivisions, not exceeding 640 acres each. Section 3634 provides that if the owner fails to do this, or fails to give a sufficient description, the assessor may obtain from the superior court an order requiring the county surveyor to survey the land and define the subdivisions for the assessor. There is no evidence that this was done or that the assessor's map represents any such survey. The maps and plat books provided for by section 3654 were not intended to represent any actual survey or surveys. The owners are not consulted in their preparation nor allowed any opportunity to see that they are correct, and they are not binding upon him. They are mere compilations embracing the entire county made under the direction of the board of supervisors, or by the assessor, upon such information as may be at hand. They are designed merely to facilitate the business of the office, as a convenient exhibition of all the lands in the county to which the officers can refer in the daily routine of business. It is not shown that the subdivisions indicated on the map by the parallel lines have ever been marked on the ground, or that they coincide with the section lines outside the rancho, or that they can be located by any visible marks or monuments or at all. They are mere arbitrary lines drawn on paper in some office without any reference whatever to actual conditions on the premises. Some one has copied a part of the map of the rancho attached to the record of the patent, and has drawn these lines across his copy, so as to make a picture such as might be shown by a map of a part of the congressional townships in which the rancho lies, if such townships had ever been surveyed, subdivided, and mapped through said rancho. As a matter of fact, they never were so surveyed. The picture has no counterpart on the surface of the land. It cannot serve to identify the land, for the location of the tracts indicated cannot be ascertained.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Opinion of the District Court of Appeal.

The action was one instituted by plaintiff against defendants to quiet title to certain described real estate, plaintiff's title resting upon sales of the premises on account of the nonpayment of delinquent taxes, the validity of which is the sole matter in controversy.

The court finds that plaintiff had no right, title, or interest in said property, and rendered judgment against plaintiff for costs. From this judgment, plaintiff appeals upon a bill of exceptions.

The facts as presented by the record are these: The Rancho Los Feliz was granted by the Mexican government in 1843 to one Verdugo, which grant in 1854 was by the land commissioners confirmed, and upon appeal from such confirmation the District Court of the United States for the Southern district of California, in its December term in 1856, affirmed the decree of said commissioners to the extent of 1½ leagues, the exterior boundaries whereof were defined by the record of juridical possession on file in said case, and the title of said Verdugo was decreed good and valid. Thereafter, in 1871, a patent was issued by the government of the United States to the said Verdugo to the premises so included in said grant and subsequently confirmed, which patent certified that a plat and survey of said lands had been deposited in the general land office, whereby it appears that said claim had been designated as lot No. 38, in township 1, north of range 13 west, lot No. 38 in township 1, north of range 14 west, lot No. 38 in township 1, south of range 13 west, and lot No. 37 in township 1, south of range 14 west, San Bernardino meridian, containing 6,647.46 acres of land. A copy of such plat and survey was attached to such patent and made part thereof. An examination of such plat shows that the lots No. 38 north of the base line, and being the portion of the rancho in which is situated the property in dispute, were not surveyed or divided into sections. The only lines of survey marked thereon affecting the property in controversy being the base line, a line marking the southerly boundary of sections 13 and 14, a line extending southerly from the southerly line of sections 13 and 14 along the westerly line of rancho to a point at and below the southerly limit, and the township line extending north and south dividing township 13 west from township 14 west. No lines marked or corners appear on the map indicating any survey of east and west lines through any of the territory lying between the base line and the southerly line of sections 13 and 14, which, if the sections were full, would be a distance of three miles. It is true that there appears upon the profile in that portion marked "lot 38" in township 14 west in the southerly part thereof, the word and figures "section 36," and near the center thereof "section 25," and north of the northerly line of the rancho the word and figures marked "section 24," but nothing appears as indicating the dividing line between the respective sections. Again, lot 38 in township 1, north of range 13 west, which extends from the base line northerly at least 2½ miles, and is almost equal in width with the other lot 38, has only one section marked thereon, being designated "section 31," the area of which it is obvious from the profile must exceed in extent two congressional sections. It further appears from the record that under these conditions the lands in question were by the assessor listed for taxation, and described in such assessment and in all proceedings thereafter leading up to and including the deeds to plaintiff as "Ro Los Feliz, 265 acs. being fractional sec. 24 T. 1. N. R. 14, W." in one deed, and in the other deed, "Ro Los Feliz 599 acs. being fractional sec. 25, T. 1. N. R. 14 W." there having been a separate deed for each parcel. The taxpayer named in the assessment owned at the time thereof the whole of the Los Feliz rancho. After the assessment for taxation, the taxpayer conveyed a large part of such rancho, including the premises in controversy, to defendant city, the same to be used for park purposes, which conveyance was made March 5, 1898, and the defendant city has ever since been in possession thereof, claiming ownership and making improvements thereon. The attempted sales to the state, on account of delinquent taxes, were made on July 2, 1898, and the time for redemption expired July 3, 1903. No redemption being made, the state sold the property to plaintiff on June 30, 1905. This action was commenced January 3, 1907, and the judgment herein rendered January 7, 1908.

The principal question involved upon this appeal is, Was the land assessed for the purpose of taxation under a description sufficient for its identification? Section 3650 of the Political Code of this state provides that property shall be listed by the assessor in accordance with the following method: Land, by township, range, section, or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, not exceeding in each and every tract 640 acres. Any assessment not in conformity with this section is wholly void. Palomares Land Company v. Los Angeles County, 146 Cal. 536, 80 Pac. 931.

It is insisted by appellant, that, fairly considered, the map and profile attached to the patent literally divided these premises into congressional subdivisions, and therefore the description in the assessment is technically correct. With this we cannot agree. Assuming that, notwithstanding the particular description in the decree of confirmation, the record of juridical possession on file in said case and the intendments in favor of every judgment, section 8 of the act of July 23, 1866 (Zabriske's Land Laws of the United States, page 571), and not sections 6 and 7 of the act of 1864, apply to this grant, and that it was the duty of the Surveyor General to cause the lines of the public surveys to be extended through such lands, nevertheless, we think it clear from the plat and profile that such survey as provided by the act of 1866 was never in fact made.

Section 2395, Rev. St. (U. S. Comp. St. 1901, p. 1471) provides: "The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles so as to form townships of six miles square. * * * Third. The township shall be subdivided into sections containing as nearly as may be 640 acres each, by running through the same each way parallel lines at the end of every two miles; and by marking on each of such lines at the end of every mile. The sections shall be numbered respectively, beginning with the No. 1 in the northeast sections and proceeding west and east alternately through the township with progressive numbers until the 36 be completed. * * * Eighth. * * * He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands described, the subdivisions thereof, and the mark of the corner."

It is said by our Supreme Court in Bullock v. Rouse, 81 Cal. 594, 22 Pac. 920: "Even after a principal meridian and a base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is divided into sections and quarter sections by an approved survey. The lines are not ascertained by the surveyor, but they are created. * * * The tract has no separate legal identity until the survey is made and approved under the authority of Congress."

Appellant further contends that, conceding that no such division into congressional subdivisions was ever had, nevertheless, it was competent to show by evidence aliunde facts from which the identity of the land assessed could be determined, and accordingly offered in evidence a map prepared for the assessor under the provisions of section 3658, Political Code, from which map it appears that the Los Feliz rancho is divided into sections not in conformity with the plat attached to the patent, but by arbitrary lines, and not by fixed congressional districts, and it is claimed that this map identifies the lands assessed beyond the possibility of question. This map is not recorded. There is no provision of law for its record, and it purports upon its face to create for the purposes of assessment that which does not in fact exist. The rule laid down in Best v. Wohlford, 144 Cal. 737, 78 Pac. 293, is that evidence may be received for the purpose of showing the sufficiency of identification, and whether the description of the land is sufficient to identify it, is a question of fact to be determined from the evidence presented on that issue; that parol proof may be resorted to for the purpose of applying the terms of the description to the face of the earth but no further, and that it cannot supply any deficiencies in the metes and bounds. Applying this rule, the assessor's map could not be placed upon the surface of the ground for the purpose of identifying sections which did not in fact exist. It is not possible to make a description of a tract clear and definite when such tract has no description of the kind and character sought to be defined. The assessor's map could not create a congressional subdivision, and it contains nothing which would establish the identity of the tract or parcel of land sought to be assessed, either by metes and bounds or other descriptive statements designating the property, so that the part of the Los Feliz rancho sought to be charged with the tax could be ascertained—a necessary thing in proceedings to enforce the collection of a tax Labs v. Cooper, 107 Cal. 657, 40 Pac. 1042.

The trial court impliedly found that this extrinsic evidence offered did not so identify the property sufficiently to enable the owner to determine from any inspection of it what part of his land was so sought to be assessed, and we think this finding of fact should not be disturbed. The trial court further found that the defendant city had been in the quiet and peaceable possession of all the real property described in the said amended complaint, and hereinbefore described, holding and claiming it adverse to plaintiff and adverse to all other persons for more than five years prior to the commencement of this action. We think this finding and the fact upon which it is based is insufficient to establish a prescriptive title in the defendant. Were it conceded that the state acquired a title thereto by the tax proceedings in the deed of the sale for delinquent taxes, as against the state the period of the bar, "section 315, Code Civ. Proc.," is 10 years, and as against the plaintiff five years from the period of the acquisition of title, less than five years elapsing from the date of the sale to the state up to the commencement of the action, we think there is no merit in the claim of prescriptive title alone as supporting the judgment. Wilhoit v. Tubbs, 83 Cal. 287, 23 Pac. 386.

Respondent further criticises the proceedings of the officers in and about the assessment and sale of the property in that the delinquent tax list was sought to have been published on the 6th day of June, 1898, a day succeeding the time when the publication is required by section 3764, Political Code. We think this contention is answered in the case of Buswell v. Supervisors, 116 Cal. 354, 48 Pac. 227, where it is said "that the provisions as to the time upon which or within which acts are to be done by a public officer, regarding the rights and duties of others, are directory unless the nature of the act or language of the Legislature makes it clear that the time fixed is by way of limitation," in support of which, section 3885 of the Political Code is cited, which section provided that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality or because the same was not completed within the time required by law." This section, we think, applies as well to the criticisms made on account of the fact that the statement attached to the published delinquent list was not sworn to; that is to say, there was no affidavit attached showing its verification.

The point made by respondent as to the form of the tax collector's deed has been made and disposed of by the decision in Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936.

Respondent presents no authority in support of its proposition that the sale was invalid, by reason of the fact that the delinquent list did not comply with the form required by section 3764, Political Code. This question, we think, has been disposed of in the case of Carter v. Osborn, 150 Cal. 620, 89 Pac. 608.

As a summary, therefore, we are of opinion that for the reason that the property was not assessed by a description sufficient for identification, the assessment and all proceedings thereunder were void, and that plaintiff was not shown to have any title or interest in the property, and the finding of the trial court in that regard must be sustained.

BEATTY, C. J., not participating.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I have always been of the opinion that the property involved in this action was sufficiently described in the assessment, and but for the fact that I was absent at the time the opinion of the court was filed, I should have expressed my dissent at that time.

The denial of the petition of plaintiff for a rehearing enables me to record my dissent.

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14 Cal. App. 393

WITTER v. REDWINE. (Civ. 749.)

(Court of Appeal, Third District, California. Oct. 29, 1910.)

1. New Trial (§ 163*)—Order—Operation.

Where an order granting a new trial does not specify the particular ground on which it is based, it will be affirmed if it can be justified on any of the grounds urged.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330–332; Dec. Dig. § 163.*]

2. New Trial (§ 68*)—Appeal and Error (§ 979*) — Grounds — Insufficiency of Evidence.

The granting or denying of a motion for a new trial because the verdict is contrary to the evidence is largely within the discretion of the trial court, and its action will not be reversed, unless its discretion has been abused.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 130; Dec. Dig. § 68;* Appeal and Error, Cent. Dig. §§ 3871–3873; Dec. Dig. § 979.*]

3. New Trial (§ 70*) — Insufficiency of Evidence—Review.

Where a new trial was demanded on the ground that the evidence was insufficient to sustain a verdict and that the verdict was contrary thereto, the trial court could not rest on a conflict in the evidence, but must weigh the evidence, and if the judge is not satisfied with the verdict and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142–148; Dec. Dig. § 70.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Von B. Witter against Georgia Redwine. From an order granting plaintiff a new trial after verdict for defendant, she appeals. Affirmed.

T. J. Butts, for appellant. Lucien Fulweider, for respondent.

BURNETT, J. The action was brought to recover money claimed to have been loaned by plaintiff to defendant. A general verdict was rendered by a jury in favor of defendant, and a motion by plaintiff for a new trial was granted by the trial court. From this order the defendant has appealed. The motion was based upon several grounds, among which was specified the insufficiency of the evidence to sustain the verdict. The order of the trial court was as follows: "This cause is before the court on a motion for a new trial on the grounds of newly discovered evidence and insufficiency of evidence, etc. The court is of the opinion that a new trial should be granted, and it is so ordered."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court, as will be observed, did not specify the particular ground upon which the order was based, and it is therefore indisputable that said order must be affirmed, if it can be justified upon any of the grounds upon which the motion for a new trial was made. There can be no doubt that the order of the court may be justified upon the ground of the insufficiency of the evidence to sustain the verdict. The rule, as to this, is stated in People v. Flood, 102 Cal. 332, 36 Pac. 663, as follows: "If one of the grounds of the motion for a new trial is that it is contrary to evidence, and the order does not specify the ground upon which the new trial is granted, it must be held that, if there is any ground upon which it can be sustained, it must be affirmed; and that, as the granting or denying a motion for a new trial upon the ground that the decision or verdict was contrary to evidence is largely within the discretion of the trial court, its action will not be reversed, unless its discretion in this respect has been abused, whether this be the only ground upon which the motion is made, or one of the several statutory grounds."

It is equally clear that we cannot say that the court below abused its discretion in granting the motion for a new trial. This follows from the consideration that the evidence was conflicting, and we must assume that the showing made by the parties carried conviction to the mind of the trial judge that the verdict was wrong. Holding to this belief, it was the duty of the trial court to grant the motion for a new trial. Appellant admits that "there is a direct conflict between the testimony of the plaintiff and the testimony of the defendant," but she contends that "the jury were the sole judges of the facts and of the credibility of the witnesses, and they observed them and their manner of testifying, and where there is a substantial conflict of the testimony, the verdict should not be disturbed, as the preponderance of the evidence was in favor of the defendant." She has, however, entirely mistaken the rule by which the trial court is governed in reviewing the sufficiency of the evidence on a motion for a new trial. The question has been recently discussed by this court in the case of Kramm v. Stockton Electric Railroad Company, 10 Cal. App. 271, 101 Pac. 914, and therein it is held, in accordance with the statement of the rule by the Supreme Court in various cases, that "the trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony." While we are not in a position to pass upon the veracity of the witnesses and do not undertake to do so, we can readily understand how the trial court, exercising a just and wise discretion, may have reached the conclusion, from observing the manner of said witnesses and the apparent probability of their statements, that the plaintiff's testimony was true and that he would be greatly wronged if the verdict were permitted to stand.

There was a sufficient specification of the insufficiency of the evidence, and, as the action of the court upon this ground was warranted and decisive of the controversy, the other questions incidentally discussed by counsel need not be considered.

The order granting the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

158 Cal. 711

MILLSAP v. BALFOUR. (Sac. 1,797.)

(Supreme Court of California. Dec. 2, 1910.)

1. Appeal and Error (§ 1097*)—Former Decisions—Law of the Case.

Plaintiff having sued to foreclose a street assessment lien for laying sidewalks, defendant demurred to the complaint, and on appeal from an order sustaining the demurrer the Supreme Court reversed the decision, holding that lots on one side of the street might be lawfully assessed to pay the cost of a sidewalk laid on the opposite side, where it was not shown that a sidewalk had already been laid in front of such lots on the side on which they abutted, when the proceeding was instituted for the walk on the opposite side. *Held* that, it not appearing at the time of such decision that defendant had constructed a walk on his side, such decision on appeal was not the law of the case on a subsequent appeal from judgments enforcing a lien against defendant's lots after a trial on the merits, on which it appeared that defendant had previously constructed a sidewalk in front of his lots, under the rule that a prior decision is the law of the case only so far as the facts are the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4361; Dec. Dig. § 1097.*]

2. Municipal Corporations (§ 428*)—Street Improvements—Sidewalks—Assessment — Construction of Work by Property Owners—Assessment for Work on Opposite Side of Street.

Deering's Gen. Laws 1909, p. 1290, § 7, subd. 1, relating to municipal improvements, provides that the expenses incurred shall be assessed on the lots and land fronting thereon except as otherwise specifically provided. Subdivision 8 declares that where work with certain exceptions is done on either or both sides of the center line of any street for a block or less, and further work opposite to the work of the same class already done is ordered to complete the unimproved portion of the street, the assessments to cover the total expense of the work so ordered shall be made on the lots or portions of lots only "fronting" the portions of the work so ordered. Subdivision 10 declares that, when the owner of any lots or land fronting on any street shall have done the work in front of his lot at his own expense, such work will be excepted from the order for the work, and subdivision 11 declares that the lots or portions of lots fronting upon any excepted work already done shall not be included in the frontage assessment for the class of work from which the assessment is made. *Held* that, where an owner of land on one side of a street on which sidewalks were to be constructed on both sides constructed sidewalks in accordance with the specifications in front of his own property, such property was not subject to assessment for any part of the cost of constructing walks on the other side of the street in front thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 428.*]

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Wirt Millsap against Douglass Balfour. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 154 Cal. 303, 97 Pac. 668.

Hudson Grant, for appellant. E. B. Mering, City Atty., for respondent.

SHAW, J. Appeal by defendant from a judgment foreclosing the lien of a street assessment made under the act commonly known as the "Vrooman Act." St. 1885, c. 153. The work for which the assessment was levied was the laying of a concrete cement sidewalk five feet wide along the south side of Clover street in the city of Woodland from Westcott street to Walnut street, a distance of six blocks, excepting the portions thereof where concrete cement sidewalks had already been constructed and accepted. Balfour owned a lot abutting Clover street on the north side, fronting thereon for a distance of 186 feet, situated on the northwest corner of First and Clover streets, opposite a part of one of the blocks included in the improvement ordered. The work was ordered by resolution adopted on January 21, 1907. Prior to that date Balfour, at his own expense, had laid a concrete cement sidewalk five feet wide in front of his lot, both on Clover street and on First street. It was laid upon the official grade, it complied with the specifications then required by the city, it was constructed in pursuance of permission from the city council, and on January 21, 1907, it was in perfect order and in a condition satisfactory to the street superintendent of the city. The expenses of the sidewalk on the south side of Clover street as ordered by the council under the Vrooman act, amounted to $1,179.67. The assessment therefor was made upon each and every lot fronting on Clover street, those on the north side as well as those on the south, from Westcott street to Walnut street, excepting certain lots on the south side in front of which a sidewalk had been previously laid, but including all the lots on the north side, whether a sidewalk had already been laid in front of them or not. The plaintiff's lot was assessed for $48.54. Judgment of foreclosure for that sum and for costs was given. This case was before this court upon a former appeal by the plaintiff from a judgment for the defendant given upon the sustaining of his demurrer to the complaint. 154 Cal. 303, 97 Pac. 668. The judgment was reversed and the sum of $22.25 was thereupon taxed in the court below for the said plaintiff's costs upon said appeal. The judgment now appealed from declares that the plaintiff is personally liable for this sum. The defendant contends, upon this appeal, that inasmuch as he had already, at his own expense, laid a sidewalk satisfactory to the street superintendent in front of his lot on the north side of the street, that lot could not be lawfully assessed for the cost of a sidewalk upon the opposite side. He also claims that the part of the judgment declaring him personally liable for the costs of the former appeal is erroneous.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1. Upon the first question the respondent claims that the decision upon the former appeal is the law of the case and is conclusive. The record upon that appeal consisted only of the complaint, the demurrer, and the judgment. There was nothing therein to show that Balfour had previously, or at all, constructed a sidewalk in front of his lot. That decision, so far as it was based on the record before the court, was merely to the effect that lots on one side of a street could be lawfully assessed to pay the cost of a sidewalk laid on the opposite side, where it is not shown that a sidewalk had been already laid in front of such lots at the time the proceeding for the walk on the opposite side was begun. It is not the law of the case except in so far as the facts are the same. Sharon v. Sharon, 79 Cal. 654, 22 Pac. 26, 131; Heidt v. Minor, 113 Cal. 391, 45 Pac. 700; Klauber v. San Diego St. Car Co., 98 Cal. 107, 32 Pac. 876; Hibernia, etc., Soc. v. Farnham, 153 Cal. 583, 96 Pac. 9, 126 Am. St. Rep. 129; Jacks v. Deering, 150 Cal. 275, 88 Pac. 909; Flood v. Templeton, 152 Cal. 158, 92 Pac. 78, 13 L. R. A. (N. S.) 579; Ellis v. Witmer, 148 Cal. 534, 83 Pac. 800. Hence, as the record in the present case does show the fact that Balfour had previously constructed a sidewalk in front of his own lot, the former decision does not control. It has the force of a precedent, so far as it is applicable, but it does not constitute a conclusive adjudication of the law. It is true, counsel for Balfour, in his brief upon that appeal, asserted that he had laid a walk in front of his lot at his own cost, and argued that, under subdivision 11 of section 7 of the Vrooman act, his lot must on that account be excepted from the assessment, and the court, in the opinion deciding the appeal, said that, even if the fact were as asserted, the lot would nevertheless be subject to assessment for half the cost of a walk laid on the opposite side. But this was a statement upon a point not presented in the record, and although it was upon a fact asserted and a point argued by counsel, it was not a decision having binding force as an adjudication of the law of the case. That doctrine does not extend to obiter dicta. Wixson v. Devine, 80 Cal. 388, 22 Pac. 224; Oakland v. Carpentier, 21 Cal. 667; Gwinn v. Hamilton, 75 Cal. 266, 17 Pac. 212; Ventura v. Clay, 119 Cal. 215, 51 Pac. 189. The question must be decided on its merits, and not upon the theory that it was settled by the former decision. The law upon which the question depends is section 7 of the Vrooman act, as amended in 1891. St. 1891, p. 201; Deering's General Laws 1909, p. 1290. The portions of this section which bear upon the question, omitting the irrelevant clauses, are as follows:

Subdivision 1: "The expenses incurred for any work authorized by this act * * * shall be assessed upon the lots and land fronting thereon, except as hereinafter specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work."

Subdivision 8: "Where any work mentioned in this act (manholes, cesspools, culverts, crosswalks, piling, and capping excepted) is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expense of said work so ordered shall be made upon the lots or portions of the lots only fronting the portions of the work so ordered."

Subdivision 10: "* * * Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done, or shall hereafter do, any work (except grading) on such street, in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering the work to be done, as provided in subdivision eleven of this act; provided that the work so done at the expense of such owner or owners, shall be upon the official grade, and in condition satisfactory to the street superintendent at the time such order is passed." (Special provisions are made for grading work.)

Subdivision 11: "The city council may include in one resolution of intention and order any of the different kinds of work mentioned in this act, and it may except therefrom any of the work already done upon the street to the official grade. The lots or portions of lots fronting upon said excepted work already done shall not be included in the frontage assessment for the class of work from which the assessment is made."

It appears clear that these provisions forbid the assessment of Balfour's lot for any portion of the expense of the work ordered to be done. He had previously laid a similar walk upon the official grade by permission of the council, and this walk was in a condition satisfactory to the street superintendent at the time the sidewalk on the opposite side of the street was ordered. The above quoted provisions of subdivision 10 had been literally complied with. The order in question provided in terms that a walk should be constructed "along the south side of Clover street" for the specified distance "excepting such portions of said street as are required to be kept in order by any person or company having railroad tracks thereon, and also excepting such portions thereof where concrete cement sidewalks have already been constructed and accepted."

It may be admitted that the terms of the exception quoted, if construed without reference to the statute, would not cover the lot of Balfour upon the north side of the street, since the order itself was for a walk upon the south side only, and an exception of "portions" of that side would not exempt a lot on the north side. But the purpose of the exception in the order must have been to comply with the provisions of the statute on the subject, and it should be given that effect, if reasonably possible. And even if the exception does not, under any possible construction, include the plaintiff's lot, the law would nevertheless control, and if the facts are such as to bring the lot within the exemption of the statute, it would not be liable for any part of the cost of the walk, although not expressly excluded by the terms of the order.

Balfour had complied with the provisions of subdivisions 10 and 11, and was entitled to exemption thereunder, unless those provisions, so far as sidewalks are concerned, are intended to apply only in cases where the walk subsequently ordered is upon the same side of the street as that upon which the walk is already, in part, laid. But in view of the other provisions of the act, this could not possibly have been intended. At all events, if it was so intended, the effect would be that the law, as to such cases, would not be uniform in its operation, would work unequally, unfairly and unjustly, and it would therefore be unconstitutional. An intent to make an unconstitutional law is not to be imputed to the Legislature unless no other interpretation is reasonably possible. If the statute means this, then Balfour, and every person similarly situated, after having paid the whole cost of a walk in front of his lot on the side it abuts, will be compelled to pay one-half of the walk ordered to be laid on the opposite side of the street in front of the opposite lot, while the owner of the opposite lot will be obliged to pay only one-half of the cost of the walk on which his lot abuts and nothing for the opposite walk, or if we concede that such owner of the opposite lot might be assessed for one-half of the cost of a walk to complete the improvement on Balfour's side, whenever such completion is ordered, still he would pay only one-half thereof, and the sum of his payments would only equal the cost of one walk for the length of his frontage, whereas Balfour, if he is not now exempt, will have to pay one and a half times the cost of a walk of that length. In other words, when the sidewalk is laid on both sides of the street, the man who has laid it in front of his own lot, at his own expense, before any proceedings are begun, will have paid three-fourths of the total cost of his frontage, while his neighbor opposite will have paid only one-fourth. A law which would cause this result would not operate uniformly on persons similarly situated with respect to it, and to that extent it would be invalid.

It is not necessary, however, to give it a construction which would have this effect. Of course, if we should hold that, under the first subdivision above quoted, where a sidewalk is ordered on only one side of a street, the whole cost thereof is to be assessed against the lots on that side only, the question here presented could not arise. The former decision in this case, being the "law of the case" to the extent that both sides may be assessed, where no walk is already laid on the opposite side, we are bound to accept that rule, so far as the present decision is concerned. But if we concede, as we must under that decision, that in the case of a sidewalk on one side only of a street, the lots on the opposite side are to be considered as "fronting thereon" and consequently are to be assessed therefor according to such frontage, under the provisions of subdivision 1, then we must carry this meaning into the other portions of the section relating to the same subject. In this view, a lot fronting on either side is to be considered as fronting upon the whole street and assessable for a sidewalk upon the opposite side, equally with those on the side where it is laid. The necessary consequence is that where, in the part of subdivision 10 above quoted, the statute speaks of an owner of land "fronting on any street," who shall do any work (which includes a sidewalk) "in front of any block," and then refers to similar work afterwards ordered "in front of the same block," it must be understood to include a sidewalk subsequently ordered on the side opposite to the lot of such owner, as well as one on the same side. Likewise, in subdivision 11 the provision that the lots "fronting upon said excepted work already done shall not be included in the frontage assessment, for the work" subsequently ordered, must, in the case of a sidewalk, mean a lot on the side opposite to the side on which the walk is ordered, as well as a lot on the same side. If the lots across the street from a sidewalk ordered are to be considered as "fronting thereon"—that is, on that work, for the purposes of assessment for the cost thereof—then, under subdivisions 10 and 11, such sidewalk ordered must be considered as "in front of the same block," and the work already done by the owner on the opposite side, must also be deemed to be work "in front" of the block on which the work is ordered, for the purpose of the exemption provided by the last-mentioned subdivisions. In contemplation of the statute the sidewalks on both sides of a street comprise the entire work of that class upon that street, and one who has properly performed at his own expense any part of such entire improvement is to be given credit for that much of the entire work by the exemption. Thus construed, the statute does not authorize any assessment upon Balfour's lot for the sidewalk ordered and laid on the side across the street opposite thereto, in front of which he had already laid a walk. We think it should receive the construction above stated, and that no other would be reasonable or constitutional.

Possibly the same result would be brought about by subdivision 8 if it is applicable to the case. In this case the sidewalk ordered extended over several blocks, while the sidewalk previously laid by Balfour on the side opposite thereto was for less than one block. San Diego Inv. Co. v. Shaw, 129 Cal. 275, 61 Pac. 1083, involved the work of grading a street to the official grade, on the east side of the center line thereof, for a distance of 17 blocks. The whole cost was assessed exclusively upon the lots fronting on the east side. The defendant owned one lot on that side. It did not appear that the grading on the west side had been already done. The court said, "The work was not done on one block or less, opposite work of the same class already done," and for that reason subdivision 8 was held not applicable, whether because the work ordered was for more than one block, or because no work had been already done on the opposite side, is not made clear, but from the language of the subdivision it must have been for the latter reason. The exemption of this subdivision, by its terms, applies to a lot on one side of a street in front of which a particular class of work is already done, "for one block or less," where further work of that class on the opposite side thereto is afterward ordered to be done, although the "further work" may extend to more than one block, and so far it undoubtedly includes the case of Balfour. The additional condition is imposed, however, that such "further work" must be "ordered to be done to complete the unimproved portion of said street." As the sidewalk here ordered was for one side only, and that the side opposite to Balfour's lot, it would not, of itself, entirely complete the sidewalking of the street for the entire length of the work ordered, but only one side thereof. But that is not what is meant by this subdivision, as applied to sidewalks. If it were, it would not apply to sidewalks at all, except where the "further work" ordered extended only the same distance along the street as the work already done opposite, or where it included both sides for the same block, at least. We cannot suppose that this limited application was the one intended. It would be an extremely rare occurrence, and the protection of the exemption could be easily evaded in most instances by extending the further work to a greater distance and improving each side by separate proceedings. Nor is there any necessity for giving it this effect. The words "to complete the unimproved portion of said street" may reasonably be held to refer to that section of the street in front of the work already done. If the work ordered has the effect, in connection with that already done, to complete the whole street for that section thereof, so far as that class of work is concerned, then the case comes within the protection of the statute, and the lot in front of which the work is already done is exempt. In such case the assessment upon the lots fronting upon that section must be upon those fronting directly upon the work ordered; that is, upon the same side of such section. In this way the exemption will apply to all cases, and only in this way can substantial justice always be done, under this subdivision.

For these reasons, we conclude that Balfour's lot, upon the facts found, was not liable for any part of the cost of the work ordered to be constructed and that the assessment thereof was unauthorized and invalid. As this will require a reversal of the judgment, it is unnecessary to consider the clause therein declaring him personally liable for the costs of the former appeal.

The judgment is reversed.

I concur: ANGELLOTTI, J.

I concur in the judgment: SLOSS, J.

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158 Cal. 720

MILLSAP v. WILBUR. (Sac. 1,783.)

(Supreme Court of California. Dec. 2, 1910.)

Department 1. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Wirt Millsap against W. P. Wilbur. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. B. Mering, for appellant. Hudson Grant, for respondent.

SHAW, J. This is an appeal by the plaintiff from a judgment refusing to allow him a lien upon the lot of the defendant under a street assessment.

The proceeding in which the assessment was levied was the same as that considered in the case of Millsap v. Balfour (Sac. 1,797, decided simultaneously herewith) 112 Pac. 450. The findings in this case show that the improvement ordered consisted of the construction of a concrete cement sidewalk along the south side of Clover street from Wescott street to Walnut street in the city of Woodland, crossing First, Second, Third, Fourth and College streets, and that the defendant Wilbur owned a lot on the north side of said street between Second and Third streets. It further showed that prior to the passage of the resolution of intention to make this improvement the city had given notice to the property owners along the line of the street on each side thereof, that it intended to proceed to cause sidewalks to be constructed thereon, and gave them until October 1, 1905, within which to do the work in accordance with the directions of the city officials, and that in pursuance of this notice and order the defendant Wilbur and the other owners of the lots fronting on said street between First street and Third street had caused such sidewalks to be constructed on both sides of said street for the entire length of the said blocks. The assessment in question was levied upon all the lots fronting on said street between Walnut street and Wescott street, excepting those on the south side of the two blocks aforesaid upon which sidewalks had been already constructed, but including those on the north side thereof. The rate of assessment was $.2611 per front foot, and the portion assessed upon the lot of Wilbur was $48.54. The court below concluded that the lots upon the north side of these two blocks could not be assessed for this improvement, and denied the plaintiff any relief.

These facts bring the case within the principle laid down in the decision of Millsap v. Balfour above mentioned.

Upon the authority of that decision the judgment is affirmed.

I concur: ANGELLOTTI, J.

I concur in the judgment: SLOSS, J.

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158 Cal. 567

ALASKA SALMON CO. v. STANDARD BOX CO. (S. F. 5308.)

(Supreme Court of California. Nov. 18, 1910. On Rehearing in Bank, Dec. 17, 1910.)

1. Frauds, Statute of (§ 146*)—Pleading Contract Within Statute.

The complaint in an action on a contract need not allege it was in writing, as required by the statute of frauds; but that it was is to be presumed, and defendant relying on the statute against the complaint must plead it.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 352-354; Dec. Dig. § 146.*]

2. Corporations (§ 519*)—Actions—Compliance with License Law — Burden of Proof.

That plaintiff, admitted by the answer to be a corporation and engaged in business as such, has failed to comply with the corporation license law, and so is not entitled to maintain the action, is matter of affirmative defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2093; Dec. Dig. § 519.*]

3. Sales (§ 99*)—Termination of Contract—Delivery in Installments—Failure to Pay for Installment on Delivery.

Though a contract to manufacture and deliver boxes in installments contemplates payment for each installment as delivered, mere failure to pay for an installment when delivered is not a violation of the contract, which avoids it, refusal to pay for them being justified by an insufficient number being delivered, those delivered being of inferior quality, and there being then insufficient time to count and inspect them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 264; Dec. Dig. § 99.*]

4. Sales (§ 108*)—Termination of Contract—Acts Constituting Rescission.

Defendant contracted to manufacture and deliver to plaintiff 100,000 boxes in which to pack canned salmon, 50,000 to be delivered in the first week of April of a certain year, shortly after which, as it was understood, plaintiff's vessel would take them to its canning factory in Alaska; the other 50,000 to be delivered at the same time the next year, each delivery to be paid for as made. Defendant delivered less than 50,000 boxes in time to be taken on the vessel, and those delivered, as noted by plaintiff, and made known to defendant, during delivery, were not up to quality. *Held* that, as it would have been difficult, if not impossible, to replace them if any were rejected, and the time for inspection being short, and it being plaintiff's duty to minimize the damages, it was justified in taking on board those furnished, and refusing to pay till the damages were determined, so that the contract was not avoided thereby; and there having been an adjustment of the difference by arbitration, and a payment of the award, and defendant not having treated the contract as abrogated, till plaintiff demanded delivery of the remaining boxes for the following year, plaintiff could recover for failure to deliver them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 277; Dec. Dig. § 108.*]

5. Sales (§ 417*)—Action by Buyer—Failure to Deliver Goods—Proof of Plaintiff's Ability to Perform.

Plaintiff, suing for breach of defendant's contract to manufacture boxes and deliver them to it, sufficiently proves that it was ready, able, and willing to perform, where its insolvency is not charged, and the defense is not based on its inability by the fact that defendant's refusal to furnish the boxes involved no question of plaintiff's ability, but arose simply from defendant's demand that new terms, conditions, and price be fixed, the price of such boxes having risen.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1173; Dec. Dig. § 417.*]

6. Sales (§ 418*)—Action by Buyer—Failure to Deliver Goods—Damages.

Notwithstanding Civ. Code, § 3354, providing that in estimating damages, the value of property to a buyer, deprived of its possession, is the price at which he might have bought an equivalent in the market nearest to the place where the property ought to have been put in his possession, a purchaser can recover of a seller, who refuses to deliver, the difference between the contract price and what is thereafter paid for a like article in a distant market, the amount paid being less than the price at any market nearer the place at which the seller was to deliver.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

7. Trial (§ 252*)—Instructions—Applicability to Evidence.

Refusal of an instruction as to a state of facts different from that shown by the evidence is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

On Rehearing.

8. Sales (§ 411*)—Remedy of Buyer—Breach of Contract—Consideration—Pleading.

Where the complaint in an action for breach of defendant's contract to manufacture and deliver boxes alleges that plaintiff was to pay for the boxes "the price called for by the contract," there is not an absence of allegation of consideration, but, at worst, a defective allegation thereof, to which a special demurrer should be addressed; and it is good in the absence of demurrer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1161; Dec. Dig. § 411.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. CORPORATIONS (§ 519*)—PAYMENT OF LICENSE TAX—PLEADING—NEGATIVE ALLEGATION—BURDEN OF PROOF.

Under Code Civ. Proc. § 1869, requiring proof in support of a negative allegation, when such allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, defendant, for special defense having pleaded nonpayment by plaintiff of the corporation license tax, has the burden of proof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2093; Dec. Dig. § 519.*]

10. CORPORATIONS (§ 592*)—FORFEITURE OF FRANCHISE—DESTRUCTION OF EXISTENCE—NONPAYMENT OF LICENSE TAX.

There is not a forfeiture resulting in the destruction of a corporation's existence from its mere failure to pay the corporation license tax; but coupled therewith must be the performance by the Secretary of the State and the Governor of the acts of proclaiming the forfeiture required to be performed by them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2373, 2398; Dec. Dig. § 592.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Alaska Salmon Company against the Standard Box Company. Judgment for plaintiff, and defendant appeals. Affirmed.

P. L. Benjamin, for appellant. Chickering & Gregory, for respondent.

HENSHAW, J. The action was for damages for breach of contract. The case was tried before a jury, whose verdict was given for plaintiff. From the judgment which followed and from the order of the court denying defendant's motion for a new trial, it appeals.

The complaint charged that in October, 1905, plaintiff and defendant entered into a contract whereby defendant agreed to manufacture for plaintiff 100,000 wooden boxes, to be delivered during the canning seasons of 1906 and 1907 as called for by plaintiff for its use in the business of manufacturing and selling canned salmon. Defendant supplied plaintiff for the canning season of 1906 with 44,000 boxes, and plaintiff prior to the commencement of the canning season of 1907 demanded of defendant that it furnish the remaining boxes, to wit, 56,000, for use during the canning season of 1907. It is alleged that plaintiff has always been ready and willing to receive the said 56,000 boxes, and to pay for them at the price called for by said contract and in accordance with the terms thereof, but that defendant has refused to deliver the boxes, whereby plaintiff has been damaged in the sum of $3,920. The answer was by general denial, and for a special defense it is alleged "that the plaintiff is and for more than three years last past has been a corporation, organized, existing, and doing business under and by virtue of the laws of the state of California"; that plaintiff has at all times since its incorporation wholly failed to comply with the provisions of the act imposing a license tax upon corporations, and has wholly failed to pay the license or any of the licenses required by this act. The jury's verdict was for $3,640.30.

1. It is asserted that the complaint wholly fails to state a cause of action because it does not allege that the contract of October was in writing. The law will presume the contract to be valid and not invalid, and thus, where required by the statute of frauds, will presume it to be evidenced by writing. Nunez v. Morgan, 77 Cal. 427, 19 Pac. 753; Bradford Investment Co. v. Joost, 117 Cal. 204, 48 Pac. 1083. If the defendant relies upon the statute of frauds against such a complaint he must plead it. Broder v. Conklin, 77 Cal. 330. 19 Pac. 513. Moreover, the execution of the contract was not denied and in the answer the written agreement is expressly set out in a counterclaim for damages; and, finally, the contract was, in fact, in writing, and was proved and legally evidenced by an interchange of business letters between the two corporations.

2. It is argued that, because plaintiff did not affirmatively show the payment by it of the license tax required, it cannot be permitted to maintain this action. It will be remembered that the defense pleaded such nonpayment by plaintiff, but no evidence was introduced in support of the plea. The answer itself avers that the plaintiff is a corporation and is engaged in business as a corporation. This is an admission of the plaintiff's corporate capacity to sue, and is a waiver of the proof contemplated by section 297 of the Civil Code to the effect that a certified copy of the articles of incorporation "must be received in all the courts of this state and in other places as prima facie evidence of the facts therein stated." The corporate existence and general capacity of the plaintiff thus being established by the admission of the pleadings, it was matter of affirmative defense for the box company to have shown the extraneous fact that plaintiff had failed to comply with the corporation license tax law, and therefore should not be permitted to proceed further. The burden of proving a negative thus being cast upon the defendant only slight evidence would be required. But, as has been said, defendant never undertook to furnish any evidence at all, and here rests merely upon the proposition that every corporation must itself affirmatively show a compliance with the corporation license tax act before being permitted to prosecute an action. This view of the law, for the reasons given, cannot be upheld.

3. To the better understanding of the other propositions advanced by appellant, compre-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

hension of the facts becomes necessary. Plaintiff is engaged in the business of canning salmon in distant Alaska. It sends its ships equipped with the necessary supplies to its canneries. Its success for any year is absolutely dependent upon its ability to have its men and supplies at its canneries in time to handle the salmon run. It was important, therefore, that its supplies should be on board the ship, and the ship started for the Arctic as early as practicable. As part of its supplies it required for the years 1906 and 1907 each 50,000 wooden boxes in which were to be packed the tins of salmon. These boxes the defendant undertook to furnish, "50,000 to be delivered f. o. b. ship at wharf in San Francisco during the first week of April, 1906," and 50,000 to be delivered at the same time in 1907. "Boxes to be of standard size and quality, guaranteed to be perfectly dry. The price of shook 10½c. each; cases nailed up 12½c. each, all cash less 2 per cent." In fact, defendant did not deliver all of the first lot of 50,000 boxes, and complaint was made by plaintiff to defendant both of the shortage and of the quality of the boxes which it actually delivered, in that they were wet and not dry. The effect of the wet boxes would be to rust the tin cans of salmon and so impair the value of the pack. The ship started north on April 12th and demand for payment was made by defendant upon plaintiff for the boxes already delivered. The earthquake and fire with the consequent confusion and disturbance of all business occurred on April 18th. Plaintiff insisted that the payment should be made only after adjustment because of the inferior quality of the boxes, and the failure to furnish the full 50,000 contracted for. Finally an agreement was reached, evidenced by a writing signed by the Standard Box Company, to the effect that upon the payment of $3,000 by plaintiff the box company would leave a balance which it claimed to be due of $1,175.57 in the hands of plaintiff "until such time that the ship Big Bonanza arrives from the north at about September next, when you can ascertain damage sustained, if any, on account of delivery not being in accordance with contract dated October 26, 1905. Also on account of quality which you claim to be below standard, and we hereby appoint James Madison the sole arbitrator in this matter, and his decision to be final and binding upon this company." The plaintiff then paid the $3,000 and James Madison, upon his return, declared that there was $754.40 still due to defendant, the remainder being deducted for damages. Upon October 6, 1906, defendant was paid this $754.40 in full satisfaction of its claim, and defendant receipted without protest, never intimated its dissatisfaction with the settlement or its desire to terminate the contract. Subsequently, on February 19, 1907, plaintiff made demand for the 56,000 boxes for the year 1907 to be delivered during the first week in April in accordance with the contract. Then, for the first time, on February 20th the box company replied: "As to cutting your order for 56,000 cases, we would say that if we can agree upon new terms and conditions and prices we are willing to fill same, as we consider your treatment of us an abrogation of your contract, in withholding our money for such a long time." Upon this refusal plaintiff bought boxes from a northern box factory in Astoria, Or., and lays damages for the difference between the defendant's contract price and the price which it was thus compelled to pay.

It was not error for the court to refuse to instruct the jury as requested by defendant to the following effect: "As a matter of law, the contract in this case required payment to be made by plaintiff for each lot of boxes delivered, as the same should be delivered, or, at the very latest, upon the collection day following each lot of deliveries, and it was the duty of the plaintiff to pay the defendant at the very latest on April 13, 1906, if that was a collection day, the amount due for all boxes delivered by collection day; I mean, of course, collection day as known to the business world generally in San Francisco." Such instruction would have made it mandatory for the jury to find that the failure or refusal of plaintiff to pay for all the delivered boxes on April 13th was a violation of the contract, notwithstanding the fact that the refusal to pay might have been fully and completely justified by a delivery of an insufficient and inferior quantity without opportunity for counting and inspection. There is no question but that this contract contemplated a cash payment. It is equally true that it contemplated delivery in the first week in April, a delivery which defendant did not make. The defendant was aware that the boxes were to go north on shipboard under the circumstances noted. The general line of cases to the effect that it is the duty of plaintiff to inspect goods when delivered and reject them if not up to specification, and that the plaintiff cannot accept goods in part and reject them in part, and that having kept the goods it is too late for plaintiff to contend that they did not conform to the contract, are none of them apposite. Each case must be governed by its conditions and facts. A plaintiff, where a defendant has violated his contract, is charged with the general duty of doing every reasonable thing to minimize his own loss and thus reduce the damages for which defendant has become liable by his breach. The time for examination was extremely short. Whatever goods were rejected as not up to quality involved in their rejection trouble and difficulty, if not absolute inability, for their replacement. Plaintiff was, therefore, justified in doing as it did, namely, taking on board the boxes furnished, even though deficient in number and not up to standard in quality. That they were of inferior quality was noted by plaintiff and made known to defendant during delivery. Under these circumstances, the instruction actually given by the court was all that defendant was entitled to ask. It was as follows: "When a contract for the manufacture and delivery of certain goods provides for the payment of the contract price in installments as the goods are delivered, it is the duty of the party who is to pay for the goods to pay each installment as required by the contract; and if when, under the contract, an installment becomes due, the party who is to pay refuses or fails to pay such installment, the other party to the contract has the right to cease the manufacture and delivery of the goods, and to consider the contract at an end; and the other party to the contract who has so failed to make payment of an installment, when the same became due, cannot, under such circumstances, complain of the refusal of the contractor to proceed further with the manufacture and delivery of the goods, and cannot maintain any action against the contractor for damages because of such refusal of the contractor to proceed with the manufacture and delivery of the goods."

4. The contract was not terminated before this action was brought. The argument herein seems to be based upon the law of the preceding rejected instruction, that the failure to pay upon delivery operated to avoid the contract. But neither then nor thereafter, until its letter of February, 1907, did defendant ever treat the contract as abrogated, annulled, or rescinded. It never gave notice of rescission. To the contrary, it entered into an arbitration agreement for the adjustment of its differences with the plaintiff under the contract. Regardless of the question as to whether or not that arbitration agreement was in strict legal form, it was accepted by both parties, and fully executed by the judgment of the arbitrator and by the payment and acceptance of his award, without sign of protest from either party.

5. It is contended that plaintiff failed to prove that it was ready, able, and willing to perform the contract on its part. Such proof is, of course, required. Barron v. Frink, 30 Cal. 486; McGehee v. Hill, 4 Port. (Ala.) 170, 29 Am. Dec. 277; Grandy v. McCleese, 47 N. C. 142. But where the insolvency of plaintiff is not charged, and where the defense is not in any way based upon such inability, very slight proof will fill the requirement. The complaint alleged that the plaintiff has always been ready and willing to receive the 56,000 boxes and pay for them under the contract. No question in the case arose over any previous inability of the plaintiff to pay. To the contrary, it plainly appears by defendant's letter of February 20th that its refusal to furnish the boxes involved no question of plaintiff's ability, but arose simply from the defendant's demand that new terms, conditions, and price be fixed. The price of such boxes at this time had risen. We hold the evidence to have been sufficient.

6. The court instructed the jury to the following effect: "The plaintiff claims to have paid 7 cents in excess of this contract price, for each box of the remaining 56,140, making $3,920, and, if you find that it did make such payment, then plaintiff is entitled to a judgment for this amount, unless the contract was, by some act or omission of the plaintiff, rescinded or terminated." It is contended that this instruction does violence to the provisions of section 3354 of the Civil Code, to the effect that, in estimating damages, the value is deemed to be the price at which one might have bought an equivalent thing in the market nearest to the place where the property ought to have been put in his possession. It is claimed that a purchase from the Astoria Box Factory was not a purchase in the nearest place, and that the purchase by plaintiff of the boxes at seven cents advance of the contract price in no way tended to show the market value. Still further it is said that the boxes for which plaintiff paid the advanced price were not the kind and quality of boxes called for by the contract, but were better boxes, of better material. The evidence on the last point is that the boxes "were the same boxes called for by the contract here, only much better boxes and better material," which is fairly open to the construction that what the witness meant to convey was that the boxes were of the same size and standard make, and general quality, but that the boxes which they received from the Astoria factory were of better material and workmanship. It is in evidence, moreover, that the price obtained from the Astoria Box Company was the cheapest price for which the plaintiff could get the boxes from any one anywhere. The bids of the San Francisco box companies were higher, and therefore if plaintiff had bought the boxes in San Francisco, defendant's damage would have been greater. The provision for the purchase of property in the market "nearest to the place" is a provision designed wholly for the protection and benefit of the vendor in default. It is to prevent any exorbitant or extortionate charge being made against him by the unnecessary purchase of the goods in a distant or foreign market. But where, as here, it is shown that the damages for which defendant was liable were decreased, and the consequent award against him lessened by the purchase in a northern market it will not be said that the purchase was to his injury or in violation of the law.

7. The plaintiff clearly showed that it had sustained damage, and from all that has been said it is apparent that the court was justified in refusing an instruction to the jury to the effect that it was the duty of the plaintiff to have accepted the full quantity

of 50,000 boxes if they were delivered on the wharf before the vessel put out into the stream. No evidence sustains the proposition that the 50,000 boxes were in fact delivered at the wharf. Indeed, it appears that the delivery of the final boxes to complete the 50,000 was made after the ship had left. The contract called for delivery in the first week in April. Defendants were engaged in supplying other ships, the time was extended to the 12th, and when the ship put forth into the stream delivery then was not completed.

For these reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing.

In Bank.

PER CURIAM. 1. In the petition for a rehearing, it is urged that this court misconceived the position of appellant, which is that the complaint did not state a cause of action in failing to allege that the contract was in writing, and in failing to allege any consideration for the agreement which it pleads that defendant entered into. Except for the petition for rehearing, it would have been regarded as unnecessary to say that no demurrer was interposed to the complaint, either general or special, and that the complaint does allege that plaintiff has always been ready and willing "to receive the said 56,000 boxes, and to pay for them at the price called for by said contract and in accordance with the terms thereof." However defective this allegation might be regarded as an allegation of consideration under the attack of a special demurrer, in the absence of either general or special demurrer, a cause of action is sufficiently stated. In Moore v. Waddle, 34 Cal. 145, discussion was had with reference to a demurrer which was therein interposed to the sufficiency of the complaint. It was pointed out that under the common-law rules of pleading a consideration was imported only to an instrument under seal. It was held that the contract sued upon was sealed, and that therefore the ground of demurrer was not well taken. The same is true of Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583. There, too, demurrer was interposed to the complaint. Here, as has been said, no demurrer was interposed to the complaint. There is an allegation in the complaint to the effect that plaintiff was to pay for the boxes "the price called for by the contract." There was therefore not an absence of allegation of consideration, but, at the worst, a defective allegation of consideration to which a special demurrer should have been but was not addressed.

2. Defendant for special defense pleaded the nonpayment of the corporation license tax. It offered no word of evidence in support of this defense, but argues upon appeal that because it tendered this defense it became incumbent upon the plaintiff to prove, upon its part, the payment of the tax. This in direct denial of the Code declaration to the effect that while evidence need not be given in support of a negative allegation generally, it must be given "when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded." Code Civ. Proc. 1869. Here was a defense wholly based upon the negative allegation of nonpayment. It was incumbent upon the defendant to support such a defense by some evidence, and, from the nature of the defense such evidence was easily procurable. It is meaningless to cite cases where the courts have held as to certain negative averments that proof is not necessary. The Code provision covers the whole matter. Byers v. Bourret, 64 Cal. 73, 28 Pac. 61, is not in point. The discussion there was not directed to the burden of proof. Issue was joined upon the plea in abatement that plaintiffs had not complied with the provisions of 2466 and 2468 of the Civil Code relating to partnerships, and the court made findings thereon. The discussion in this court was upon the sufficiency of the findings to support the judgment. What it said as to the duty of the plaintiffs "to have shown that the certificate had been filed and published once a week for four successive weeks before the commencement of the action" had reference not at all to the burden of proof, but to the fact that by the evidence which they introduced they failed to establish a compliance with the law. As little in point is Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444. There, upon its face, the complaint showed that plaintiffs were partners doing business under a designation which did not show the names of the partners. This made it incumbent upon the plaintiffs to plead that they had filed a certificate as required by section 2468 of the Civil Code. They did so plead. The allegation as to the filing of the certificate was denied by the answer. The certificate which was offered in evidence did not comply with the statute. It was held that since the complaint showed that plaintiffs were doing business as copartners under a designation which did not show the names of the persons, the allegation of compliance with the provisions of the Code was essential to the sufficiency of the complaint, and that plaintiffs could not recover without proving it. In the present case no such question is involved. The same is true of Bank of British North America v. Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726. The law required a foreign bank doing business in California to publish certain statements as a prerequisite to their right to maintain or prosecute any action or proceeding in any of the courts of the state. The answer averred that plaintiffs had not complied with certain provisions of that act. The court's findings were, in effect, that the

plaintiffs had sufficiently complied with the law. Here, again, was no discussion of the burden of proof, this court determining merely that the evidence offered by plaintiff in support of the finding that it had complied with the law was insufficient, and therefore reversed the judgment. It may thus be seen that not only are none of these cases in point, but it may be added that the pleading of the special defense is wholly insufficient to show that a forfeiture was worked by failure to pay the license tax. Manifestly, if a forfeiture did not result, plaintiff's corporate capacity still existed. The allegation of the defense is merely that the plaintiff has "wholly failed to comply with the provisions or any provisions of the act of the Legislature" relating to the license tax upon corporations, and "has wholly failed to pay the license or any of the licenses required to be paid by the provisions of the said act." But a casual inspection of the act itself and of the decision of this court in Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 Pac. 341, will disclose to the legal mind that the forfeiture which destroys the corporate existence does not result from a failure to pay the license tax, but results from a failure to pay the license tax, coupled with the further fact "that the acts required to be performed by the Secretary of State and the Governor (proclaiming the forfeiture) shall have been performed in the manner required." Kaiser Land & Fruit Co. v. Curry, supra, page 654 of 155 Cal., page 347 of 103 Pac. Without the performance of such acts, the forfeiture does not result, and the pleading is wholly insufficient by reason of its failure to aver their due performance. The absence of merit in this petition is thus shown. Petitioner seems to have undertaken to supply this lack of merit by disrespectful vehemence.

It is therefore ordered that the petition for rehearing be denied, and that the petition itself be stricken from the files of this court.

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158 Cal. 579

PENNEBAKER et al. v. SAN JOAQUIN LIGHT & POWER CO. (S. F. 5,276.)

(Supreme Court of California. Nov. 18, 1910. On Rehearing in Bank, Dec. 17, 1910.)

1. Electricity (§ 15*) — Injuries — Negligence.
An electric lighting company is not required to discontinue all light and power in a district in which a fire alarm is given, in order to protect firemen and others going on the premises to fight the fire, in absence of special circumstances requiring it in a particular case; nor is it negligent for not having an employé at the fire to disconnect its wires.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. § 15.*]

2. Electricity (§ 15*)—Injuries from Use—Negligence.
An electric lighting company was not negligent, making it liable for a fireman's death by contact with its wires in the yard of a burning building, because an employé who was at the fire, but not in the performance of any duties, did not warn the firemen of the danger from the wires, especially where it did not appear that such employé was there when the wires were charged.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. § 15.*]

3. Electricity (§ 13*)—Injuries—Liability.
One using a street, as in the case of an electric lighting company for stringing wires, is not an absolute insurer that the street shall be as safe after it has strung its wires as it was before.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 6; Dec. Dig. § 13.*]

4. Electricity (§ 15*)—Injuries—Liability.
Intestate, a fireman, was killed while fighting fire by contact with wires of defendant lighting company in the back yard of the burning premises. It did not appear that defendants had any exact knowledge of the location of the fire, and the current which killed decedent was one which would not ordinarily endanger life. *Held*, that the lighting company was not negligent so as to make it liable for decedent's death.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. § 15.*]

5. Negligence (§ 32*)—Liability to Licensee—Firemen.
In absence of ordinance or statute, a fireman entering a building is only a licensee, who assumes the risks, and to whom the owner of the premises owes no special duty to maintain them in a safe condition.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

6. Electricity (§ 19*) — Injuries — Action—Admission of Evidence.
In an action against an electric lighting company for the death of a fireman by contact with its wires in the yard of a burning building, claimed to have been caused by defendant's negligence in not cutting off the power, a report by the city electrician to the trustees of the city, adopted and filed, showing that the light committee of the city council to which was referred the matter of having cut off cut-off switches installed to control currents in case of fire, reported a meeting with defendant's officers, at which the latter stated that they had made arrangements whereby the fire chief or city electrician could telephone to defendant's substation to have the current shut off in case of fire, was admissible, in connection with testimony that, in case of former fires, the power had been shut off in lighting districts at the request of the city electrician by a person maintained at its substations by defendant, and that no such request was made on this occasion, as bearing on defendant's negligence in not shutting off the power, even though the arrangement between defendant and the city officials did not amount to a municipal by-law.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Elda Marian Pennebaker and others against the San Joaquin Light & Power Company. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Reversed and remanded. Rehearing denied in bank; Beatty, C. J., dissenting.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Frank H. Short and F. E. Cook, for appellant. Larkins & Feemster, for respondents.

HENSHAW, J. This appeal is from the judgment and from the order denying defendant's motion for a new trial. The action is by the widow and minor child, heirs of Carl G. Pennebaker, for damages resulting from his death. Pennebaker was a member of the fire department of the city of Fresno. A fire occurred about 2 o'clock in the morning in a wooden building on the outskirts of the business portion of the city. Pennebaker, in the performance of his duty, went to the fire to help in extinguishing it. The complaint charged: That an alarm of fire was turned in to and given the fire department of the city, and at the same time, "so plaintiffs are informed and believe, and upon such information and belief allege the fact to be, an alarm of said fire was turned in to and given said defendant at its electric substation in said city. That by said alarm, so plaintiffs are informed and believe, and upon such information allege the fact to be, defendant was notified of the existence and apprised of the location of said fire." The complaint further charged: That wires, carrying powerful and deadly currents of electricity, were maintained by the defendant at and in the building which caught fire. That the fire continued to burn for the space of about 40 minutes after the alarm was turned in. These wires were thus burned from their fastenings and fell to the ground soon after the alarm was given, continued to lie upon the ground during the greater part of the time that the fire was so burning, and while so lying upon the ground continued to be charged with electricity in dangerous and deadly quantities. That defendant neglected and carelessly permitted its wires so charged to lie upon the ground where it was necessary for persons to go and to be for the purpose of combating and extinguishing the fire. "That defendant, although notified of the existence, and apprised of the location of the fire, as aforesaid, and well knowing of the existence of its said wires at said place, and having the entire charge and control of said wires and of its said electricity and currents of electricity, and well knowing that its said wires were then and there charged with and carrying currents of electricity, and well knowing that said wires were, in the event of a fire, liable to be burned from their fastenings, and to fall to the ground and endanger the lives of people, and particularly of persons engaged in fighting the fire, and having full and ample time and opportunity to know and ascertain the condition of said wires at said time and place, and having ample and sufficient time and means to turn off said electricity and to cut said wires, and to render the same safe and harmless, negligently and carelessly failed to cut said wires, and negligently and carelessly failed to turn off said electricity, and negligently and carelessly failed to do anything, whatever, to render said wires, or any of said wires, safe and harmless during the time of said fire and while its said wires were down and lying upon the ground, as aforesaid." Issue was joined upon the material averments of negligence, and for an affirmative defense the contributory negligence of Pennebaker was charged. The cause was tried by the court without a jury, and the court gave judgment for plaintiffs; its findings conforming exactly to the allegations of the complaint.

The principal contention advanced upon this appeal is that the evidence introduced by plaintiffs, giving to it the fullest weight, utterly fails to show negligence upon the part of the defendant. Appellant contends, for its second proposition, that, if the evidence of the plaintiffs be held sufficient to charge the defendant with negligence, it must be concluded from the same evidence that the deceased was guilty of contributory negligence, and, finally, it is urged that the court erred in its ruling refusing admission to certain evidence proffered by the defendant. A statement of the substance of plaintiffs' evidence is made necessary for a consideration of appellant's contention that it utterly fails to show negligence upon its part.

The evidence disclosed: That defendant, an electric light and power corporation, was under contract to supply, and engaged in supplying, light and power to the municipality of Fresno and to private users and consumers; that at 2 o'clock a. m. a fire was discovered in the building before mentioned. Alarms of fire from two boxes, Nos. 4 and 82, representing contiguous fire districts, were turned in well-nigh simultaneously. Automatically a signal was thus given in the fire department stations, and a more general signal by the blowing of a whistle at a substation of the electric company, about five blocks distant from the actual location of the fire. Each of these fire districts embraced territory of five or six blocks. So that a recognition and understanding of the signal as being from district 4 or district 82 would indicate that the fire was somewhere within one of the five or six blocks embraced respectively in such district. The signal would not, and did not, of course, indicate the building, and would not and did not indicate whether the defendant company had light or power wires that would be affected by the fire, though of course there would be imputed to the company knowledge that it had such wires within the district. The firemen arrived promptly at the scene of the fire and proceeded to fight it with water and chemicals. The building was a bicycle repair shop, into which was conducted power used in operating a small lathe. The wires carried electricity which by no possibility could exceed 260 volts; 260 volts are not regarded as dangerous to human life, much less as deadly. These wires were burned and fell to the ground by reason of the fire, and lay upon the ground in the back yard of the premises. Certain of the firemen noticed these wires and saw by their sputtering that they were "hot" and "carried juice." One or two of the firemen actually received shocks from these wires and jumped away. Discussion arose amongst the firemen as to whether the wires were dangerous. The fire chief testifies: "I went around in the back, and there was quite a number of the boys (firemen) had been in the yard and they had come out, and of course they hadn't ought to come out, and they said the reason they came out was on account of the juice being in there. Others spoke up and said there was not enough in there to hurt anybody, and I went in there and it didn't bother me at all. I didn't feel it. I never got a particle of a shock at all." The fire being subdued in about three-fourths of an hour from the time the alarm was given, the chief gave orders to his men to carry out their hose and other paraphernalia and make ready to disperse. Pennebaker, in the performance of his duty, went into the yard, his feet touched and became entangled in the wires, and he pitched forward unconscious. He was dragged out by his fellows, never recovered consciousness, and died within an hour. The chief of the fire department testified that he saw one or more of the employés of the defendant at the fire, but it is not shown that they were on duty, were charged with any duty, were informed of or knew that the wires were carrying electricity or even that they were there when the wires were carrying electricity, for in a very few minutes after Pennebaker was struck down the city electrician climbed the pole and cut the wires. The city was divided by the defendant into districts, and the light and power from these districts could be turned off at the substation. A man was maintained there day and night to do this, upon proper demand. No demand or request was made in this instance. The effect in turning out the light in any one of these districts would be to leave it entirely without electric light or power. Pennebaker was a vigorous man in the prime of life.

The foregoing is a fair summarization of all the evidence upon the question of negligence presented by plaintiffs. It is the evidence to which the motion for nonsuit was addressed. It is to be noted that no knowledge was brought home to defendant that the fire had disturbed, or would in any way disturb, its wires; that, if knowledge that there was a fire and the general location of that fire was imputable to defendant by the blowing of the whistle, such knowledge, in the nature of things, could tell them no more than that it was in a district comprising five or six blocks. No knowledge was imputed or was imputable to defendant that the fire was even in a building containing its wires. It is to be noted, moreover, that the wires, whose detachment caused the fatal accident, did not fall upon any public way, but in the back yard of private property. Respondent contends, and the trial court took the view, that this uncontradicted evidence was legally sufficient to establish the negligence of defendant. If it did, it can be but upon one or another of two theories, both of which are advocated by respondent. First, that it was the duty of defendant to have disconnected its wires when the fire alarm was sounded. Second, that it was the duty of the defendant to have an employé at the fire, either to disconnect the wires himself or to signal to the substation to have it done. A third theory of respondent, broader perhaps than either of these, is that by the very happening of the accident, under the indicated circumstances, the law imputes negligence to the defendant, and that therefore the nonsuit was properly denied. This is the invocation of the doctrine res ipsa loquitur.

1. In support of the first contention, no authority is cited, nor do we think any can be. It would compel defendant, upon the one hand, to extinguish all light and power in a district, regardless of the necessity of so doing, or be held liable for any consequences that might follow its failure. It takes no account of the fact that by so doing, in the case of a night fire, a district would be left in complete darkness, and that under such circumstances, following the alarm of fire, panic might ensue in hotels, lodging houses, and residences, and that the resulting damage might far exceed that which the extinguishment of the lights was designed to prevent. No such rule of law exists, nor, we take it, will ever exist, and the utmost that will be exacted of lighting companies in this regard is that they shall hold themselves in readiness to cut off the electricity when the necessity arises and they are informed of it by proper authority.

2. Nor is negligence imputable to the defendant because it did not have an employé at the fire, charged with the duty of disconnecting particular wires, or signaling for the disconnection of the district. Any reasonable ordinance in this regard which a municipality might adopt would, of course, be upheld, and, if injury resulted from the negligent failure of the light and power company to obey the terms of such ordinance, undoubtedly negligence could be predicated upon it. But here no such exactions were required by any ordinance, and it cannot be held that the defendant failed in any duty with which the law charged it in not having such employé in attendance at every fire. Indeed, in New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89, where an ordinance required

electric companies to send one or more competent linemen to fires to report to the city engineer and remove or disconnect wires where directed, the court held that this imposed no further duty upon the company than that of so doing, and that the company was not liable, even when it was shown that the company's lineman invited the firemen to proceed to lower the ladders, declaring that the wires with which it thereupon came in contact, and which proved to be heavily charged, were "dead." The court ruled that his declaration to that effect, being entirely outside of the line of his duty, could not charge the defendant company; that defendant light company owed no duty to the firemen to warn them of danger either in ascending or descending the ladder or in removing it from between the wires after the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded, devolved upon the officers of the city. See, also, Trouton v. New Omaha Thomson-Houston Elec. Light Co., 77 Neb. 821, 110 N. W. 569. This same reasoning and authority answer the argument of respondent that employés of the defendant were at the fire that night and saw the fire and "undoubtedly the flashing of the electricity and the condition of the wires, yet they did nothing." In addition to what has been said in this regard to the effect that they were not there in the performance of any duty, and that it is not shown that they were there when the wires were charged with the electricity, respondent's argument, for a still further reason, is felo de se. For if defendant's employé, a mere bystander and looker-on, can be charged with knowing that electricity in dangerous quantities was escaping from his employer's wires, how much more is Pennebaker himself charged with this knowledge, when he was a fireman, in the immediate vicinity of the wires, when some of his fellow firemen had received shocks, when the matter had been discussed amongst them, when a cry of danger had been given, and when in the resulting conversation it had been argued that the wires were not carrying power enough to injure anybody. Clearly, if knowledge of a dangerous condition arising out of the presence of the electric current in the fallen wires was chargeable to an employé of defendant, under these circumstances, it was even more chargeable against Pennebaker, and the conclusion would be unanswerable that his own negligence, after such knowledge, proximately contributed to his death.

3. The third theory, and that perhaps most strongly relied upon by respondent, is that the facts proved established negligence per se. Herein much reliance is placed upon the decision of the Supreme Court of Missouri in Gannon v. Laclede Gaslight Company, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. This decision was rendered by a divided court. While there are expressions in the prevailing opinion in accord with respondent's contention, the real question decided was quite different. The action, like the one under consideration, was to recover damages for the death of a husband and father, himself a fireman. The proof by plaintiff was merely to the effect that the deceased, while in the performance of his duty as fireman at a fire, was killed by coming in contract with heavily charged wires of defendant company lying in a public alley. In its essence the proof went no further than this. The defendant company showed that the wires were burned through, or their attachments burned down, through no fault of its own, by an accidental fire; that it received no notice; and, indeed, that there was no time between the falling of the wires and the accident in which it could have received notice so as to cut off the current. It made this proof full and complete by unimpeached witnesses and uncontradicted testimony. The verdict of the jury was for plaintiff. The Supreme Court was divided, not at all, upon the question whether or not the defendant company had made full and complete defense. That was admitted; but upon the question whether or not the jury was bound to believe and decide in accordance with the evidence of the defense, a bare majority holding that the jury alone were triers of the fact, and that a court of appeals would not reverse a case and override the verdict if the evidence proved unsatisfactory to the jury, however satisfactory it might be to the court, the minority of the court holding that such a rule gave juries uncontrolled liberty to disregard and reject evidence which, under the circumstances, it was their duty to have accredited.

This was the principal point of controversy between the members of that court. In the prevailing opinion, it is true, language is used, upon which respondent here relies, which would make not only electric light companies, but every other person using a street, saving foot passengers, absolute insurers in case injury resulted to person or property. An instance of such a declaration is found in the following language: "It was a matter of the plainest duty for the defendant to see that the streets and alleys of the city, along which by permission it was suffered to place its overhead wires for its own private gain, were at all times maintained in the same condition as to safety from the danger of electricity as they were before its overhead use thereof was begun." Every added vehicle upon the street of a city increases the danger to pedestrians in the use of the street. Every street car does the same. Every suspended sign has like effect. If it be true that in all these, and in the innumerable other instances which might be cited, the street must be as safe after as before the new use, then it must necessarily follow that the user becomes an absolute insurer. If that is what the Supreme Court of Missouri means, it must suffice to say that it stands alone in its opinion, without reason or authority in its support. 1 Thompson Law of Neg. § 802; 15 Cyc. 472. If, however, the Supreme Court of Missouri meant but to declare that where the wires of an electric light company, heavily charged with electricity, are shown to be lying upon a public street and injury to a person lawfully upon the highway results from these wires, without negligence on his part, a presumption that the company is negligent thus arises, and the burden is cast upon it to overcome this presumption, the principle of law thus declared is one over which there need be no discussion, for it is not pertinent or applicable to the present case. Here, no wires were upon the public street. They were upon private property and were cast to the ground by the burning of the building upon that property. In the absence of ordinance or statute changing the common-law rule in this regard, a fireman entering a building under imperative public necessity is but a licensee, who assumes the risks as he finds them, and to whom the owner of the premises owes no special duty to maintain those premises in a safe condition. New Omaha, etc., Light Co. v. Anderson, supra; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Hamilton v. Minneapolis, etc., Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; 21 Am. & Eng. Ency. of Law (2d Ed.) 475. We would not from this be understood as holding that, in all cases where the owner is exonerated, an electric light or power company, using the building as a means of transmitting into or over it power in dangerous quantities, would also be exonerated. A broad distinction might often exist between the duty of the owner, who had no control over the dangerous current, and the responsibility of the company using the building for the transmission of the dangerous force, and whose duty therefore it was to control it in all proper ways. So, in the very case at bar, the owner, having perhaps little knowledge of the force, and less of methods of its control, might well be held nonliable where dereliction of duty might be charged and consequent liability might be imposed upon the electric company, if, after knowledge of the dangerous condition, it failed promptly to remedy it. But, under the facts here stated, such knowledge was not brought home to it, and it was not chargeable with this knowledge as matter of law.

It should be repeated that in this case there is no question involved of deadly wires lying in a street, to the imminent danger of the traveling public. There is no question of faulty installation or operation. Moreover, the defendant, if chargeable with everything else, could not be charged with the maintenance of deadly wires, since, notwithstanding the fact that the current which they carried caused the death of Pennebaker, and in this sense they proved deadly, a defendant's conduct is to be judged by the ordinary knowledge of mankind, and it is in evidence that 260 volts was the utmost which the wires could have carried, and that the shock of 260 volts is not regarded as at all dangerous to human life. It is not shown, therefore, that the defendant in this case failed in any duty toward the deceased which was imposed upon it by law. If it has not failed in such duty, it is not legally responsible for his death.

4. The court's ruling in rejecting offered evidence, of which appellant complains, was error. This evidence consisted of a report made by the city electrician of the city of Fresno to the board of trustees, showing that the water and light committee of the Fresno city council "to which was referred the matter of having cut-off switches installed for controlling electric currents in case of fire, reported a meeting with the officers of the San Joaquin Power Company, at which they explained that every circuit in town could be controlled from the power house, and that they had made arrangements with the telephone company whereby the fire chief, or city electrician, by asking the chief operator of the telephone company for the power house, would be given the line immediately, and that the current could be shut off quicker and with a great deal more safety in any district of the city by an attendant at the station." This report was by the trustees of the city adopted and placed on file. It was offered to be shown that the city electrician had, upon occasions of fire when the exigencies of the case in his judgment called for it, requested the cutting off of a district, and the request had always been promptly complied with. And it was offered to be shown, moreover, that the company always maintained a competent man at its substation for the purpose of doing this very thing, and that on the occasion of this fire no request so to do had been made. In fact, the electrician arrived at the fire, cut the wires himself, but, unfortunately, a few minutes after Pennebaker met his death. The evidence was rejected apparently upon the theory that it did not amount to a by-law or ordinance or regulation of the city, and so could not operate to change defendant's legal duty toward the deceased. In this view the court was clearly in error. If the converse of the proposition had been sought to be proved, namely, that with the existence of such an understanding the company had failed upon proper request to disconnect the wires, it would not be doubted that it would furnish strong evidence of the company's negligence. Here, if it be conceded that the understanding or arrangement or agreement or convention of the parties did not have the legal effect of a municipal by-law, it was competent nevertheless to show that it was an accepted regulation by the municipal au-

thorities of the duty of defendant in the matter of fires, that it was an agreement which had been put into force, and which had always been lived up to by the company. The evidence would certainly have a strong tendency to show that in this respect the company was not delinquent in the performance of its duty, and for this purpose and to this extent it should have been admitted and weighed.

These considerations cover all the matters called to the attention of the court, and for the reasons hereinbefore given the judgment and order appealed from are reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing.

In Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. It is here decided, among other things, that the superior court erred in sustaining the objection to the defendant's offer to prove the adoption by the board of trustees of the city of Fresno of the following report of the city electrician: "To the Honorable, the Board of Trustees of the City of Fresno: Gentlemen—The undersigned, the city electrician of the city of Fresno, herewith submits for your consideration his report for the month of December 30, 1905, as follows, to wit: 'On the 13th the water and light committee met representatives of the power company in my office to decide on some safe and practical method of handling dangerous wires at fires. It was agreed that by giving the right of way over all others to the telephone lines, to the city electrician and fire chief, that the current could be shut off quicker and with a great deal more safety in any district of the city, by the attendant at the station. As with switches, it would be necessary to pull at least two to kill the line, and it would be necessary to climb the poles to do so. And besides, it is possible that the switch pole might be in range of the fire, in which case the switch would be useless. Respectfully submitted, C. T. McSherry, City Electrician.'"

If this report had been offered by the plaintiffs in support of their case, I think it would have been harmful error to have excluded it, for it would have proved in their favor that the necessity of providing "some safe and practical method of handling" the wires of the defendant carrying dangerous voltage in case of fires had been recognized and considered both by the city authorities and by the defendant, that it had been agreed that a proper measure of precaution in such case would be the cutting off of the circuit (i. e., the district) affected, and that the defendant's plan of cutting out the whole district at the substation had been adopted in preference to the alternative plan of providing local switches within the various districts. This, in connection with abundant evidence that the defendant's agent at the substation, knowing that a fire had started within five or six blocks of the station, and in a district to which its wires extended carrying a voltage which the event proved to have been deadly to a grown man in apparently sound health, had neglected for 40 minutes after the alarm of fire to adopt the precaution suggested by defendant itself and claimed to be the safest and most practicable, would have made out a clear case of highly culpable negligence, unless the adoption of the electrician's report can be construed as a valid agreement exempting the defendant from any obligation to cut off the current from a circuit where a fire might be raging until its agent at the substation should be requested to do so by the city electrician or the chief of the fire department. This indeed seems to be the view of the court, and, as appears from the opinion, is the ground upon which the ruling of the superior court is condemned. It is from this view that I dissent. It is perhaps a just inference from the terms of the report that its author assumed it to be a part of the duty of himself and the fire chief to the public (but not to the defendant) to give prompt notice of the occurrence and locality of the fire to the persons in charge of the defendant's substation; but this did not exempt the defendant from the duty of acting promptly upon the same notice coming from any other person or in any other form. That they had such notice, and neglected to act upon it with reasonable promptitude, was in my opinion amply proved, and it was no error as to the defendant to exclude the electrician's report and proof of its adoption, since it had no tendency to prove that the neglect to shut off the current at the station was excused by the failure of the fire chief and electrician to make the request.

I do not think this court can on the evidence set aside the finding of the trial court as to contributory negligence.

As to the status of a fireman who enters a burning building in a city in the vicinity of other buildings for the purpose of extinguishing the fire or saving life or property, it may be that the liability of the owner for any injury received by him while on the premises is no other or greater than it would be to a mere licensee, but the fireman is not there as a licensee of the owner; he is there in performance of his duty as a public servant under the authority and protection of regulations clearly within the police power of the state, and of superior force to the will of the owner of the premises, and he is entitled to the same indemnity for injuries caused by the culpable negligence of others as if he were on a public street.

As to the comparative harmlessness of less than 500 volts res ipsa loquitur: Either these wires carried more than 500 volts, or less than that voltage, though harmless to most men, is deadly to some—and those few are entitled to protection. And, finally, the argument based upon the serious dangers (of panic, etc.) involved in the cutting out of a circuit on an alarm of fire does not appear to consist very well with the choice of a plan of handling its dangerous wires suggested by the defendant itself and approved by the city trustees, which was nothing less than a means of transmitting prompt notice of the outbreak of a fire to the substation and the cutting out of the circuit.

Upon this view of the case, the question presented by the appeal is not whether it can be held as a matter of law that it was culpable negligence on the part of the defendant to wait for official notice of the danger before adopting any precaution against it, but is, on the other hand, whether it can be held as a matter of law that, under the facts disclosed by the evidence, there was no culpable negligence. Negligence is a question of fact and not of law, except in those cases where upon the facts found or proved there can be no reasonable difference of opinion as to the absence of culpability. In this case the judge of the trial court, performing the function of a jury, has found that there was negligence. I do not think that his conclusion was unreasonable. At least I think the case is deserving of further consideration.

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14 Cal. App. 396

WILLIAMS v. BRAUN. (Civ. 842.)

(Court of Appeal, First District, California. Oct. 31, 1910. Rehearing Denied by Supreme Court Dec. 29, 1910.)

1. BILLS AND NOTES (§ 398*)—PRESENTMENT—NOTICE OF DISHONOR—DILIGENCE—COMMON-LAW RULE.

At common law the maker of a check could not be exonerated by the payee's failure to present the check, or to give notice of its dishonor with due diligence, except so far as he could show injury to himself from such delay.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1045–1050; Dec. Dig. § 398.*]

2. BILLS AND NOTES (§ 15*)—"CHECK"—DEFINITION.

A check is but a request to another to pay to the payee the sum named therein out of funds supposed to be deposited with the drawee to meet the check. If the drawee does not comply with the request, the funds are still there and the debtor still owes the money; the drawer of the check being the principal debtor, and not a surety, like an indorser.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 15.*]

3. BILLS AND NOTES (§ 418*)—CHECK—NOTICE OF DISHONOR—DELAY—EFFECT—STATUTES.

Civ. Code, § 3177, provides that the rights and obligations of a drawer of a bill of exchange are the same as those of a first indorser of any other negotiable instrument, and that a check, so far as notice of its dishonor is concerned, is on the same footing as a bill of exchange. Section 3255, however, declares that a check is subject to all the provisions of the Code concerning bills of exchange, except that the drawer and indorser are exonerated by delay in presentment only so far as the injury suffered thereby, and that an indorsee after apparent maturity, without actual notice of its dishonor, acquires a title equal to that of the indorsee before such period. *Held*, that since the presentment of a check for payment is the principal thing, and notice of dishonor is but a secondary matter, the drawer of the check, seasonably presented and dishonored, was not released from liability because of the holder's delay in giving notice of dishonor, where the drawer suffered no injury thereby.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 418.*]

4. PAYMENT (§ 21*)—DISHONORED CHECK.

Where a check delivered in payment for merchandise was presented for payment within a reasonable time and dishonored because of the failure of the bank on which it was drawn, and the drawer suffered no injury because of delay in giving notice of dishonor, the delivery of such check was not payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 86; Dec. Dig. § 21.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Buck, Judge.

Action by E. H. Williams against George Braun. Judgment for plaintiff, and defendant appeals. Affirmed.

Tum Suden & Tum Suden, for appellant.
Jos. E. Bien, for respondent.

COOPER, P. J. This action was brought to recover $800.75 for goods sold and delivered by plaintiff's assignor to defendant at his special instance and request. Plaintiff recovered judgment, and this appeal is prosecuted from the said judgment. The only question is as to a check of $700 given by defendant to plaintiff, which defendant claims constituted a payment under the circumstances as disclosed by the record.

On the 28th day of October, 1907, defendant gave to plaintiff's assignor a check on the California Safe Deposit & Trust Company for the sum of $700. The check was presented for payment during banking hours on the 30th day of October, 1907, but was not paid, for the reason that the bank had become insolvent and had just closed its doors a few moments before the check was presented. It is admitted that the check was presented within a reasonable time, or, at least, no question is made as to delay in presenting the check. Written notice of the dishonor of the check was not given to the defendant until December 10, 1907; and the sole contention of defendant is, that by reason of the delay in giving the notice defendant cannot be held liable for the indebtedness to the extent of the check.

The delivery of the goods and the value thereof as alleged were not questioned. No claim is made that defendant suffered any injury by reason of the delay in giving him notice of the dishonor of the check. At common law the maker of a check could not be exonerated by the failure of the payee to present the check, or to give notice of its dishonor, with due diligence, except to the extent that he could show injury to himself consequent upon such delay in the presentment of the check or in giving notice of its dishonor. Such rule has its foundation in reason and justice. The person who is indebted to another and gives a check to his creditor does not, by the mere giving of the check, pay the indebtedness. A check is only a request to another to pay to the payee thereof the sum named therein out of the funds supposed to be deposited to meet such check. If the drawee does not comply with the request, the fund is still there and the debtor still owes the money. He is the principal, and not a surety, like an indorser. It is quite different from the case of an ordinary bill of exchange, or of one who indorses such bill, or even of one who indorses such check. It is said in Daniel on Negotiable Instruments (5th Ed.) § 1587: "But there is an important distinction as to the extent of the legal consequence of neglect and delay in presentment and notice, between bills and checks. It is true that the indorsers of such instruments stand on the same footing in reference to the effect of delay, or failure in making presentment, or giving notice. They are absolutely and entirely discharged, if presentment be not made within a reasonable time, and due notice given. But the drawer of a bill stands upon a different footing from the drawer of a check. In the case of a bill of exchange, negligence, in respect to presentment or notice, absolutely discharges the drawer. But the drawer of a check is regarded as the principal debtor, and the check purports to be made upon a fund deposited to meet it. And the negligence of the holder in not making due presentment, or not giving him notice of dishonor, does not absolutely discharge him from liability, unless he has suffered some loss or injury from such negligence, and then only to the extent of such loss or injury. He is at most entitled only to such presentment and notice as will save him from loss. Were it otherwise, the drawer would profit by a neglect which could do him no injury."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The rule as stated by the author is supported by many authorities cited in the note to the section. The same rule is laid down in Story on Promissory Notes, § 492, where it is said: "In case of a check the drawer is treated as in some sort the principal debtor, and he is not discharged by any laches of the holder in not making due presentment thereof, or in not giving him notice of the dishonor, unless he has suffered some loss or injury thereby, and then only pro tanto."

In Allen et al. v. Kramer et al., 2 Ill. App. 205, the ruling is in accord with the textbooks just quoted. The court there said: "The law is well settled that want of presentment or notice of dishonor of a check does not discharge the drawer, unless he has suffered some loss or injury thereby." See, further, Heartt v. Rhodes, 66 Ill. 351; Stevens v. Park, 73 Ill. 387; Griffin v. Kemp et al., 46 Ind. 173; Henshaw et al. v. Root et al., 60 Ind. 220; Gregg v. George, 16 Kan. 546; Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178, 75 N. W. 18, 71 Am. St. Rep. 477.

The rule as above stated is too well settled even for appellant to dispute it, but he claims that it has been changed by Civ. Code, § 3177, which provides: "The rights and obligations of a drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument," and that a check, so far as notice of its dishonor is concerned, is on exactly the same footing as a bill of exchange. It must be admitted that the section, standing alone, lends much plausibility to appellant's argument; but we must read the section in the light of other sections of the Code, and consider them together, if such construction can be reasonably given, so as to uphold the well-settled rule as hereinbefore stated. It would require a very plain and mandatory declaration to induce the court to believe that the Legislature intended to sweep aside a rule long established and founded upon principles of justice, and in lieu adopt a rule that would release the debtor who has not paid his creditor upon mere proof that he was not promptly notified of the dishonor of his check, when such notification could not and did not change his condition or his ability to protect his funds in the hands of the drawee, and no injury was occasioned by such delay. Now, while a check is a bill of exchange, payable on demand without interest, the Code provides (section 3255): "A check is subject to all the provisions of this Code concerning bills of exchange except that (1) the drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby; (2) an indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period." This section provides that the drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they have suffered thereby. It is therefore plain that if the check in this case had not been presented, the defendant would have suffered no injury, and the act of presenting it was not necessary in order to bind defendant. If, therefore, the plaintiff did an unnecessary thing, it seems reasonable that the failure to notify defendant thereof could not release the defendant. The presentment of the check was the principal thing, and it necessarily had to be presented before the defendant could be notified of its presentment and dishonor. If a delay in the presentment could not, under the circumstances of this case, have injured the defendant, it is difficult to see how upon principle he could have been injured by the delaying in giving notice of having done an unnecessary thing. The presentment of the check was the first and material thing, and the giving of notice was only a secondary matter. As defendant owed the amount, and as he has not been injured by the delay in giving notice of dishonor, he cannot claim that the check for $700 was payment. The evident spirit and meaning of section 3255 is that delay in presentment or in giving notice of dishonor exonerates the drawee, only to the extent of the injury he has suffered thereby. This construction is evidently in accord with justice, and with the law which has been long established in regard to a notice of dishonor of checks.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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14 Cal. App. 401

FOLEY et al. v. NORTHERN CALIFORNIA POWER CO. (Civ. 730.)

(Court of Appeal, Third District, California. Oct. 31, 1910. Rehearing Denied by Supreme Court Dec. 27, 1910.)

1. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

An electric light and power company on ascertaining the effect of a heavy snow fall on its wires must make an investigation within a reasonable time to ascertain and avert obvious perils caused by down wires, but a delay of about 36 hours in averting a peril through down wires, heavily charged and accessible to its office, is actionable negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

2. ELECTRICITY (§ 14*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

The owner of an electric plant must exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, increasing the danger to persons lawfully in the pursuit of their business or pleasure, may be reasonably discovered.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.*]

3. NEGLIGENCE (§ 16*)—DANGEROUS SUBSTANCES—CARE REQUIRED.

The care which the law exacts from one engaged in operating an instrumentality is in proportion to the danger reasonably to be apprehended from its use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 19-21; Dec. Dig. § 16.*]

4. DEATH (§ 58*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

A defendant sued for negligent death has the burden of proving the contributory negligence of decedent.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75-78; Dec. Dig. § 58.*]

5. DEATH (§ 58*)—ACTION FOR NEGLIGENT DEATH—PRESUMPTIONS.

Where it was shown that decedent killed by electric shock had picked up an uninsulated copper wire detached from a pole, the court must assume that he did not believe and had no reason to believe that the wire carried electricity, because of the presumption that he had such a regard for his life as an ordinary man has.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75-78; Dec. Dig. § 58.*]

6. ELECTRICITY (§ 19*)—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Where, in an action for death by contact with a detached live wire, there was evidence that decedent picked up the wire and that there was no occasion for him to do so, either for his own safety or for the safety of others, a finding of contributory negligence was not unsupported.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

7. ELECTRICITY (§ 18*)—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In determining whether one who picked up an uninsulated live wire detached from a pole, thereby receiving a fatal electric shock, was guilty of contributory negligence, the jury must consider the reasonableness of his belief that the wire was harmless and the quality of his act, and where one having reason to believe that a wire was harmless aimlessly and needlessly seized it and received a shock, the jury might find that his act was inexcusable, so as to make him responsible for the consequences.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.*]

8. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Refusal of a new trial on the ground of newly discovered evidence, consisting of declarations by a witness who testified during the trial, is not erroneous, because the newly discovered evidence might have been produced on the trial with reasonable diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210-214; Dec. Dig. § 102.*]

9. NEGLIGENCE (§ 111*)—ACTIONS—COMPLAINT—SUFFICIENCY.

In an action for negligence, it is sufficient under the Code to allege the negligence in general terms, specifying the particular act alleged to be negligently done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111.*]

10. NEGLIGENCE (§ 119*)—COMPLAINT—ISSUES.

One suing for negligence must rely on the particular acts of negligence specified in the complaint.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

11. ELECTRICITY (§ 19*)—INJURIES—COMPLAINT—ISSUES—INSTRUCTIONS.

Where, in an action for death from electric shock, the complaint specifically alleged that the wires were uninsulated and were charged with electricity so as to endanger the life of any one coming in contact with them, that the wires were of insufficient size and strength for the purposes intended, that defendant negligently failed to remove the wires from the ground to which they had fallen and negligently failed to turn off the current, an instruction that there was no allegation charging defendant with negligent construction or maintenance of any of its crossbars by which it maintained any wires at the point where decedent was killed, and that there was no issue for them as to that, was proper, though evidence as to crossbars as a part of the res gestæ was received without objection.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

12. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—NEGLIGENCE.

The negligence of an electric light and power company in the construction and maintenance of its wires is actionable, where it contributes to an accident, and there is a causal connection between the injury and the faulty construction and maintenance, but where a storm was so violent that it would have broken the wires regardless of their condition, the storm was the sole cause of the breaking of the wires, and whether there was faulty construction and maintenance was immaterial.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.*]

13. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, in an action for death by contact with a detached wire, the evidence showed without contradiction that the installation and maintenance of the system were not faulty, and the only theory on which a verdict for plaintiff could be sustained appertained to defendant's negligence in turning on the electric current in the wire and allowing it to remain in its exposed and dangerous position, an instruction that though the installation and maintenance of the wires were inadequate, yet, if the wire became detached by a storm of unexpected force, defendant would not be liable, unless it permitted the wire to remain on the ground for an unreasonable time or failed to turn off the current of electricity after discovering the fact that the wire had fallen on the ground, was not prejudicial, though it implied that negligence in the construction and maintenance of the plant was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

14. ELECTRICITY (§ 19*)—INJURIES—MISLEADING INSTRUCTIONS.

Where, in an action for death by electric shock by taking hold of a detached live wire, there was nothing to show that defendant had been employed by an electric company and the proof showed that his only connection with electricity had been in moving a lever one way to turn on electricity and the other way to turn it off, and there was evidence that he had reason to believe that the wire was harmless, an instruction that a man of ordinary prudence, who has lived in a city where electricity is conveyed by power lines, is presumed to know the dangers of electricity, was erroneous, as leading the jury to believe that decedent must be presumed to have known of the danger.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.*]

15. ELECTRICITY (§ 18*)—INJURIES INCIDENT TO PRODUCTION — CONTRIBUTORY NEGLIGENCE.

In determining whether a person who was killed by taking hold of an electric wire which had fallen to the ground was guilty of contributory negligence, the test is whether an ordinarily prudent man under the same circumstances would have believed that there was danger.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Pauline Foley on her own account and as guardian ad litem of her two minor children and others against the Northern California Power Company. From an order denying a new trial after verdict for defendant, plaintiffs appeal. Reversed.

W. P. Johnson, N. A. Gernon, and Donohoe & Freeman, for appellants. Reid & Dozier and Jas. T. Matlock, Jr., for respondent.

PER CURIAM. The following statement of the facts, substantially in the language of appellants, is sufficiently full and accurate for an intelligent application of the questions of law involved: The action was brought by Pauline F. Foley on her own account and as guardian ad litem of her two minor children against the defendant for damages on account of negligence in causing the death of James M. Foley, husband of the said Pauline Foley and father of said minor children. The case was tried before a jury and the verdict was for defendant. The appeal is from the order denying the motion for a new trial.

The defendant was and is a corporation engaged in the business of generating, selling, and distributing electricity. On the 18th of January, 1907, and prior thereto, it maintained wires over and along the west side of Fourth street, between Park avenue and Douglas street, in the Park addition to the town of Red Bluff, and used said wires for the purpose of producing light and power. There were two unusually heavy snowfalls in that vicinity in January, 1907, the first on the 7th and the second on the 16th of the month. On the morning of the 17th, Charles Hughes, superintendent of defendant corporation for the Red Bluff division, came to town and discovered a number of wires down; all but one being telephone wires. Knowing they might come in contact with power lines, hé cut the telephone wires which were hanging down free from the poles, and caused the electricity to be turned off from the town. He then sent three employés to patrol his lines. They returned in a short time, reporting that they had found a few 110-volt lines down and a number of them badly sagged, but not dangerous. Mr. Hughes then turned the current back on the town and 2,000 volts of electricity were carried into the transformer attached to the southernmost pole on Park avenue. Later he found that the employé who had been sent to patrol the lines, including Park avenue, had patroled them no further than the pumping plant, three blocks north of the Park avenue line. The Sanitary Fruit Company had a packing house and cutting shed and dryer on block N of said Park addition. The season had closed, but James M. Foley was employed to do odd jobs about this property. On Friday afternoon, January 18th, between 12 and 1 o'clock, he left his home to go to work for said company. He was last seen alive between 12 and 2 o'clock of said afternoon within two blocks of and going towards said property. His body was found early in the afternoon of Saturday, the 19th, under a trestle near the said south pole on Fourth street. The wire from this pole was detached and lying coiled up at one end about six feet from his body. It was an uninsulated copper wire about one-tenth of an inch in diameter. His body lay in a little passageway about 4 or 4½ feet high, used by the workmen in going to and from the dryer. His hands were partially closed. The fingers of the glove he wore and the fingers of the hands were burned. The body lay perfectly rigid. There was a hole scooped out by his heels as he fell. Dr. Fife testified: "I judge the moment he touched the wire he received this tremendous shock and the body became rigid and he pitched forward." After Foley was killed, it was ascertained that the 2,000-current wire had become detached from the said southerly pole. The cross-arm was split and hanging down and the wire was broken at the insulator. There is nothing to account for the breaking of the wire except the heavy snowstorm. As the deceased was alone at the time of the fatal affair, the immediate surrounding circumstances are involved in some degree of obscurity. It is, however, reasonably certain that he took hold of the wire—probably to remove it from the path—and he was instantly electrocuted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

As usual in such cases, two main questions are presented, one relating to the negligence of defendant and the other to the contributory negligence of the deceased. As to the first, it is clear that defendant's manager acted prudently in turning off the current when on the morning of January 17th he ascertained the effects of the storm. But the mistake was made in turning on the current without patroling the line on Fourth street south of Park avenue. It is manifest that if that portion of the line had been explored, the break would have been discovered and the line restored before the current was turned on again. The question is thus presented whether this failure to inspect the line involved herein is imputable to defendant as actionable negligence. In regard to this there can hardly be any difference of opinion. The company was plainly put upon notice by reason of the storm and, in view of the nature of the agency with which it was dealing and the importance of the safety of the citizens, the company could not be held blameless for its failure to ascertain and avert the obvious peril. A reasonable time would, of course, be allowed in which to make an investigation, but the proximity of the scene of the accident and its accessibility to the company's office render the conclusion irresistible that the delay was unnecessary and unreasonable.

The owner or operator of an electric plant is bound to exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, which would tend to increase the danger to persons lawfully in the pursuit of their business or pleasure, may be reasonably discovered. Bourke v. Butte Electric & Power Co. et al., 33 Mont. 267, 83 Pac. 470. The care which the law exacts from any person, firm or corporation engaged in operating an instrumentality is always in proportion to the degree of danger reasonably to be apprehended from the use of the means employed. Carroll v. Grande Ronde Electric Co., 47 Or. 424, 84 Pac. 391, 6 L. R. A. (N. S.) 290. In the latter case it was held that where defendant permitted a wire charged with a high degree of voltage to remain for nearly 20 hours fastened to a picket fence beside a public highway, in such condition that any living creature coming in contact with the wire must necessarily suffer death, defendant was prima facie guilty of negligence. A similar view is announced and other authorities cited in the case of Tackett v. Henderson Bros. et al., 12 Cal. App. 658, 108 Pac. 151. We have therefore no hesitation in declaring that on the question of the negligence of defendant the conclusion should be in favor of plaintiffs.

As to whether the conduct of the deceased was such as to preclude recovery, there is more room for candid difference of opinion. As we have already observed, no one saw the accident which resulted in Foley's death. Appellants argue that to assume that he was guilty of contributory negligence would be to indulge in mere surmise, a mere guess, when all the facts proven are consistent with an entire absence of negligence on his part and, in truth, they affirmatively show that he is not chargeable with negligence. In this state the rule is that the burden of proving contributory negligence is cast upon the defendant, and it is insisted that no such evidence is to be found in the record. Assuming that the deceased picked up the wire, we must conclude, so it is contended, that he did not believe and had no reason to believe that the wire carried electricity. This follows from the presumption that he had such a regard for his life as the ordinary man has. Texas P. R. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. As to the reason for his believing that the wire carried no electricity, these circumstances are pointed out: The south pole, near which Foley was killed, was the end of the Northern Power Company's line. Foley had been working the preceding season for the Sanitary Fruit Company and the electricity had been shut off, so that it did not enter the transformer in the building. The motor of the company was taken away between the 1st and the 15th days of November, 1906, and after this there was no electricity used by the said company and probably not for a month previous. There was no person to be served with electricity beyond the Sanitary Fruit Company's plant. The Madison place, just beyond and adjoining block N, had used electricity from this line. But no electricity had been used on the Madison place for months. As the deceased had been working about the company's property, he must have been familiar with these facts. Indeed, the local manager of the company testified that Foley worked "at such times as he saw fit. The days were short out in the shed and the sheds were dark when he was working on block N. He couldn't work long hours on account of the absence of light." Seeing the wire detached from the said south pole, he would therefore naturally conclude that it was not charged with electricity, and his efforts to remove it cannot be said to manifest any recklessness or want of due caution on his part. It is urged also that he was an unskilled laborer and the same degree of care could not properly be exacted of him as of one familiar with the dangerous character of electricity. It is true that there is some evidence that he had occasionally turned on and off the motor. But this was in obedience to the direction of the foreman and it was a very simple operation, as the testimony of the foreman shows: "From time to time Mr. Foley turned on the motor under my instructions. Sometimes I would call to him if I was close enough. At other times I would give him a motion of the hand. He turned on the motor just by moving a little lever. All that was necessary to stop the motor was to move the switch." But granting, as stated in Shade v. Bay Counties Power Co., 152 Cal. 12, 92 Pac. 63, that deceased "was not a backwoodsman who had never heard of electric plants and the danger which lurks in live wires, if, indeed, such a person could be found in California," and, assuming that he realized the probable consequences of taking hold of such a wire, still it is urged that he had a right to believe, under the circumstances, that the wire was not a live one and therefore he was not chargeable with negligence. The contention is quite plausible and the jury might have found accordingly, but we are not prepared to say that the freedom of deceased from negligence is so clear that an adverse finding is entirely unsupported. There is evidence that he picked up the wire with both hands, and the inference from all the circumstances detailed is not unreasonable that there was no occasion for him to take hold of the wire either for the safety of himself or of others. There are two considerations to be weighed in determining whether he was guilty of contributory negligence. The first relates to the rationality of his belief as to the wire being charged and the other to the quality of his act in taking hold of the wire at all. Even if an individual had reason to believe that a wire was harmless, yet if he aimlessly or wantonly or needlessly seized it and thereby received a shock, it would still be competent for a jury to find that his unnecessary and reckless act was inexcusable and to hold him legally responsible for the consequences. Appellants, as we view it, have not given due consideration to this phase of the question.

We cannot hold that the trial court erred in declining to grant a new trial on account of the newly discovered evidence. This was set forth in an affidavit by one John Berg and consisted of the declaration that he saw the detached wire on the day before Foley's death, and that he did not think "it was more than one foot to the east of that part of the tramway where Foley's body was found. There was a bend in the wire and it stood up from the ground in front of said passage at least two feet." But this witness was on the stand during the trial and the case was brought clearly within the rule that, "where newly discovered evidence might have been produced with reasonable diligence, a new trial will not be granted." People v. Urquidas, 96 Cal. 239, 31 Pac. 52. There are other reasons why the foregoing affidavit should not have the effect contended for by appellants, but they need not be considered.

Complaint is made of the following instruction given by the court on the request of defendant: "I charge you that there is no allegation in the amended complaint of plaintiffs in this action charging the defendant with negligent construction or maintenance of any of its cross-arms, by which it maintained any wires at the point where the deceased, James M. Foley, met his death, and this being so, there is no issue before you as to the proper construction or maintenance of any cross-arms." It is true that plaintiff made a general charge of negligence on the part of defendant and followed this by particular specifications, among which no reference is made to the cross-arms. The instances of negligence are pointed out as follows: "That said wires were not insulated and were so heavily charged with electricity as to endanger the life of any person who should come in contact with them. * * * That the said wire was of insufficient size and strength for the purpose for which it was used by the defendant. That the defendant negligently failed to remove the said wire from the ground to which it had fallen and negligently failed to turn off the current of electricity with which said wire was charged, and negligently and wrongfully permitted the said wire, heavily charged with electricity as aforesaid, to remain upon the ground for an unreasonable time after the same had fallen from the pole to which it had been attached." It is further alleged that the death of Foley "was caused by the negligent acts of defendant as aforesaid." The rule undoubtedly is, as stated in Stevenson v. Southern Pacific Company, 102 Cal. 148, 34 Pac. 620: "As a result of the application of these principles to code pleading in cases of negligence and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done." The particular acts were specified here and upon these plaintiffs were compelled to rely.

The instruction was in line with the familiar principle requiring a correspondence between the allegations and the proof, and it does not furnish ground for reversal. It is true that some evidence as to the crossbars was received without objection from defendant, but it related particularly to the appearance of the wire attached to the pole nearest the body of the deceased and constituted a part of the res gestæ. It cannot be said that defendant's failure to object to the recital of the surrounding circumstances must be held as an acquiescence in the theory that the complaint charged negligence in the construction and maintenance of the said crossbars.

Instruction No. 5, requested by the defendant and given by the court, is in the following language: "Even though the installation and maintenance of the said power line in question were inadequate, insecure, and insufficient, still, if the wire which caused the death of James M. Foley, if his death was caused by the coming in contact with such wire, became detached or broken by reason of a storm or snowstorm of unusual or unexpected force or severity, still the defendant could not be held liable for negligence, unless it allowed and permitted said wire to remain upon the ground for an unreasonable length of time, or failed to turn off the current of electricity after the discovery of the fact that the wire had become detached and had fallen to the ground." The contention of appellants is that this instruction necessarily implies that negligence in the construction and maintenance of the plant is entirely immaterial, although the jury may have believed that a plant properly constructed would have successfully resisted the storm and remained intact. As a proposition of law, this would be manifestly incorrect, as a negligent construction or maintenance of the wire, if it contributed to the accident, would impose liability upon the defendant. It is equally true that there must be some causal connection between the injury and the faulty construction or maintenance. If the storm was so violent that it would have broken the wire regardless of its condition, then the storm could be said to be the sole cause of the breaking of the wire, and, if the jury so believed, it would be immaterial if they also found that there was fault in the construction and maintenance. This is really what was intended by the instruction, and while not very happily expressed and subject to the criticism of uncertainty, the jury must have so understood it, in view of the other instructions supplementary to and qualifying it. But, if abstractly considered, it should be held erroneous, plaintiff cannot complain, for the reason that there is no evidence of any imperfection in the construction or maintenance of said wire. The evidence shows without conflict that the installation and maintenance of the system were not faulty in any respect and the court might have so instructed the jury without prejudice to plaintiffs. Indeed, the only theory upon which a verdict for plaintiffs could be sustained appertains to defendant's negligence in turning on the electric current in the wire in question and allowing it to remain for such a length of time in its exposed and dangerous position.

Instruction 17 presents a more serious problem. Therein the jury were instructed that "a man of ordinary prudence and understanding, who has lived in a city, neighborhood, or community where electricity is conveyed by means of power and pole lines for purposes of heat, light, and power and where electric power transmission lines are installed and maintained, and who has been around electrical power lines, transmission lines, service lines, machinery and appliances, is presumed to know the powers, dangers, and potentialities of electricity and electric power." If we are to indulge such a presumption, it must be in opposition to what we know to be a fact. Neither the ordinary nor, probably, the extraordinary man knows the "powers and potentialities of electricity." But the instruction as to this feature is not so important as the direction in reference to the dangers of electricity, since the latter is a vital element in the determination of the question of the "contributory negligence" of the deceased. In the light of the undisputed facts, the instruction of the court would be understood by the jury as a declaration that Foley must be presumed to have known "the powers, dangers, and potentialities of electricity and electric power." From this the inference would reasonably follow that he must have known that if he came in contact with a live wire of the voltage in question, death would result. Is this not an invasion of the province of the jury? Is it a matter of such general knowledge that the ordinary man who lives in a neighborhood where electric plants are operated and who has been around the machinery and appliances, however infrequently and whatever his business there, may be declared as a matter of fact to be acquainted with the "dangers and potentialities" of electricity? This does not seem to be one of the unquestioned data of general observation and knowledge that a court is permitted to declare to a jury. Probably the vast majority of such men do understand and appreciate the danger, but, under our system of procedure, the plaintiffs had a right to have the jury determine whether the deceased knew the danger of the electric current. As far as Foley's actual knowledge of electricity is concerned, the record is meager. There is nothing to show that he was ever employed by an electric light company and the only connection of his work with the current was in moving a lever one way to turn the electricity on and the other way to turn it off. Nevertheless, the jury were virtually instructed that they must find that he knew the danger of coming in contact with the current. In Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, it is held that "the mere fact that a dangerous agency is used raises no presumption that the public know enough of its nature to avoid the danger which may arise from its use." It is true, as suggested by respondent, that, since said decision was rendered, we have made great progress in the use and knowledge of electricity and the instruction condemned therein is more objectionable than the one before us, but, after all, the evidence does not show that Foley had any greater knowledge of electricity than the general public. Again, it is not improbable that the jury made a wrong and prejudicial application of the instruction to the act of the deceased in taking hold of the wire, ignoring the consideration of whether he had reason to believe that the wire was not charged with electricity. It is easy to see how, in view of the peculiar facts, the jury may have concluded that the court intended that the presumption of knowledge of the danger would accompany this act of the deceased. At any rate, we think the determination of the knowledge of the danger on the part of the deceased should have been left to the jury without any direction from the court unfavorable to plaintiffs.

The plaintiffs requested this instruction: "If you find that James M. Foley, when going to or coming from his work found a wire in his way, and that he did not believe said wire was carrying a current of electricity and that an ordinarily prudent man in his situation at the time would not have believed that said wire was carrying a current of electricity, then if you find that he placed his hands on said wire, in an endeavor to get it out of his way, he was not guilty of negligence." The court modified the proposed instruction by adding after "believed" the following words, "or suspected, and would have had no reason to believe or suspect." The contention is that an ordinarily prudent man might have had some suspicion that the wire was charged and yet not be guilty of negligence if he ignored the suspicion and took hold of the wire. The test that seems to be generally recognized is whether an ordinarily prudent man, under the same circumstances, would have believed there was danger. It is probable that the jury would not be misled by the introduction of the additional element of suspicion, but we think the modification might well have been omitted. As a matter of fact, instruction No. 21, as given by the court is in exact harmony with the proposed instruction No. 20, and, we think, states the rule correctly. We have examined the other assignments of error, but find nothing therein demanding specific notice.

We think a new trial should be granted, and the order denying the motion is therefore reversed.

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14 Cal. App. 481

In re CHADBOURNE'S ESTATE. (Civ. 748.)

(Court of Appeal, Third District, California. Nov. 9, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 22*)—APPOINTMENT—SPECIAL ADMINISTRATOR.

The appointment of a special administrator is not intended to bring about a general administration of the estate, the administrator's powers being limited, and should not be extended without necessity, or continue longer than is reasonably necessary to secure the appointment of an administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 116; Dec. Dig. § 22.*]

2. EXECUTORS AND ADMINISTRATORS (§ 35*)—APPOINTMENT — SPECIAL ADMINISTRATOR — STATUTES.

Code Civ. Proc. § 1411, provides that when an executor or administrator is suspended or removed, the superior court or a judge thereof may appoint a special administrator to collect and take charge of the estate, and to exercise such powers as may be necessary in the preservation of the estate, or he may direct the public administrator to take charge thereof. Section 1426 provides that if all the executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed, or otherwise, to the widow or next of kin, or others, in the same order and manner as directed in relation to original letters of administration. *Held*, that when executors were removed for failure to give notice to creditors for several months after appointment, the court had power, pending an appeal from such removal order, to appoint a special administrator under section 1411, and also to proceed under section 1426 to the hearing of a petition for the appointment of an administrator with the will annexed; but the court had no jurisdiction to appoint a general administrator with the will annexed, until the order of removal had become final.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 259; Dec. Dig. § 35.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Judicial settlement of the estate of Edwin Chadbourne, deceased. From an order appointing Dennie May Chadbourne, surviving wife of deceased, special administratrix and appointing J. W. Warboys, administrator of the estate, pending an appeal from an order revoking the appointment of Mrs. Chadbourne and F. A. Chadbourne executors of the estate, F. A. Chadbourne and others appeal. Reversed in part, and remanded for further proceedings.

T. T. C. Gregory, for appellants. Paul C. Harlan, for respondents.

CHIPMAN, P. J. This is an appeal from an order appointing an administrator with the will annexed, pending the appeal from an order revoking the appointment of the executors of said will.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On December 15, 1909, Dennie May Chadbourne, surviving wife of deceased, filed her petition in which it was alleged that F. A. Chadbourne and she, herself, had been duly appointed executors of the will of deceased; that her co-executor had neglected for two months to give notice to creditors of the estate as had been ordered, and that she did not give notice, "because she relied upon the assurance of said F. A. Chadbourne that the said notice had been given"; that, "subject to the revocation by the court of the letters testamentary issued as aforesaid to the said F. A. Chadbourne, petitioner is willing to, and will, upon such revocation being made, resign her aforesaid appointment as such executor." She prayed that a day be appointed for the said F. A. Chadbourne "to show cause why his said appointment and letters as executor shall not be revoked"; and that until the hearing the powers of the said F. A. Chadbourne be suspended and "your petitioner be appointed special administrator of said estate, and upon the hearing petitioner be appointed administrator."

The court found that F. A. Chadbourne caused directions to be given that notice to creditors should be published in the Solano County Courier, on the day the court ordered notice to be published, and that Dennie May Chadbourne believed such notice had been published and did not know to the contrary, until just before the filing of her petition; that "no damage accrued to the estate by reason of the neglect to give notice to the creditors other than such as may arise from delay in the administration of the estate." On January 14, 1910, the court gave its judgment, which was filed January 20th, that the letters of said executors be revoked, and appointing Mrs. Chadbourne special administrator. On January 14, 1910, respondent, J. W. Warboys, filed his petition for appointment as administrator of said estate, as the nominee of Mrs. Chadbourne, and on the 17th of January appellants, Joseph R. Chadbourne and Grant Chadbourne, brothers of deceased, filed their petition praying for letters of administration with the will annexed of said deceased, and on the same day filed their petition for appointment as special administrators pending the hearing of said petitions. On January 31st, F. A. Chadbourne, Joseph R. Chadbourne, and Grant Chadbourne filed their opposition to the appointment of said Warboys and on the same day F. A. Chadbourne filed notice of appeal from the judgment entered January 20th, revoking his letters and appointing Dennie May Chadbourne special administrator. On January 31st, the petition of Warboys for letters, the opposition thereto, and the petition of Joseph and Grant Chadbourne for letters came on for hearing and evidence, written and oral, was introduced. Among other things, the court found: That the authority of said executors, F. A. and Dennie M. Chadbourne, was, on January 14th, revoked; that on that day (there being no executor) said Warboys filed his petition for letters "at the request and upon the appointment of the said Dennie May Chadbourne, * * * and said request and appointment were duly and regularly filed herein on January 14, 1910"; that on January 17th Joseph and Grant Chadbourne, brothers of deceased, filed their petition for special letters and also for letters with the will annexed; that "the said Dennie May Chadbourne and said J. W. Warboys are competent to administer said estate," and that the said Dennie "is competent to appoint, designate, and nominate any other person to administer the said estate in her stead; but said Dennie May Chadbourne is not entitled to the appointment as administrator with the will annexed in said estate"; that said Dennie and said F. A. Chadbourne "were removed and their power and authority revoked, as said executors, solely for the reason of their neglect to give notice to creditors for more than two months after their appointment as such executors; that there will be no delay in granting letters of administration with the will annexed to said estate; that the making of the order therefor will not be likely to be protracted; and that said estate will not suffer either loss or damage for the want of some person with authority to take charge of and care for it under special letters of administration; that said J. W. Warboys is entitled to letters of administration with the will annexed herein; and that neither the said Grant Chadbourne nor the said Joseph R. Chadbourne is entitled to either letters of administration with the will annexed, or special letters of administration herein." Judgment was accordingly made bearing date February 2, 1910, and filed February 8, 1910, from which the Chadbournes, on March 4, 1910, duly gave notice of appeal.

Appellant's principal point is that, pending the appeal of F. A. Chadbourne from the order removing him as executor, he was suspended from office, and, while it was within the power of the court to appoint a special administrator to act during such suspension, the court had no power to appoint an administrator with the will annexed, until such order of removal became final. Reliance is placed upon section 1411 of the Code of Civil Procedure, which provides as follows: "When * * * an executor or administrator * * * is suspended or removed, the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate * * * and to exercise such powers as may be necessary for the preservation of the estate, or he may direct the public administrator to take charge of the estate."

Section 1426 of the same Code reads: "If all the executors or administrators die, or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. * * *"

The court had the power, under section 1411, to appoint a special administrator to take charge of the estate (Estate of Crozier, 65 Cal. 332, 4 Pac. 109); and it also had the power, under section 1426, to proceed to the hearing of a petition for the appointment of an administrator with the will annexed. The appointment of a special administrator is not intended to bring about a general administration of the estate; his powers are limited by the section, and, while they may, by order of the court, be made to embrace duties not strictly within the letter of the statute, under the pressure of necessity made to appear, the appointment should not continue longer than is reasonably necessary to secure the appointment of an administrator, who would have all the powers given executors. We do not doubt the power of the court to proceed under section 1426 (In re Pina, 112 Cal. 14, 44 Pac. 332; Estate of Strong, 119 Cal. 663, 51 Pac. 1078), unless, as is contended, the appeal from its order removing the executors stayed all proceedings to appoint a general administrator.

In Re Moore, 86 Cal. 72, 24 Pac. 846, the precise question was before the court and it said: "Pending the appeal of Thomas W. Moore from the order removing him, he was suspended from office, and it was within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal became final." This case is cited in More v. More, 127 Cal. 460, 463, 59 Pac. 823, 824, and in Guardianship of Van Loan, 142 Cal. 429, 76 Pac. 39. The proposition decided in 86 Cal. supra, was approved and applied to the case of the removal of a guardian in the Van Loan Case. Mr. Justice Angellotti gives what appears to be the reason for the rule, namely, that "the question as to who shall be the general administrator of the estate is involved in the appeal, and proceedings thereon are stayed by such appeal."

The notice of the appeal from the judgment removing the executors was filed January 31, 1910, and although the petition for the appointment of Warboys was heard on that day, the order appointing him was not made until February 2d, following. Respondents' claim that the appointment was made prior to the appeal is not borne out by the record.

A question is raised as to the sufficiency of the nomination of Warboys by Mrs. Chadbourne and also as to whether she was entitled to make a nomination. It is not necessary to decide the point, inasmuch as we must hold, in view of the decisions above cited, that the court was without authority to appoint a general administrator.

The record does not disclose the outcome of Mrs. Chadbourne's appointment as special administrator by the same order which revoked her letters as executor. Just how it came about that the court removed her as executor for cause, and yet appointed her by the same order to take charge of the estate, does not appear. Nor does it appear whether she gave the bond required and qualified. It would rather be inferred from the record that the court and counsel treated that part of the order as a nullity. Indeed, section 1511 of the Code of Civil Procedure requires the court, upon the neglect of an executor for two months after his appointment to give notice to creditors, to revoke his letters and "appoint some other person in his stead." However, this feature of the proceedings does not affect the main question.

In the judgment appointing J. W. Warboys administrator, the court denied the petition of Joseph R. and Grant Chadbourne to be appointed special administrators and also administrators with the will annexed. The appeal is from the whole of the judgment. The denial of the petition of the Chadbourne brothers doubtless was because, in the opinion of the court, Mrs. Chadbourne, as widow, had the superior right to administer or to nominate a person in her stead. As the appointment of her nominee was without authority, it seems to us that the question of appointing a special administrator pending the appeal from the judgment revoking the letters of the executors, should go back unembarrassed by any proceedings now here on this appeal.

The judgment dated February 2, 1910, and filed February 8, 1910, is reversed, with directions to the court to take such further proceedings in the matter as it may be advised.

We concur: HART, J.; BURNETT, J.

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14 Cal. App. 442

PEOPLE v. DANFORD. (Cr. 168.)

(Court of Appeal, Second District, California. Nov. 3, 1910. Rehearing Denied by Supreme Court Dec. 29, 1910.)

1. TELEGRAPHS AND TELEPHONES (§ 79*)—FORGERY OF TELEGRAM—STATUTES—EVIDENCE.

Evidence *held* sufficient to sustain a conviction on an information framed under Pen. Code, § 474, and charging defendant with willfully delivering to another a message falsely purporting to have been received by telegraph knowing the same to be false, and with the intent to injure and deceive the person to whom it was delivered.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TELEGRAPHS AND TELEPHONES (§ 79*) — FORGERY OF TELEGRAMS — INJURY FROM FORGERY.

It is not necessary that the person intended to be injured or deceived by a forged telegraph message in violation of Pen. Code, § 474, should be actually injured.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.*]

3. JURY (§ 5*)—JURY LIST—APPORTIONMENT.

Code Civ. Proc. § 206, requiring that the list of jurors be selected from the different townships or wards of the respective counties in proportion to the number of inhabitants therein, as near as can be estimated by the persons making the list, is directory, and, in the absence of any abuse of discretion, the action of the judges of the superior court in making the selection should not be disturbed.

[Ed. Note.—For other cases, see Jury, Cent Dig. § 8; Dec. Dig. § 5.*]

4. INDICTMENT AND INFORMATION (§ 129*) — JOINING OF COUNTS—OFFENSE RELATING TO SAME TRANSACTION.

Under Pen. Code, § 954, providing that an information may charge different offenses under separate counts, but that they must all relate to the same transaction, an information charging in one count forgery of a telegraph message, and in a second count an attempt to obtain money by false pretenses, based on the same transaction, was not demurrable as stating more than one offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414–418; Dec. Dig. § 129.*]

5. INDICTMENT AND INFORMATION (§ 41*) — CONFORMITY OF INFORMATION TO PRELIMINARY COMPLAINT.

Where defendant was committed by a magistrate upon an affidavit charging forgery of a telegraph message, in violation of Pen. Code, § 474, he cannot be charged in the information with attempting to obtain money under false pretenses though it grew out of the same transaction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 152, 163–169; Dec. Dig. § 41.*]

6. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—DEFECTS IN INFORMATION.

Where an information sufficiently charges the commission of the offense for which defendant was committed by a magistrate on an affidavit of complaint, that the information also charges another offense arising out of the same transaction, but not included in the preliminary complaint and commitment, was not ground for reversal, especially where the latter count was dismissed at the commencement of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101–3106; Dec. Dig. § 1167.*]

7. INDICTMENT AND INFORMATION (§ 138*) — MOTION TO SET ASIDE—GROUNDS—FORM.

A motion to set aside an information, on the ground that the second count charges defendant with an offense for which he was not committed, should be directed against the second count alone, and not to the entire information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 472; Dec. Dig. § 138.*]

8. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—DISMISSAL OF COUNT—OPERATION AND EFFECT.

Whether one of the counts of an information was or was not for an offense for which defendant was not committed by a magistrate, defendant had no ground of complaint to its dismissal on motion of the district attorney, leaving the information sufficient to charge the offense for which he was committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. § 1167.*]

9. INDICTMENT AND INFORMATION (§ 144*) — MOTION TO DISMISS—"DISMISSAL."

The dismissal of a count of an information is not an amendment thereof, but is in the nature of an election to proceed on the remaining counts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*

For other definitions, see Words and Phrases, vol. 3, pp. 2105–2106; vol. 8, p. 7639.]

10. INDICTMENT AND INFORMATION (§ 144*)—MOTION TO DISMISS—DISMISSAL OF COUNT—OPERATION AND EFFECT.

Under Pen. Code, § 1019, providing that a plea of guilty puts in issue every material allegation of the information, the dismissal of one count after the plea is entered, leaving another count, the allegations of which are complete and independent of the dismissed count, does not leave the case without issue joined.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 488; Dec. Dig. § 144.*]

11. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE — FORGERY — FACTS EXTRINSIC TO INSTRUMENT.

An information for forgery, which charged the offense in the language of the statute (Pen. Code, § 474), without averment of extrinsic matter showing in what manner the forged message deceived the complaining witness, is not defective, as it cannot be said that the instrument, if genuine, would not have efficacy to or that it could not injure or deceive.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. § 110;* Forgery, Cent. Dig. §§ 61, 64.]

12. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—VARIANCE.

Where the information charged the forgery of a telegram, setting out a copy of the message, and on trial an identical copy was offered in evidence, in connection with the rules and regulations of the telegraph company without objection by the defendant, the variance involved in admitting the rules and regulations in evidence was without prejudice to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101–3106; Dec. Dig. § 1167.*]

13. CRIMINAL LAW (§ 552*)—EVIDENCE—INCRIMINATING CIRCUMSTANCES—IDENTITY OF DEFENDANT AS PARTY AT TELEPHONE.

In a trial for forgery of a telegraph message, where there was evidence tending to show that some one, claimed by the state to have been defendant, telephoned to the telegraph office, asking that the message be returned to him for correction, but the employés of the telegraph company failed to identify defendant as the person who telephoned, circumstantial evidence was admissible to prove such identity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259–1262; Dec. Dig. § 552.*]

14. CRIMINAL LAW (§ 1166½*)—TRIAL—PREJUDICIAL CONDUCT OF JUDGE.

At the trial of an information for forgery of a telegraph message, defendant, after a colloquy, said, "I desire to assign here prejudicial error," to which the court replied: "That is for the Supreme Court to say. You take your exception to the adverse ruling, and you have your record made." *Held*, that the statement made by the court was not prejudicial misconduct.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

15. CRIMINAL LAW (§ 730*)—TRIAL—MISCONDUCT OF COUNSEL—ACTION BY COURT.

Alleged misconduct of the district attorney was cured where the court, on its own motion, instructed the jury that they should disregard those acts of the district attorney which defendant considered offensive and prejudicial, especially where it was apparent from the verdict that the jury was not influenced by such misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

16. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS — INSTRUCTION COVERED BY THOSE GIVEN.

Where the jury have been fully and fairly instructed upon a point covered by a requested instruction, its refusal is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

W. J. Danford was convicted of forgery, and he appeals. Affirmed.

Grove E. Walter, L. L. Cardwell, and W. J. Danford, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

SHAW, J. Defendant was convicted upon an information charging him with willfully delivering to another a message falsely purporting to have been received by telegraph, knowing the same to be false, and with the intent to injure and deceive the one to whom it was delivered. The information was as follows:

"The said W. J. Danford is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of a felony committed as follows: That the said W. J. Danford on the 23d day of December, 1909, at and in the county of Los Angeles, state of California, did willfully, unlawfully, feloniously, knowingly, and with intent to deceive, injure and defraud one C. J. O'Keefe, deliver and cause to be delivered to C. J. O'Keefe a certain false and forged message, which said false and forged message is in the following words and figures, to wit, 'Dated Telluride, Colo., Dec. 22, '09. To C. J. O'Keefe, Los Angeles, Calif. —Bonds inquired about will be redeemed at par 5,000 dollars and interest upon maturity, May, 1910. I. E. Brown, Cashier;' and which said false and forged message then and there falsely purported to have been received by telegraph and from a telegraph office and from one I. E. Brown, cashier; that in truth and in fact the said message was false and forged, and had not been received by telegraph, and had not been received from any telegraph office, and had not been received from I. E. Brown, cashier; and that he, the said W. J Danford, then and there well knew that said message was false and forged and had not been received by telegraph, and had not been received from any telegraph office, and had not been received from I. E. Brown, cashier—contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

A number of alleged errors are assigned as grounds for reversal, among which it is urged that the verdict is not justified by the evidence.

1. The evidence tended to show that the defendant, who was at the time engaged in the practice of law in the city of Los Angeles, had in his possession a $5,000 bond, which purported to have been issued by the San Miguel Gas, Light & Power Corporation of Telluride, Colo.; that defendant desired to negotiate a loan of $1,000 upon this bond as security, and to that end called upon C. J. O'Keefe, the complaining witness, in said city of Los Angeles. In the course of the conversation defendant gave to O'Keefe the names of certain alleged bond brokers in Denver and suggested that he (O'Keefe) wire them as to the value of the bond. On the day following O'Keefe called at defendant's office, where, at O'Keefe's suggestion, it was arranged that a telegram signed by him (O'Keefe) should be sent to the First National Bank, Telluride, Colo., the expense thereof to be borne by defendant. Thereupon, a telegram was prepared as follows: "First National Bank, Telluride, Colo. Please advise as to value of five thousand dollar bond, No. 32, Series A, issued by San Miguel, Gas, Light & Power Corporation, of date May first, 1900, due 1910, signed by E. W. Weed, Prest., and Jas Herman, Secty., and is same likely to be paid when due. [Signed] C. J. O'Keefe." Defendant telephoned for a messenger boy, and after writing upon the telegraphic blank containing the message that the expense of transmitting the message was to be charged to him and the answer delivered at his office, gave it to the messenger, who delivered it to the Western Union Telegraph office. Shortly after this message was delivered to said office, some one claiming to be, and who gave the name of defendant, phoned the telegraph office, advising them not to transmit the message, but to return it to defendant's office. Pursuant to such instructions, the message was not transmitted, but the same was returned to the office of defendant and delivered to him. On the following day O'Keefe called at defendant's office, in response to a phone call from defendant, at which time defendant gave him what purported to be a reply to the message which O'Keefe had written and which he supposed had been transmitted to the First National Bank, Telluride, Colo. This reply was inclosed in a sealed envelope of the Western Union Telegraph

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Company and addressed to C. J. O'Keefe. It contained a telegram in the words and figures following: "Dated Telluride, Colo., December 22, 09. To C. J. O'Keefe, Los Angeles. Calif. Bond inquired about will be redeemed at par, 5000 dollars and interest, upon maturity, May, 1910. [Signed] I. E. Brown, Cashier." O'Keefe at the time believed the message to be genuine and sent in reply to the one prepared by him, which he supposed had been transmitted. Nevertheless, he later made some inquiry at the telegraph office, and learned that no such message had been received or delivered through the Western Union telegraph office. It further appeared at the trial that I. E. Brown, whose name purported to be signed to the telegram, never signed the same, that the bond was valueless, and that there was no such corporation as San Miguel Gas, Light & Power Company of Telluride. O'Keefe did not make the loan, and sustained no loss or injury by reason of the alleged deception.

Appellant made no attempt to controvert these facts, but based his defense upon the claim that he was an innocent victim of another, one Jeffrey Ryan, who, as a client, employed the defendant to negotiate a loan for him upon the bond, assigning certain reasons for not being known in the transaction himself. The testimony of defendant and the inferences to be drawn therefrom are, in effect, that Ryan personated defendant in intercepting and by telephone recalling the message signed by O'Keefe and addressed to the First National Bank at Telluride, and that Ryan forged the telegram, made the basis of the prosecution, and gave it to defendant, claiming that it had been delivered at defendant's office in the absence of the latter and received by Ryan, who left it with defendant for delivery to O'Keefe; that defendant, believing it to be genuine and in answer to O'Keefe's telegram to the First National Bank, gave it to him when he went to defendant's office in response to a telephone call requesting him to do so. Ryan did not appear at the trial, nor was it made to appear that any one other than defendant had ever seen or heard of such a person. Evidently the jury did not believe the defendant to be the victim, as he claimed, of Jeffrey Ryan, and, as they had a right to do, discredited his testimony in this regard. Eliminating his explanation, there can be no question but what the testimony justified the finding of the jury that at the time defendant delivered the message to O'Keefe he knew the same was forged and was not a telegraph message received from a telegraph office, and that he committed the act with the intent to deceive and defraud O'Keefe of his money. Indeed, it is impossible to conceive of the jury reaching a verdict other than that of guilty. The fact that O'Keefe subsequently learned the true facts and did not part with his money is immaterial. People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

2. Defendant interposed a challenge to the panel of jurors; the court denied the challenge and appellant assigns the ruling as error. One of the grounds of the challenge, and the only one now urged by appellant, is that in selecting the names of jurors suitable and competent to serve as jurors, the statute (section 206, Code Civ. Proc.), requires that such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making such lists. The record discloses that at the time the list of jurors were selected Catalina township, in said county, contained 25 inhabitants competent and in every way qualified to act as jurors in the trial of cases in the superior court of said county during the ensuing year, but that no one of the 25 inhabitants of said township was selected and included in said list of jurors. In our judgment, such fact standing alone affords no just ground for challenge. The section (206 Code Civ. Proc.) does not require jurors to be selected from every ward and township in the county, but from the different wards and townships therein, the total number of jurors required to be apportioned in accordance with the estimated number of inhabitants in each ward or township, as nearly as the same may be estimated. Whether or not the number of inhabitants of Catalina township, when compared with the number of inhabitants in the other townships of the county, was sufficiently large to entitle it to representation on the jury list, is not made to appear. Conceding such fact, however, to have been established, nevertheless it cannot be said the persons (in this case, a majority of the judges of the superior court) whose duty it was to make the lists of the names of jurors failed to select them from the different townships in proportion to the number of inhabitants therein, as nearly as such persons could estimate the same. In our judgment, the provision of the section in this regard is directory, and, in the absence of an abuse of discretion in making such estimate, the action of those whose duty it was to make the selection should not be disturbed. No such abuse is made to appear, and there was no error in denying defendant's challenge. People v. Durrant, 116 Cal. 194, 48 Pac. 75.

3. In addition to charging the defendant with the offense of which he was convicted, the information, by a second count, as it was originally filed, charged him with another offense, that "of attempting to obtain money by false and fraudulent representations and pretenses," which was based upon the same act and transaction set forth in the first count. A demurrer interposed to the information upon the ground that it stated more than one offense was overruled. There was no error in this ruling. Section 954, Pen. Code, provides that "the * * * information may charge different offenses, * * *

under separate counts, but they must all relate to the same act, transaction, or event. * * *" Both counts in stating the offense with which defendant was charged related to and were predicated upon the same act and transaction, and, hence, the information was not subject to demurrer upon the ground specified. Section 1004, Pen. Code. The case of People v. Clement, 35 Pac. 1022[1] has no application, for the reason that section 954, Pen. Code, as it stood prior to the amendment of 1905, provided that the information should charge but one offense.

4. Defendant also made a motion to set aside the information upon the ground that he had not been legally committed by a magistrate, which motion was denied. It appears that in the affidavit of complaint filed with the justice of the peace defendant was charged with a violation of section 474, Pen. Code, as set forth in the first count of the information, and for which offense only he was by the magistrate committed; hence, it must be conceded the district attorney had no power to charge defendant with the offense specified in the second count thereof. People v. Nogiri, 142 Cal. 596, 76 Pac. 490. The charge set forth in the first count, however, was not subject to this infirmity, and therefore was not subject to the objection. To be effective the motion should, in our judgment, have been directed to the second count alone, and not to the entire information. Moreover, conceding the ruling to have been erroneous, it clearly appears that defendant's substantial rights were not prejudiced thereby, for the reason that, at the commencement of the trial, the district attorney moved the court to dismiss the second count, which motion was by the court, over defendant's objection granted.

5. There was no error in granting the motion to dismiss the second count. As the charge set forth therein was unwarranted by the commitment of the magistrate, it was mere surplusage and had no proper place in the information. "When a sufficient information charging the offense for which he stood committed remained, the accused could in no sense be injured by the action of the district attorney or the court in striking out such surplusage." Ex parte Danford, 110 Pac. 692; Commonwealth v. Tuck, 20 Pick. (Mass.) 356. The dismissal was not an amendment, but in the nature of an election to proceed against defendant for the offense charged in the remaining count alone. Wooster v. State, 55 Ala. 217. Even had the offense charged in the second count been authorized by the commitment, defendant would not be in a position to complain that he was relieved from prosecution thereon. His rights could not be prejudiced by such action.

6. Neither is there any merit in appellant's contention that the dismissal after plea had been entered left the case without issue joined. Defendant's plea of not guilty put in issue every material allegation of the information. Section 1019, Pen. Code. The allegations of the first count were complete and in no wise dependent upon those contained in the second. The plea of not guilty to the allegations stating the offense for which defendant was committed was not affected by the dismissal. Ex parte Danford, supra.

7. Appellant further contends that the information is fatally defective by reason of the fact that it does not contain averments of extrinsic matter showing in what manner the forged message deceived the complaining witness. An answer to this contention is that the information charged the offense in the language of the statute, and in People v. Chadwick, 143 Cal. 116, 76 Pac. 884, involving a like offense, this was held sufficient, the court saying: "The information charges in the language of the section, and it cannot be said that the instrument, if genuine, would not have efficacy to, or that it could not injure, defraud, or deceive."

8. It is insisted there was a variance between the telegram offered in evidence and the forged message set out in the information. The record discloses no basis for such contention. The copy of the telegram set out in the information was identical with that offered in evidence. In addition to the message, however, there was read in evidence, without objection on the part of defendant, the printed rules and conditions of the telegraph company under which it receives and transmits telegraphic messages. In no event, conceding the alleged error, were the rights of defendant prejudiced by such wholly immaterial evidence.

9. A line of testimony was introduced, over defendant's objection, tending to show that a short time after the telegram signed by O'Keefe had been received at the telegraph office, defendant by telephoning to the office intercepted it and caused the message to be returned to him at his office. It is insisted that such evidence was erroneously admitted, for the reason that the employés of the telegraph office with whom the conversation was had over the telephone did not recognize defendant, and could not say that it was defendant who ordered the sending of the telegram stopped and returned to his office for correction. While there was no direct evidence that defendant was the person who gave the instructions, the circumstances disclosed by the record strongly point to him as the person who described the telegram as one signed by O'Keefe, addressed to the Bank at Telluride, Colo., marked "Charge W. J. Danford," and ordered it returned to him for correction, and it was so returned. There can be no doubt as to the admissibility of such line of testimony. The fact in dispute was susceptible of proof by circumstantial evidence.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 101 Cal. xvii.

10. Appellant insists that the court was guilty of misconduct whereby his rights were prejudiced. During the trial, and in response to defendant's objection to a question asked by the district attorney, the court said: "Upon the avowal (of the district attorney) that the fact sought to be proven will be connected and corroborated by circumstances, the objection will be overruled." Whereupon, defendant said: "I desire to assign here prejudicial error." The court then said: "That is for the Supreme Court to say. You take your exception to the adverse ruling, and you have your record made." It is apparent from the above statement of the proceedings that the remark of the court was prompted by a desire on its part to aid defendant's attorney in obtaining a proper record for review on appeal, by suggesting that he except to the ruling of the court in admitting the evidence, rather than to assign it as prejudicial error. In no sense can the statement made by the court be regarded as misconduct.

11. A number of assignments of error are predicated upon the alleged misconduct of the district attorney, all of which, after careful examination, are found to be of such a trivial character as to merit no discussion. Moreover, the court, of its own motion, instructed the jury that they should disregard what defendant considered offensive and prejudicial action on the part of the district attorney. Suffice it to say that, in view of the evidence, it clearly appears that the verdict of the jury could in no wise have been controlled or affected by the alleged misconduct.

12. Defendant requested the court to give to the jury an instruction as follows: "If you believe from the evidence that the defendant did not know the contents of the envelope, namely, defendant's Exhibit B (the alleged forged telegram), which complaining witness testified that the defendant delivered to him, before or at the time of delivering it, you must find the defendant not guilty"; which instruction, and others of like tenor, the court refused to give. Conceding the instruction to have been a correct statement of the law, there was no error in the ruling, for the reason that the substance of this requested instruction was fully covered by other instructions, in one of which the jury was instructed that, in order to justify conviction, they must find beyond a reasonable doubt that "the defendant, with intent to deceive, injure and defraud the said C. J. O'Keefe, did, as charged, willfully and knowingly deliver or cause to be delivered to said O'Keefe, the certain message so as aforesaid set forth and described in the information; and further believe from the evidence, beyond a reasonable doubt, that such message was false and forged, and falsely purported to have been received by telegraph, and from a telegraph office, and from the said I. E. Brown, cashier, as alleged in said count of the information, but that, in truth and in fact, it had not been received by telegraph, nor from a telegraph office, nor from the said I. E. Brown, cashier; and further believe from the evidence, beyond a reasonable doubt, that the said defendant, at the time, well knew the said message was so false and forged, and had not been received by telegraph, nor from a telegraph office, nor from said I. E. Brown, cashier." There were others of like import, from all of which it clearly appears that the jury were fully and fairly instructed upon the points covered by the instructions offered by defendant and which the court refused to give.

Other alleged errors are without sufficient merit to justify consideration. It appears from the entire record that defendant was accorded a full and fair trial. The evidence is ample to justify the verdict. No defect or error appears either in the information, the trial, or the proceedings therein which could have prejudiced the substantial rights of defendant. Pen. Code, §§ 960, 1258, 1404.

The judgment and orders appealed from are therefore affirmed.

We concur: ALLEN, P. J., JAMES, J.

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14 Cal. App. 487

WALKER v. WALKER. (Civ. 755.)

(Court of Appeal, Third District, California. Nov. 9, 1910.)

1. DIVORCE (§ 40*) — DEFENSES — SEPARATION AGREEMENT—CONSTRUCTION—STATUTES.

Civ. Code, § 158, provides that either the husband or wife may enter into any engagement with the other respecting property which either might, if unmarried, etc. Section 159 provides that they cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree to an immediate separation, and may make provision for the support of either of them, etc. Plaintiff, who had a good cause of action for divorce against defendant, his wife, for desertion, entered into an agreement with her to adjust their property rights and to live apart; the contract reciting that it had become impossible for them to longer live together as husband and wife, etc. *Held*, that the sole purpose of the agreement was to adjust the property rights of the parties, and did not affect the legal consequences flowing from the prior desertion and bar the husband's action for divorce.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 40.*]

2. DIVORCE (§ 37*)—DESERTION—OFFER TO RETURN.

Where the offense of desertion has continued for the statutory period, Civ. Code, § 102, requiring a return or offer to return in good faith to cure such desertion, must be substantially complied with in good faith to effect such result.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 37.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Samuel Walker against Anna E. Walker. From a judgment for defendant and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Frank L. Coombs, for appellant. James M. Palmer and E. S. Bell, for respondent.

CHIPMAN, P. J. Action for divorce. Defendant had judgment, from which and from the order denying his motion for a new trial plaintiff appeals. The complaint was filed October 30, 1907. The court found that the parties were married in 1862 and ever since have been husband and wife; that on April 1, 1903, defendant willfully and without cause, and contrary to plaintiff's wishes, separated from him, "with intent then and there to desert and abandon plaintiff, and from said 1st day of April, 1903, up to and including the 16th day of February, 1905, said defendant, without plaintiff's consent, and contrary to his wishes continued to live separate and apart from said plaintiff with intent at all of said times to desert and abandon him." The court then finds: That on the 16th day of February, 1905, said plaintiff and defendant effected a complete reconciliation of all of the differences existing between them at the said time as husband and wife, by reason of having upon said day made, executed, and delivered the following agreement. This agreement states: "That whereas certain unhappy differences have arisen between the parties hereto, whereby it has become impossible for them longer to live together in that condition of amity and accord essential between husband and wife; and whereas, it is therefore necessary that some arrangement be arrived at whereby the respective property and personal rights may be forever settled and adjusted; * * * Now, therefore, * * * said party of the first part does hereby release and forever absolutely discharge said party of the second part of and from any and all claims and demands, action, and causes of action of any and every name and kind whatsoever as the wife of the said party of the first part; and does hereby discharge her, the said party of the second part, of and from any and all claims upon the separate property, upon any property she acquires under the terms of this agreement, or upon any other property she may hereafter acquire, for the support and livelihood of said party of the first part. And said party of the first part does hereby relinquish forever any right or interest in or to the separate property of said second party and in or to any property she may hereafter acquire by right of succession or otherwise and does further covenant and agree that she shall and may live separate and apart from him, the said first party, and shall and may choose her residence and place of abode without let or hindrance from said first party." Then follow clauses similar in language expressing like covenants on the part of defendant. "And the parties hereto agree to an immediate separation and each does hereby relinquish to the other all claims, rights, benefits, and privileges to which he or she may be entitled from the other by reason of their marriage relations." The concluding paragraph reads: "In consideration of fifteen hundred dollars * * * said party of the second part agrees and does accept the same in full satisfaction of any and all of her claims or rights in or to the property of the said parties as wife of the said first party; and the said second party relinquishes as wife of the said first party all right in law or in equity, by succession or descent, any further share in the community property or in any property the said first party now has or which he may hereafter acquire." These are all the provisions which seem to have any bearing upon the questions now raised. As a conclusion of law the court found: "That said agreement, by its terms and agreements constitutes a bar to this action as brought by the plaintiff against the defendant."

The evidence was sufficient to justify the finding of the court upon the fact of defendant's desertion of plaintiff in 1903, and the evidence was that she never, after having deserted him, returned to his home or offered to do so up to the time of the trial, May 12, 1908. There was no evidence of her having made any attempt at reconciliation or ever offered to resume marital relations after April 1, 1903. The case may be stated to be simply this: On February 16, 1905, plaintiff had a good cause of action for desertion; on that day the parties came together long enough to enter into an agreement to adjust their property rights and to live separate and apart, and they have ever since done so Can the action be maintained, based upon the desertion prior to the execution of this agreement?

No evidence was offered as to the intention of the parties in making the agreement of separation other than is found in the agreement itself. The court limited its finding of desertion to the 15th day of February, 1905, inclusive, doubtless holding that the desertion ceased after that date by reason of the contract of separation. This would seem to follow from the finding that by the contract the parties "effected a complete reconciliation of all the differences existing between them at the said time as husband and wife"; and the trial court held that, as to the prior desertion, the agreement barred any action upon it.

"Either the husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried," subject to certain rules governing trust relations. Civ. Code, § 158. But "a husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation." Civ. Code, § 159. These sections, it is contended by appellant, prescribe the limit of their power to contract with each other; that marriage is a legal relation and they are powerless to alter that relation by contract, except as to property and except, also, that they may agree in writing to an immediate separation, i. e., to live separate and apart.

At the time the defendant entered into this contract, she had given plaintiff a sufficient ground for divorce; she had willfully deserted him for a period considerably beyond the statutory time prescribed; her matrimonial offense was complete and plaintiff's right of action had accrued. "If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract and solicits condonation, the desertion is cured." Civ. Code, § 102. There is no pretense that defendant did this or even made the slightest conciliatory advance towards her husband. The evidence was that she had previously declared that she never would again live with him. The contract shows on its face that she returned for no purpose of remaining and fulfilling her marital obligations and soliciting condonation, but quite to the contrary, for the agreement declares that "it has become impossible for them longer to live together in that condition of amity and accord essential between husband and wife"; and she relinquished to him "all claims, rights, benefits, and privileges to which she may be entitled by reason of their marriage." It is impossible to find in this agreement any suggestion of a purpose on her part, or either of them, for that matter, ever again to resume the marriage relation. Furthermore, she declared in the agreement, as showing her purpose in making it, that "it is therefore necessary that some arrangement be arrived at whereby the respective property and personal rights of the parties and their future relations be forever settled and adjusted." It is in view of this state of the case we are asked to hold that the parties intended by their contract to obliterate the past, execute an accord and satisfaction of any right of action arising out of past conduct, and continue the separation, but upon a different footing.

In Benkert v. Benkert, 32 Cal. 468, the wife had manifested no intention to return to her husband, until after the statutory period constituting desertion had elapsed. The court said: "Her repentance did not obliterate the offense. If it had been accepted and acted on by the plaintiff, by receiving her and renewing the cohabitation, it would be regarded as a condonation. But he may, after the lapse of the statutory period, refuse to accept the offer. Bishop (§ 530), in speaking of the offer to return, says that if it is made in good faith within the period prescribed by the statute to complete the offense, it will bar the suit. 'But after the time has expired and the right of action has fully accrued, the injured party is not obliged to accept such an offer; it comes too late.'" Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037. The statute requires that the action shall be commenced within a reasonable time (Civ. Code, § 124), and "unreasonable lapse of time is such delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same with intent to continue the marriage relation notwithstanding the commission of the offense." Civ. Code, § 125. In McMullin v. McMullin, 140 Cal. 112, 117, 73 Pac. 808, 809, the court said: "Of course, the original offense is not destroyed by the fact that after the desertion has continued for the period essential to make it a ground of divorce, the status of the separation changes and the separation becomes in every way agreeable to the deserted party. She has still her right of action for a divorce because thereof, and is not obliged to condone the offense."

There was no such lapse of time here as would bar the action, for there is not the slightest indication of "connivance, collusion, or condonation of the offense," and there was no showing of full acquiescence in the desertion "with intent to continue the marriage relation," with all its rights and privileges. The "status of the separation" was not changed by the agreement, for to all intents and purposes this status was to continue precisely as it had existed while the offense was being committed. We are unable to discover anything in the conduct of the parties or in the language of the agreement indicating any intention to condone past offenses, or ever again to live together as man and wife. It seems to us that the purpose of the agreement and its sole purpose was to adjust the property rights of the parties, and that their agreement to live thereafter separate and apart did not affect the legal consequences flowing from the prior desertion of the wife. Where the offense of desertion has once been committed and has continued for the statutory period, the statute (Civ. Code, § 102) points out how "the desertion is cured." Anything short of substantial compliance in good faith therewith does not cure the desertion.

But it is claimed, and this was apparently the view of the trial court, that the provision of the agreement of separation is a bar to the action by reason of the clause, "said first party does hereby release and forever absolutely discharge said party of the second part of and from any and all claims and demands, action and causes of action of any and every name and kind whatsoever as the wife of the said party of the first part." It will be observed that the language purports only a release of the wife by the husband of all claims and causes of action, as the wife. If the husband intended to release all claims and causes of action he had against his wife, the language fails to so express such intention. However, if we treat the clause as intended to import a discharge of any claim or cause of action the husband then had against his wife, it seems to us that, taking the contract in its entirety and considering the context, the intention was to discharge any causes of action involving property rights. The contract was drawn pursuant to the authority given by the Code (Civ. Code, §§ 158, 159, supra), and in any construction given it we must keep not only its main purpose in view, but also the statute which authorized it, and this statute forbade altering their "legal relations, except as to property," and except as "to an immediate separation."

Appellant urges with much force that the instrument is void, in so far as it attempts a contract not permitted by the Codes. The argument is that "the Code establishes the law of this state respecting the subject to which it relates" (Civ. Code, § 4); that the common law of England is the rule of decision in the courts of this state, so far as not repugnant to the Constitution or laws of the state (Pol. Code, § 1468); that by the common law contracts between husband and wife are void for want of the wife's power to consent; that where the statutory right is given them to contract, it must be exercised only in the manner prescribed and cannot be enlarged. 9 Am. & Eng. Ency. of Law (1st Ed.) 793. We do not find it necessary to decide the point, for, conceding the power to enter into a contract waiving the right to bring an action for divorce, it does not seem to us that any such waiver was contemplated by the parties in making the contract, or that it was a consideration (if such a covenant could be treated as a valid consideration) for its execution on their part.

Nor can we see any good reason for giving the contract the construction contended for by respondent, inasmuch as she manifests no desire to resume marital relations; and, to declare the relation of husband and wife to be still subsisting, after all property rights are adjusted, would be to perpetuate a relation which she repudiates and has done all she could to terminate, and which she declares she never will resume. Why then, should we give the contract a construction so out of harmony with her acts and express declarations?

The finding that plaintiff and defendant, on February 15, 1905, effected a complete reconciliation of all the differences existing between them, by reason of having executed the agreement of that date is, we think, unsupported by the evidence.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

14 Cal. App. 462

In re PRICE'S ESTATE. (Civ. 724.)

(Court of Appeal, Third District, California. Nov. 7, 1910. Rehearing Denied by Supreme Court Jan. 11, 1911.)

1. WILLS (§ 130*)—OLOGRAPHIC WILLS—VALIDITY—DATE.

Under Civ. Code, § 1277, providing that an olographic will is one that is entirely "written, dated, and signed by the hand of the testator himself," and that it is subject to no other form, an instrument reading, "dated the —— day of ——, 1906," was invalid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 336; Dec. Dig. § 130.*]

2. WILLS (§ 69*)—STATUTORY REQUIREMENTS.

Wills are creatures of the Legislature, and while some of the formalities required may appear immaterial, the right to thus dispose of one estate being purely statutory, the manner of such disposal as prescribed must be observed with substantial strictness.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 183; Dec. Dig. § 69.*]

3. TIME (§ 2*)—STATUTORY PROVISIONS—DATE—CONSTRUCTION.

The term "date," as used in a statute requiring an instrument to be dated, means the day, month, and year, and giving the year alone is insufficient.

[Ed. Note.—For other cases, see Time, Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 2, pp. 1830-1831.]

4. WILLS (§ 130*)—OLOGRAPHIC WILL—VALIDITY—DATE.

That in a given case the writer of a pretended olograph will is found to have capacity to make a last will at any time during a certain year does not render such will valid, where no date is given, except the year.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 130.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Proceedings to probate the last will and testament of Elizabeth Price, deceased, as olographic. From an order denying probate, Judd Allen Page appeals. Affirmed.

Jas. T. Matlock, Jr., for appellant. John J. Wells and W. A. Fish, for respondent.

HART, J. This is an appeal from an order denying probate of an instrument purporting to be the last will and testament of Elizabeth Price, deceased, as olographic. The appeal is by one Judd Allen Page, who is named in said purported will as the executor thereof, and who was the petitioner for the probate of the same. The instrument was denied probate upon the ground that it was not "dated" by the deceased within the meaning of section 1277 of the Civil Code, defining an olographic will.

The instrument was written by and in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the handwriting of the deceased, but the purported date of its execution reads: "Dated this ——— day of ———, 1906." Thus it will be noticed that there is nothing definite about the "date," except the year; the day and month being omitted. Therefore, the only question submitted for solution here is, whether the numerals combined together as representing the year "1906" constitute a "date" within the meaning or contemplation of the section of the Civil Code referred to.

Said section reads: "An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."

We are of the opinion that the instrument, by reason of the incompleteness of the date as noted, does not meet the requirements of the statute prescribing the requisites of an olographic will, and that the court below properly denied the petition for its probate. Last wills and testaments are entirely creatures of the Legislature, and, while some of the formalities with which they are required to be executed may appear to be immaterial and unnecessary, yet the right to thus dispose of one's estate being purely statutory, the manner of such disposal, as prescribed by the statute, must be observed with at least substantial strictness. If, therefore, there be a substantial departure from such formalities in an attempted testamentary disposal of one's property, there is no last will in law, and the decedent's estate must go to the administrator.

The term "date," in its common and accepted signification, means the "day, month, and year" (see Century Dictionary, the Encyclopædic Dictionary, and Bouvier's Law Dictionary), and we can perceive no sound reason that would or could prompt the Legislature in using the term in any other sense when making it one of the essentials of a legal instrument in writing of any character. If the "year" alone shall be held to be sufficient to satisfy the statute as to the date of an olographic will, we can see no good reason why the "day" or the "month" only would not likewise be sufficient to meet the requirements of the statute in respect of the date, between which and the other requisites of such a testament we can discover no difference in importance.

In the case of Estate of Martin, 58 Cal. 531, an instrument purporting to be an olographic will, while entirely written and signed by the deceased, bore no date. It was there contended that the dating of a will "is a mere formal matter, not absolutely necessary." The Supreme Court, denying the soundness of this contention, said: "The Legislature has seen fit to require three things to concur for the execution of an olographic will, viz.: That it be written, dated, and signed by the hand of the testator. We are not at liberty to hold that the Legislature intended any one of these requirements to be of greater or less importance than the others. If we may omit one, why not either of the others? 'It is subject to no other form.' It is subject to the form prescribed."

Professor Page, in his work on "Wills." says: "It is generally provided that an olographic will must be dated. The date must show the year, month, and day in order to make the will valid."

"The date is an important part of every holographic will and consists of the year, month, and day, the omission of any of which is fatal." Am. & Eng. Ency. of Law, vol. 30, p. 583; Fuentes v. Gaines, 25 La. Ann. 85; Heffner v. Heffner, 48 La. Ann. 1088, 20 South. 281; Robertson's Succession, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672.

The Louisiana statute defining and prescribing the requisites of an olographic will is substantially in the same language as is found in our own. In the case of Fuentes v. Gaines, supra, an attempt was made to establish by parol the contents of a lost olographic will. Some of the witnesses testified that the alleged will was dated "A. D. 1813," and others that it was dated "July, A. D. 1813." The Supreme Court of Louisiana declared that the proof failed to disclose all the essentials of an olographic will. It said: "Is a testament, which is dated A. D. 1813, or July, A. D. 1813, to be deemed dated in the sense of the law? Certainly not, if the term 'dated' is to be understood in its 'common and usual signification.' Webster defines the word 'date' thus: 'That addition to a writing which specifies the year, month, and day when it was given or exercised.' * * * It is essential, therefore, to specify the day, month, and year, to give a date to a testament in the sense of article 1588 of the Civil Code."

In the case of Heffner v. Heffner, 48 La. Ann. 1089, 20 South. 281, the trial court rendered judgment annulling the will, olographic in form, of William Heffner, deceased, on the ground that it was not dated. Upholding the judgment, the Louisiana Supreme Court said: "The Code defines the olographic will to be that written, dated, and signed by the testator himself. The date, signature, and the entirety of the will in the handwriting of the testator are the essentials. * * * The policy of the law to secure the true representation of the testator's wishes and guard against fraudulent wills is marked in the requisite of the testator's handwriting, including the expression of the date when he writes the paper and affixes the signature it bears. The date in the testator's handwriting is part of the evidence the law requires of the verity of the instrument. If the paper is forged, the date it must bear may furnish the means of detection. On any issue of the sanity of the testator the dates indicate and restrict the period of inquiry. * * * The date in its ordinary sense imports the day of the month, the month, and the year. That is also the legal significance of the date. The day of the month is quite as much a part of the date as the month or the year. If the law requires the olographic will to be dated, the exaction extends to every part of the date. * * * The hardship of the case has prompted us, in the absence of any direct adjudication of our own courts on the point, to examine the views of the French commentators, dealing with the corresponding article of the Napoléon Code. They disclose the reason of the law in exacting the date, and maintain the day of the month to be essential. We find the distinction drawn by them between a wrong date, which it seems has been held will not vitiate, and no date or a deficient date, which will avoid the will. But the necessity of the day of the month in the date of the olographic testament is rigidly enforced by the jurisprudence under the Napoléon Code." See, also, Succession of Robertson, 49 La. Ann. 868, 21 South. 586, 62 Am. St. Rep. 672.

Counsel for appellant cites and relies upon the cases of Gaines v. Lizardi, 3 Woods, 77, Fed. Cas. No. 5,175, and Estate of Fay, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17, as supporting his interpretation of the testament involved here. But there is a clear distinction between these cases and the Louisiana cases to which we have referred. In Gaines v. Lizardi, supra (which seems to have involved the same testament that was considered in Fuentes v. Gaines, supra), it is not held that the word "dated," as used in describing the essentials of an olographic will, does not include the day, the month, and the year. To the contrary, the opinion in this regard seems to be based upon the assumption that the will bore a date within the full meaning of that term. The court in that case merely held that a fair and reasonable interpretation of the testimony bearing upon the question of the date of said testament justly led to the conclusion that "it bore the year, month, and day" in the date thereof. The case of Estate of Fay was where the date of the will, olographic in form, was inconsistent with the testimony. The instrument was dated "May 25, 1859," and it made provision for the son of the testator, Luke Fay, who was born in 1861; for his son, John Fay, who was born about the year 1865, and for a daughter, who was married in January, 1887, and died in March, 1900. From these facts it was evident that the instrument was not written in 1859. But the Supreme Court held that the will was "dated" within the meaning of the statute, and that the error with regard to the year having obviously been the result of inadvertence, would not vitiate the instrument. It is there said: "The Legislature has not used the words 'truly dated' nor 'correctly dated,' but the word 'dated,' which must be construed according to the approved use of the language (Civ. Code, § 13), and in its primary and general sense. Code Civ. Proc. § 1861."

But the proposition in the case at bar does not present the question, whether the testament has been "truly dated" or "correctly dated." It does not, in other words, involve the question, whether the writer of the document made a mistake in writing the date and thus erroneously inserted an impossible day of the month or a year in which the testimony shows that it was impossible to have written the instrument. The question propounded here is, whether the instrument was dated at all, within the meaning of the law prescribing the essentials of an olographic will. We can find no other answer to this question than that to which reason and the cases have led us, unless we are bold enough to arbitrarily substitute the will of the court as to the essentials of olographic testaments for that of the Legislature.

Nor is the fact that the court in this case found that, during all of the year 1906, in which the instrument sought to be established as the last will of the deceased was written, deceased was mentally sound and capable of making a testamentary disposition of her estate, an argument against the construction which we have given our code section pointing out the essential requisites of an olographic will. As we have seen, the right to dispose of one's belongings by testament is conferred by the Legislature, in which body there exists full and unrestricted power to require any reasonable mode or manner of a testamentary disposal of one's estate; and whatever might be the reason inspiring the Legislature to impose certain restrictions or conditions on or the manner in which a party may name the successors to his estate after his death, so long as they be not unreasonable or absurd, the formalities or essentials so prescribed must be performed. And if, as is suggested in Heffner v. Heffner, supra, one of the reasons requiring an olographic will to be dated is because it may have some bearing on the question of the mental soundness and competency of the decedent, if that issue should be submitted, it does not follow that because, in a given or a particular case, the writer of the pretended olographic will is found to have had capacity to make a last will, any one of the essentials of such a testament, as prescribed by the law, may, in the writing thereof, be omitted.

It follows, from the foregoing views, that the order must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 453

SLADE v. BUTTE COUNTY. (Civ. 706.)

(Court of Appeal, Third District, California. Nov. 7, 1910.)

1. PUBLIC LANDS (§ 53*)—LANDS IN LIEU OF SCHOOL LANDS.

By Act Cong. Feb. 26, 1859, c. 59, 11 Stat. 385, the United States appropriated other lands of like quantity in lieu of the sixteenth and thirty-sixth sections granted to a state where those sections were lost to the state by previous pre-emption settlement, and subsequent statutes made like provision in cases of homestead settlement, or where the lands were mineral or are otherwise disposed of by the United States. The act of 1859 also provided that lands granted in lieu of those sections might be selected by the state or territory in which they lie. *Held*, that no title passed to the lieu lands by the statute alone, but the statute provided that, when locations and selections were made by the state, the government, if the lands selected were unoccupied public land, would inform the state, and thereupon title would vest in it, and patent would issue by the state to the locator.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 143; Dec. Dig. § 53.*]

2. TAXATION (§ 61*) — PROPERTY TAXABLE — CERTIFICATES OF PURCHASE OF SCHOOL LAND.

Certificates of purchase of land which the state anticipates will be granted to it in lieu of school lands, which, by reason of homestead or pre-emption or other cause, have not been received by the state, are not taxable, where the state did not acquire title to the land, and the purchaser received no land under the certificates.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 61.*]

3. TAXATION (§ 543*) — RECOVERY OF TAXES PAID — ACTIONS — SUFFICIENCY OF COMPLAINT.

In an action against a county, plaintiff alleged that he was the holder and owner, by assignment, of certificates of purchase issued by the state for lands situated in defendant county, selected in lieu of other lands in the sixteenth and thirty-sixth sections, that plaintiff for three enumerated years delivered to the county assessor his sworn statement that he was the owner of lands described in the certificates, that he did so under the erroneous belief that the said certificates and their conveyances to him conveyed the equitable title therein to him, that he paid to the tax collector on a date specified specified sums as taxes on said land for the years enumerated, that the title to all of said lands at all times was in the United States, that all of said lands have been and now are vacant public lands, that plaintiff has never been in either constructive or actual possession thereof, nor ever asserted or made a possessory claim thereto or any part thereof, that he paid all of said taxes under the erroneous belief that such lands were taxable to plaintiff, that on a date specified he filed with the county board of supervisors a verified claim for a refund of said taxes under Pol. Code, § 3804, that a copy of his claim was made an exhibit to the complaint and a part thereof, and that said board considered the claim and on a date specified at a regular meeting rejected the claim. *Held*, that the complaint stated a cause of action under Pol. Code, § 3804, providing for the refunding of any taxes erroneously collected; and that it was not objectionable because of failure to allege the names of the persons to whom the certificates of purchase were issued.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1012; Dec. Dig. § 543.*]

4. TAXATION (§ 537*)—RECOVERY OF TAXES PAID—ESTOPPEL.

Where the state issues certificates of purchase of lands which it anticipates will be given it by the United States government in lieu of school lands which because of prior settlement or other reason the state never received, and the assignee of those certificates delivers to the assessor of the county his sworn statement that he is the owner of such lands and pays the taxes thereon, and the state never gets title from the United States to the lands described, the assignee is not estopped from asserting the invalidity of the assessment by his statement that he owned the property, as the state is not prejudiced by his having paid the taxes, and Pol. Code, § 3804, authorizes the refunding of taxes erroneously collected.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 996; Dec. Dig. § 537.*]

Appeal from Superior Court, Butte County; Warren Sexton, Judge.

Action by Spencer E. Slade against the County of Butte. Judgment for defendant on demurrer to complaint, and plaintiff appeals. Reversed, with directions to overrule the demurrer.

Leo H. Susman, for appellant. Lon. Bond, Dist. Atty., for respondent.

CHIPMAN, P. J. Defendant had judgment on its demurrer to plaintiff's complaint, from which plaintiff appeals.

It is alleged in the complaint that plaintiff is the holder and owner, by assignment thereof, of certain certificates of purchase, issued by the state, for lands situated in defendant county selected, in lieu of certain other lands, in the sixteenth and thirty-sixth sections; that plaintiff, for the fiscal years, ending respectively June 30th of 1905, 1906, and 1907, "delivered to the assessor of said county his sworn statement, setting forth that he was the owner of the lands described respectively in Schedules A, B, and C, hereinafter mentioned, under the erroneous and mistaken belief that the said certificates of purchase issued by said state and the said conveyances made to him thereof mentioned in paragraph 3 of this complaint, conveyed the equitable title therein to him"; that plaintiff paid to and it was received by the tax collector of said county, on November 19, 1904, the sum of $236.48, assessed as taxes on said land for the fiscal year ending June 30, 1905; and on November 27, 1905, the sum of $224.80 for the fiscal year ending June 30, 1906, and on November 17, 1906, the further sum of $178.20 for the fiscal year ending June 30, 1907; "that the title, both legal and equitable, to all of said lands at all times was and now is in the United States of America, and that all of said lands have at all times been and now are vacant public lands"; that plaintiff "has never been in either constructive or actual possession of said lands or any part thereof nor has he ever had, asserted or made a possessory claim thereto or to any part thereof; and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that plaintiff paid all of said taxes to the tax collector of said county of Butte under the erroneous and mistaken belief that such lands were then taxable to plaintiff by said county and state." It is then alleged that on November 9, 1907, plaintiff filed with the clerk of the board of supervisors of said county his duly verified claim for the refunding to him of said taxes, "in conformity with and for the purpose of availing himself of the provisions of section 3804 of the Political Code of the state of California," and copy of his said claim is made an exhibit to the complaint and part thereof; that said board considered said verified claim "and at a due and regular meeting of said board of supervisors, held on the 10th day of February, 1908, did, on said last-mentioned day, first and finally reject the said claim and the whole thereof." In the claim presented to the board of supervisors it is averred that after the issuance of said certificates of purchase "the said state of California, by its proper officers, applied to the proper authorities of the United States of America, to accept and approve the selection by the said state of the said lands in lieu of an equivalent amount of state school lands, and to list the same to the state; that thereafter the said United States refused to accept and approve the selection of any of the said lands, and to list the same to such state, and canceled the said entries thereof." In the said verified claim it is further set forth that plaintiff "did not and could not know that the selection of said lands by said state of California, would not be accepted and approved by the United States authorities and listed to the state; but that all of said taxes were collected under the mistaken belief that such lands would be so accepted, approved and listed to said state." Judgment is demanded for the sum of $639.48, the amount of said several payments, with interest thereon from February 10, 1908, at 7 per cent.

The grounds of the demurrer are: (1) Insufficiency of facts alleged; (2) that the action is barred by sections 3804 and 4076 of the Political Code; (3) that the complaint is uncertain in that it does not disclose the names of the persons to whom the alleged certificates of purchase were issued; and (4) that plaintiff is estopped from asserting the illegality of the tax assessment by reason of his having sworn to and delivered to the county assessor a list of the property involved as taxable.

Section 3804 provides that "any taxes * * * heretofore or hereafter * * * erroneously or illegally collected, * * * may by order of the board of supervisors be refunded by the county treasurer."

The statute of 1909 relating to the disposition of school lands and the acquisition of lands in lieu thereof does not apply to locations of lieu lands previously made and need not be considered.

By Act Feb. 26, 1859, c. 59, 11 Stat. 385, the United States appropriated other lands of like quantity in lieu of the sixteenth and thirty-sixth sections or fraction thereof, granted to a state, where lost to the state in which the lands lie, by reason of having previously been settled upon "with a view to pre-emption." Subsequent statutes made like provision where the loss was by reason of settlement with a view to homestead, or where the lands are mineral, or "are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States." See Act Feb. 28, 1891, c. 384, 26 Stat. 796 (U. S. Comp. St. 1901, pp. 2275, 2276). The act appropriates and grants lands in lieu of the sixteenth and thirty-sixth sections so lost to the state, and provides that other lands of equal acreage "may be selected by said state or territory in which they lie." Obviously, no title passed of these so-called lieu lands by virtue of the statute alone, i. e., it was not a grant in præsenti, as was the grant of the school lands (sixteenth and thirty-sixth sections, in place). The statute looked to possible losses to the state and provided that, when such losses were ascertained and locations or selections were made by the state, the government would, if the land selected were unoccupied public land subject to such location, approve such selection and so officially inform the state, and thereupon title would vest in it, and patent would issue by the state to the locator. The state of California passed no legislation on the subject (until in 1909) except as found in sections 3398 and 3406 (St. 1872), by which the Surveyor General was declared to be the "general agent of the state for the location in the United States land offices of the unsold portion of * * * land granted to the state for school purposes * * * and lands in lieu thereof," and, "whenever application is made to him for any portion of the lands mentioned in section 3398," he must "communicate with the United States Land Office, and ask that the lands described in the application be accepted in part satisfaction of the grant under which it is sought to be located."

Under these statutes the United States Land Department and the Surveyor General of California evolved a method of giving practical effect to the law, in pursuance of which all lieu locations have been made, those of plaintiff presumably included. Briefly, this method may be thus stated: A. B. makes application to the state Surveyor General in which he sets forth, under oath, certain required facts and states that he desires to purchase the land described therein pursuant to the provisions of title 8 of the Political Code (in which are found sections 3398 and 3406); an examination is made by the Surveyor General of his records, and, if the land appears to be unoccupied and open to entry in the United States Land Office of the district in which the land lies, he issues a certificate of purchase to the applicant, and later makes out an application to the United States Land Office to have the land applied for listed to the state in lieu of certain described school land (sixteenth and thirty-sixth sections) which he designates as the base for the listing by the government of the land applied for. This application is sent through the local land office of the district and is there indorsed by the register and receiver certifying that the application has been "filed and accepted, subject to future approval; that there is not of record in this office any adverse filing entry, or claim to the land selected by the state." The General Land Office at Washington, finding that the base is valid, and that the land applied for is free and open to entry, approves the application and lists the land to the state. By operation of the law of the United States and of the state of California, the title to the school land is relinquished to the United States and the title to the land selected in lieu thereof passes to the state.

It was held by our Supreme Court, in Roberts v. Gebhart, 104 Cal. 67, 37 Pac. 782, in a case where the General Land Office refused its approval, that the certificate of purchase issued on an application for lieu lands, followed by a selection made by the state "does not confer even an equitable right upon the state, or upon one claiming under it, such as would authorize a court of equity in reviewing the grounds or basis for such refusal." In Allen v. Pedro, 136 Cal. 1, 68 Pac. 99, it was said: "If plaintiff sought to get the land as lieu land, he acquired no title from the state, because the latter could get no title until the land had been selected, and the selection approved by the United States Land Department, and the land listed to the state"—citing Roberts v. Gebhart, supra. See, also, same case, 138 Cal. 202, 70 Pac. 1128.

The term "property" includes "all matters and things real, personal, or mixed, capable of private ownership"; and the term "real estate" includes "the possession of, claim to, ownership of, or right to the possession of land." Pol. Code, § 3617. And possessory rights to and possession of public land have been held taxable in this state, notwithstanding the compact contained in the act of Congress admitting California into the Union, exempting public lands of the United States from taxation. People v. Donnelly, 58 Cal. 144. But it was held in that case that "land which has been such can be taxed only when a patent has issued, or when the private proprietor has acquired a 'perfect equity.'" Here not only the averments of the complaint are that plaintiff has never been in possession, has made no possessory claim, and has never claimed the right of possession, but, as we have seen, neither the legal nor equitable title vests in the state until the United States has approved the selection by the state and listed it to the state. It was held in People v. Frisbie, 31 Cal. 146, that the terms "claim to land" mean not only an assertion to title; "it involves also the idea of an actual possession of the land claimed."

It was held by the Supreme Court of North Dakota that the selection must be approved before the lands become taxable. Jackson v. La Moure County, 1 N. D. 238, 46 N. W. 449; Wells County v. McHenry, 7 N. Dak. 246, 74 N. W. 241. These were cases of indemnity lands under grants to railroad companies but they discuss the question here involved.

Section 3804, as amended in 1889, and as now existing, was interpreted in Hayes v. County of Los Angeles, 99 Cal. 74, 33 Pac. 766, which was a case where the property had been twice assessed and the double tax paid. The court said: "That the object of the statute was to obviate these difficulties (pointed out as existing under the statute previous to its amendment), and provide a means for the recovery of moneys collected by mistake and to which the county and state have neither a moral nor a legal right, is apparent." Again: "Section 3804 was enacted to do justice to a class of cases where, but for its provisions, the application of the doctrine of caveat emptor would work a hardship to citizens who had paid money which it was inequitable for the county to retain." It was also held that the word "may," as applied to the duty of the board of supervisors, means "shall." In Pacific Coast Co. v. Wells, 134 Cal. 471, 66 Pac. 657, plaintiff had by mistake, in its verified statement made of its property, shown that its assessable property was greater than it was in fact. Plaintiff voluntarily paid the tax and upon the discovery of the mistake made claim for the excess paid. Hayes v. County of Los Angeles, supra, was relied upon and followed, as well as cases in other jurisdictions, and plaintiff was held to be entitled to recover. Among other things, the court said: "If the Legislature had intended to restrict the power of the board to refund to cases where the taxes had been involuntarily paid or paid under protest, it would have so said, as it did in the cases brought under section 3819, where relief is given by action in the courts." In Palomares Land Co. v. County of Los Angeles, 146 Cal. 530, 80 Pac. 931, the section was held to authorize the recovery of money erroneously paid on redemption from tax sale.

Respondent urges with apparent sincerity that the certificates of purchase, apart from the land, were property and assessable as such. There is nothing in the point. The assessment purported to be of the land and not of the pieces of paper representing whatever rights plaintiff had in the land. If the state acquired neither legal nor equitable title to or right in the land, it would be absurd to hold that the certificates themselves, which conveyed nothing, would be taxable.

We think the complaint states sufficient facts to constitute a cause of action under section 3804.

Section 4076 of the Political Code relates to the form of the claim. In the present case the facts were very fully stated in the claim presented to the board and substantially complied with the statute. Nor do we see any reason for holding that section 3804 is a bar to the action.

The point that the complaint is uncertain in not giving the names of the persons to whom the certificates of purchase were issued is without merit. Plaintiff alleged possession and ownership of the certificates by assignment, and this was sufficient. He was not called upon to plead his deraignment of title.

One question only remains: Is plaintiff estopped from asserting the invalidity of the assessment because he filed with the assessor a verified statement of the property in question for taxation? The answer must be in the negative. The transaction lacks the necessary elements of estoppel. Besides, if the facts bear the semblance of estoppel they show the state to be the greater offender, for it was through the promise of the state that the land could be acquired under lieu location that plaintiff and his predecessors parted with their money. If any one was misled, it was the plaintiff. However, we cannot perceive that the state has been injured or prejudiced by plaintiff's having paid the tax; and injury or prejudice resulting from plaintiff's conduct is of the essence of estoppel. Furthermore, estoppel is of equitable cognizance, and only in exceptional cases is it allowed where equity and good conscience forbid, and this case furnishes no exception to the general rule. The simple fact is the state got something for nothing, and it is asked to make restitution. This section 3804 authorizes it, in a case such as this.

The judgment is reversed, and the trial court is directed to overrule the demurrer.

We concur: HART, J.; BURNETT, J.

158 Cal. 755

FOLLMER et al. v. ROHRER et al.

(L. A. 2,759.)

(Supreme Court of California. Dec. 14, 1910.)

1. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

A conflict in the evidence must be settled by the trial court, and its findings will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

2. Deeds (§ 56*)—Delivery—Acts Constituting.

A valid delivery of a deed is accomplished when the conduct and acts of the grantor manifest a present intent to dispose of the title conveyed without any right of recall, and any act manifesting such intent establishes a delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118; Dec. Dig. § 56.*]

3. Deeds (§ 66*)—Delivery—Acts Constituting.

Whether an act of a grantor manifested a present intent to dispose of the title conveyed by a deed so as to make a valid delivery must be determined by the circumstances of each transaction, and is a question of fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

4. Deeds (§ 56*) — Delivery — Acts Constituting.

The act of a grantor delivering a deed to the grantee with the statement, "Here is a deed of gift in favor of yourself and wife; take it and take care of it," and the act of the grantee in taking and accepting the deed and thanking the grantor, show a valid delivery, whereby the grantor parted absolutely with the control thereof, notwithstanding any contradictory evidence, such as the continuance of the grantor's residence on the premises, payment of taxes, the failure of the grantee to list the property as his own for taxation, the want of any transfer or request for a transfer of insurance, and the declaration of the grantee that he had known nothing of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 117; Dec. Dig. § 56.*]

5. Appeal and Error (§ 1073*)—Harmless Error—Errors in Judgment—"Instrument Entitled to be Proved for Record."

The validity of the part of a judgment which adjudges plaintiff's ownership of the property in controversy and the want of interest therein by defendants is unaffected by the part which adjudges that a deed of the property to plaintiff, not acknowledged nor witnessed, is an instrument entitled to be proved for record within Civ. Code, § 1203; for the elimination of the latter part of the judgment does not affect the rights of defendants.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1073.*]

6. ACKNOWLEDGMENT (§ 46*) — PROOF—JUDGMENT.

Under Civ. Code, §§ 1198, 1203, providing that the execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, where the parties and the subscribing witnesses are dead, and providing that one interested under an instrument entitled to be proved and recorded may sue to obtain a judgment proving the instrument, the subscription of a witness is not necessary to the validity of a deed, and a grantee in a deed not acknowledged nor witnessed may, after the grantor's death, sue for judgment proving it.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 46.*]

Department 1. Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action by Raymond I. Follmer and another against Mary Rohrer and others. From a judgment for plaintiffs and from an order denying a new trial, defendants appeal. Affirmed.

Porter, Sutton & Cruickshank, for appellants. Jones & Weller, for respondents.

SLOSS, J. The defendants are the heirs and devisees of John B. Rohrer, who died in July, 1908. On October 1, 1907, said decedent was the owner of a lot of land in the city of Los Angeles. He signed a deed of gift bearing said last-named date and purporting to convey the lot to the plaintiffs. The instrument was never acknowledged or recorded, and this action was brought to obtain a decree that the plaintiffs are the owners of the land, and that the deed be proved, so as to entitle the same to be recorded. The complaint alleges that the deed was executed and delivered to the plaintiffs on the day of its date. The answer denies the delivery. The court found in favor of the allegations of the complaint, and gave judgment accordingly. The defendants appeal from this judgment and from an order denying their motion for a new trial.

The main question presented is whether the evidence sustains the finding that the deed had been delivered by John B. Rohrer to the plaintiffs. Raymond I. Follmer, one of the plaintiffs, was a nephew of the decedent. He and the coplaintiff, his wife, occupied, together with the decedent, a house situated on the lot in controversy. Follmer testified as follows: "In the latter part of November, 1907, I came home from my office * * * and in passing through the hall my uncle called me, and I went into the sitting room where he was. He was sitting at his desk. He got up and gave me this deed and said, 'Here is a deed of gift in favor of yourself and wife; take it and take care of it.' I looked at the instrument and returned it to him, and he took an envelope from his desk and inserted it and gave it to me. I sealed it up and put it in my pocket, and thanked him very much, as a matter of course. That is all that was said at that time that I remember." The witness testified further that he kept the paper until May, 1908. During a part of this period he had it on his person, and at other times in a safe at the city hall, or in a safe deposit box. In May his uncle suggested that he had made his will and that it would be a good thing to put the deed with the will. Follmer made no objection to this, and returned the instrument to Rohrer. The latter subsequently handed it to Mrs. Follmer, under circumstances that need not be detailed. It appeared, further, that the alleged grantor, Rohrer, paid the taxes on the lot for the year 1907–08; that a sworn statement of his property, including the lot in question, bore the initials of the plaintiff, Augusta H. Follmer, and was filed with the city assessor; that a similar statement of property owned by plaintiff Raymond I. Follmer, and sworn to by him on August 2, 1908, did not include the lot in question; that said plaintiff Raymond was named as executor in the will of John B. Rohrer; and that in his petition for letters testamentary he described, as real property left by the decedent, the lot in question, "subject to a partially executed conveyance of said real property by John B. Rohrer, deceased, to Raymond I. Follmer and Augusta H. Follmer." There was also testimony that Follmer never asked or obtained any assignment of the fire insurance policies covering the house, that he did not during the life of the decedent mention to his wife the fact that he and she had received a gift of the property, and that, after the decedent's death, he had stated that he had no previous knowledge of the deed.

The foregoing statement includes virtually all of the testimony on the disputed issue of delivery. It will be noted that there are circumstances tending to contradict the claim of the respondents that the deed had been delivered. The continuance of the alleged grantor's residence in the house, his payment of taxes, the failure of Follmer to list the property as his for purposes of taxation, the want of any transfer or request for a transfer of insurance, the declaration of Follmer that he had known nothing of the deed —all these were facts which the trial court might well have regarded as tending to show that there had been no delivery of the deed, although some of them, at least, were not inconsistent with delivery. But, if there was also testimony which would justify an inference that a delivery had taken place, the testimony to the contrary did no more than to raise a conflict which was, under the established rule of this court, to be finally settled in the trial court. Follmer's statement regarding the handing of the deed to him, and the attending conversation, may well have been true, notwithstanding the admissions made by him on cross-examination. If true, it clearly supports the finding of delivery. The legal requisites of a delivery have often been stated by this court. "A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. No particular form of delivery is necessary; but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each transaction." Kenniff v. Caulfield, 140 Cal. 34, 40, 73 Pac. 803, 804. See, also, Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Denis v. Velati, 96 Cal. 223, 31 Pac. 1; Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Reed v. Smith, 125 Cal. 491, 58 Pac. 139. Manual tradition of the instrument is not enough; the transfer of possession must be with the intent of presently passing title, and must not be hampered by the reservation of any right of revocation or recall. As has been said, the intent of the parties is to be determined, as matter of fact, by the trial court or the jury. We entertain no doubt whatever that the testimony of Follmer justified the inference that when Rohrer handed him the deed, he did so with the intention that the title to the property, at that very moment, should pass finally and irrevocably from him to the grantees named. The appellants lay stress on the words "take care of it," and argue that they show a transfer for safekeeping only. But this is by no means a necessary construction. Taking all of the language together, the phrase in question may well be interpreted as a mere caution to exercise care with regard to an important document. The grantor said, "Here is a deed of gift; take it and take care of it," and the recipient "thanked him very much." This is not the conduct of people who are arranging for the mere custody of a paper.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Nor was there anything in the transaction to compel the conclusion that the grantor undertook or intended to retain the right to recall the deed. "In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that upon the happening of some event, or contingency or condition, he had the right, if so disposed, to reach out and take it from the possession of the depositary." Bury v. Young, supra. Such a case is Moore v. Trott, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131, recently decided by this court, where the grantor's retention of the right to recall the deeds in a certain event was plainly evidenced, and for this reason it was held that no effective delivery had taken place. But the facts here are very different. So far as the testimony goes, the grantor parted absolutely with the control of the instrument.

In their closing brief, the appellants make, for the first time, the suggestion that the deed in question, being neither acknowledged nor witnessed, is not an instrument "entitled to be proved for record," and that the plaintiffs have not, therefore, shown their right, under Civ. Code, § 1203, to a "judgment proving such instrument." This point would not affect the validity of that part of the judgment which adjudicates the plaintiffs' ownership of the property, and the dedefendants' want of interest therein. If this part of the judgment stands, the defendants would not be helped by the elimination of the part decreeing that the deed be "adjudged to be proved, so as to entitle the same to be recorded." But, apart from this, we think the case is one coming properly within the terms of section 1203. Under section 1198, "the execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases: (1) Where the parties and all the subscribing witnesses are dead. * * *" The subscription of a witness is not necessary to the validity of a deed, and the language of the section last quoted carries the clear implication that where there is no such witness, proof of the handwriting of the party executing is sufficient.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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158 Cal. 760

FOUNTAIN et al. v. CONNECTICUT FIRE INS. CO. (S. F. 5,542.)

(Supreme Court of California. Dec. 14, 1910.)

1. INSURANCE (§ 324*) — FIRE INSURANCE — DAMAGE.

The policy provided that if a building or any part thereof fall, except as a result of fire, all insurance on such building or its contents shall immediately cease. The company claimed that the building was caused to partially fall by an earthquake before the fire started, and its evidence showed that, before the fire started, the front wall of the building from the roof to the second floor had fallen down, leaving the roof unsupported in front, so that the front part of it rested upon the second floor. Insured's evidence was that the upper stories had "great chunks out of them," and that the building could not be occupied until repaired. *Held,* that the evidence both of insured and the company showed that a substantial part of the building had fallen when the fire started, so as to avoid the policy.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

2. INSURANCE (§ 665*)—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy which provided that if any part of the building fall, except from the fire, all insurance shall immediately cease, evidence *held* not to show that the fire started in the building before the front wall fell from an earthquake shock.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

3. INSURANCE (§ 324*)—FIRE INSURANCE.

Civ. Code, § 2611, provides that a policy may declare that a violation of specified provisions thereof shall avoid it, but otherwise the breach of an immaterial provision does not avoid the policy. A fire policy provided that if any part of the insured building fall, except from the fire, all insurance on the building or its contents shall immediately cease. *Held*, that the falling of a material part of the building before the fire started immediately avoided the policy, whether it increased the fire risk or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

4. TRIAL (§ 296*) — INSTRUCTIONS — CURE BY OTHER INSTRUCTION.

Error in instructing in an action on the policy that the company must establish that such a material part of the building had fallen before the fire started as would have increased the fire risk in order to make the policy avoided by the falling of the building before the fire was not cured by the giving of other instructions which omitted the element of increase of risk; they merely conflicting with the former instruction.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.*]

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by O. Fountain and others against the Connecticut Fire Insurance Company. From an order denying defendant's motion for a new trial after verdict for plaintiffs, defendant appeals. Reversed.

A. B. Ware and T. C. Van Ness, for appellant. Thomas J. Geary, for respondents.

SHAW, J. This is an action to recover upon a policy of insurance issued by the defendant, covering goods of the plaintiff contained in a two-story brick building situated in the city of Santa Rosa, known as the Shea Building. It had two storerooms on the ground floor, one of which was occupied by Fountain. The second floor was divided into rooms used and occupied for offices and one room which was occupied by the society of "Eagles" as a lodgeroom. The defendant appeals from an order denying its motion for a new trial, after a verdict for the plaintiff. The policy contained the following clause: "If a building, or any part thereof, fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." The building referred to was the Shea building aforesaid.

Upon the trial it was admitted by the defendant that it was liable to the plaintiffs for the loss to the full amount of the policy ($1,000) "unless it could make good its defense based upon" the above-quoted clause thereof. The fire was on April 18, 1906, and it immediately followed the earthquake which occurred at 15 minutes after 5 o'clock in the morning of that day. The evidence introduced by the defendant in support of the defense aforesaid showed that, before the fire started, the front wall of the Shea building, from the roof down to the second floor, had fallen down, leaving the roof unsupported in front so that the front part of it dropped and rested upon the second floor at the top of the first story. This was the substance of the testimony of a number of witnesses who saw the building immediately after the earthquake. That this front wall was a substantial and important part of the building, and that the falling thereof would immediately terminate the policy by force of this clause, cannot be seriously disputed. The defense was therefore established, and the order must be reversed, unless other evidence raised a substantial conflict on the subject. We do not think the contention of the plaintiff that there was a conflict on that point can be sustained. The evidence of the defendant's witnesses on the point was clear, direct, positive, and satisfactory. That on behalf of the plaintiff, which it is claimed creates a conflict, is in substance as follows: The witness Burris said that he made an examination of the front and rear of the Shea building, that the rear did not seem to be damaged, and that he did not see any break in the structure of the lower walls, nor any breaks in the structure of the Fountain storeroom. On cross-examination he said that the "upper story seemed to be shook up quite a little; the windows were thrown out into the street in the débris." Referring to that and the other buildings included in the same row, he said that the upper stories were "shot up pretty badly and a great deal of brick and awnings and other things thrown down on the sidewalk and out on the street," and that he did not think any of them were clear out and down, but "there would be great chunks out of them," and that they could not have been occupied until repaired. He said nothing about the position of the roof, and apparently was not questioned concerning it. Hahman was in his own storeroom in the lower story of the adjoining building half an hour after the earthquake. He entered from the rear. He said the back walls of the Shea building were intact, but he said nothing about the front wall. He said the Shea building was burning at that time. King, another witness, occupied a storeroom in the adjoining building, and he entered it from the rear. The front and side of that building were down. He said nothing about the walls of the Shea building. Hoffer had an office in the Shea building over the storeroom adjoining that occupied by Fountain. He went into his office 10 or 15 minutes after the earthquake. He said the side walls of the second story were standing on each side of his office, that the east wall of the Shea building was up as far as the roof, and the roof had slid over onto the front—"it kind of fell out that way and sort of dropped down in front" over his office. On cross-examination he said the front walls where he occupied were out, that Dr. Mallory's office was over Fountain's store, and that Mallory's office was out just like his. This evidence is wholly insufficient to disprove the contention that the part of the wall which had fallen was not an important and material part of the building. The witness most favorable to the plaintiff was Mr. Burris, and his testimony alone shows that a material part of the building had fallen. Other evidence established the fact that the second story had rather large bay windows in front, and these windows, he says, had fallen out into the street. And, while he did not think that any of the upper stories in that row were clear out and down, they had "great chunks out of them," and the buildings could not be occupied until repaired. Clearly this was sufficient to constitute the falling of a material and substantial part of the building.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

With regard to the time when the fire started, the theory advanced is that, although there was no direct evidence on the subject, there were circumstances sufficient to justify the inference that the first effect of the earthquake may possibly have been to break some charged electric light wire in the building, so as to cause fire therefrom to begin before the shake had caused the wall or window to fall. We have not given the defendant's evidence on this point in detail, but, in substance, it satisfactorily established the fact that the fire in the Shea building was caused after the earthquake, by fire which originated in some other building or buildings in the same row and did not reach the Shea building until from 15 to 30 minutes afterwards. There was clear proof that very soon afterward fires were observed in two of these nearby buildings, and that there was none at that time in the Shea building. A witness for plaintiff said that about a minute after the earthquake, from his house seven blocks away, he saw a column of smoke 75 to 100 feet high and half as large as the courtroom at Santa Rosa arising from the neighborhood of the Fountain store; that, when he came downtown, he located that fire, and it was somewhere in the rear of the Shea building or another building not adjoining, but that he did not know the exact spot where it was nor within 40 feet of where it was; that he did not look to see what was burning. This vague and uncertain evidence is not sufficient to constitute a substantial contradiction of the other witnesses, some of them produced by the plaintiffs, who testified either directly that the Shea building was not on fire at the time they reached it, or saw it, after the earthquake, or to circumstances about which they could not well be mistaken and which if true would render it extremely improbable, if not impossible, that the building could have begun to burn until at least 15 minutes after the earthquake, and then only from fire communicated from the adjoining buildings. It thus being established that the building was not on fire immediately after the quake, there is no basis for the supposed inference that the fire therein may have begun before the wall fell. The defense was established, the verdict was contrary to the evidence, and the new trial should have been granted for that reason.

One of the instructions was as follows: "It is not sufficient for defendant, in order to avoid its policy, to establish the fact that the building described in the policy in suit had, before it began to burn, suffered some injury, or that any part of the walls of said building had fallen before the contents of the building were destroyed by fire, to avoid its policy herein; but the defendant must establish by a preponderance of evidence that such a material portion of the building had fallen before the fire started as would have increased the fire risk which defendant assumed by its policy on such building and its contents; that, if the evidence does not establish the falling of such a material portion of the building, then I instruct you to find for the plaintiff." In anticipation of a new trial it is proper to determine whether or not this instruction is correct. Section 2611 of the Civil Code declares that "a policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy." We are bound by this statutory declaration of the law, whether it accords with justice or not. The clause of the policy on this subject is in substance the same as this provision of the Code. To declare that, upon the happening of a given event, "all insurance shall immediately cease," is but another way of saying that, if the event happens, the obligation created by the policy shall become void. The effect of this section of the Code, in connection with the fallen building provision of the policy, is that the question whether the falling of a part of the building increased the fire risk or not, is wholly immaterial, provided the part of the building which had fallen at the time the fire started was a material or important part of it. The instruction was erroneous in so far as it directed the jury that the effect of the falling of the part of the building must have been to increase the fire risk and that, if it did not, the defendant would be liable. The parties had the legal right to make the contract that in such an event there should be no necessity for any inquiry as to the increase of risk therefrom and that the mere event should at once terminate the insurance, and, having done so, the defendant is lawfully entitled to the advantage thereof. The instruction was imperative in its direction to the jury, and, although other instructions given omitted the element of increase of risk, they merely caused a conflict, and did not cure the error. It is impossible to say which instruction the jury obeyed.

The decision of the court in Bastian v. British A. A. Co., 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255, was in substance based upon the principles above stated. The doctrine that the breach of an immaterial provision of the policy does not avoid it is not applicable, under the Code, where the policy expressly declares that it shall avoid it. In Clayburgh v. Agricultural Ins. Co., 155 Cal. 708, 102 Pac. 812, we were discussing the question of what was a sufficiently important "part" of a building, under the fallen building clause of a policy, to make the policy void if such part should fall. The instruction there considered was passed as substantially correct in effect, and this was put upon the ground that, although it did refer to the increase of the fire risk as a result of the falling of the part of the building, it did not, when taken as a whole, declare that such increase must occur in order to avoid the policy, but only that the part fallen must be important enough to materially impair the usefulness of the building. In substance, that decision was that to constitute an infraction of the fallen building clause, some material or substantial part of the building, as distinguished from a trivial, minute, and unimportant part thereof, must have fallen. The question of a consequent increase of risk was not held to be essential to the avoidance of the policy, if the part which had fallen was a material and important part of the building.

The question involved in this instruction is of no practical importance upon a new trial, unless the evidence should be more favorable to the plaintiff than that given upon the trial under consideration; for there can be no doubt that the falling of even so much of the building as Burris testified had fallen would increase the risk of fire. It is proper to remark, further, that the evidence does not present the question whether or not the defendant would be liable if the fire had started in the building before any part of it fell, and before it reached plaintiff's goods a material part of the building had fallen as a result of the earthquake and not as a result of the fire.

Other questions are discussed in the briefs in this case, but the probability that they will arise upon a new trial is so remote that we do not deem it necessary to consider them.

The order denying a new trial is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(158 Cal. 766)

DAVIS v. CONNECTICUT FIRE INS. CO.

(S. F. 5,558.)

(Supreme Court of California. Dec. 14, 1910.)

1. INSURANCE (§ 669*)—FIRE INSURANCE—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In an action on a fire policy which provided that the insurance should immediately cease if any part of the building fall except as a result of the fire, an instruction that such a part of the building must have fallen as would destroy its distinctive character as a building in order to avoid the policy was too vague as to what portion of the building must have fallen.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.*]

2. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR — INSTRUCTIONS — PREJUDICIAL EFFECT.

Error in an instruction in an action on a policy which provided that all insurance on the building or its contents should cease if the building or any part thereof fall, except from the fire, as being too vague as to what part of the building must fall, was not prejudicial to defendant, where the uncontradicted evidence showed that the entire upper story was knocked down by an earthquake, and the question in issue was whether the fire had attacked the goods in the insured building before a part of it had fallen.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

3. INSURANCE (§ 665*)—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy which provided that the insurance on the building or its contents should immediately cease if any part of the building fell except as the result of fire, evidence *held* to sustain a finding that the goods were on fire before any part of the building had fallen.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.*]

4. INSURANCE (§ 324*) — FIRE INSURANCE — CONSTRUCTION OF POLICY.

A provision of a fire policy that all insurance should immediately cease if the building or any part thereof fell, except as the result of fire, does not apply to avoid the policy if the building or any part thereof falls after the fire starts where the insurance is on the building, and perhaps even where it is only on the goods therein, nor does it apply to avoid the policy where the goods had begun to burn before the fall occurred.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 749; Dec. Dig. § 324.*]

5. EVIDENCE (§ 527*) — EXPERT TESTIMONY — SUBJECTS.

A question to a witness in an action on a fire policy as to whether the falling of the building was the result of fire was improper as calling for a conclusion or opinion as to a fact not the subject of expert testimony.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2334, 2335; Dec. Dig. § 527.*]

6. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on a fire policy, in which the evidence conclusively showed that the insured building fell because of an earthquake before the fire started, a refusal to allow a question to a witness as to whether the falling of the building was the result of the fire was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

7. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action on a fire policy providing that the insurance should cease if any part of the building fell except as the result of fire, in which the evidence conclusively showed that an earthquake caused a part of all the buildings on a street to fall, the exclusion of a question as to the condition of the buildings on the street after the earthquake was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

8. EVIDENCE (§ 129*)—SIMILAR CONDITIONS.

In an action on a fire policy, which provided that all insurance should cease if any part of the insured building fell, except as a result of the fire, in which defendant claimed that the insured building partly fell from an earthquake before the fire started, evidence was not admissible as to the condition of buildings other than the insured building after the earthquake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 129.*]

9. WITNESSES (§ 248*) — EXAMINATION — ANSWER.

A question asked in an action on a fire policy as to the condition of all the buildings on the street in which the insured building was situated after an earthquake occurring about the time of the fire was in effect answered where the witness testified that he could not tell one building from another because they were all down.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

Melvin, J., dissenting.

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Naomi E. Davis, executrix of the estate of Henry S. Davis, deceased, against the Connecticut Fire Insurance Company. From an order denying a motion for new trial after verdict for plaintiff, defendant appeals. Affirmed.

A. B. Ware and T. C. Van Ness, for appellant. Thomas J. Geary, for respondent.

SHAW, J. This is an appeal from an order denying the defendant's motion for a new trial. The plaintiff sued to recover upon an insurance policy issued by the defendant to Henry S. Davis, in his lifetime, covering a stock of drugs belonging to Davis, contained in a storeroom on the ground floor of a two-story brick building situated in the city of Santa Rosa. The fire which occasioned the loss took place on the morning of April 18, 1906, immediately after the great earthquake of that day. The policy issued by the defendant contained the following clause: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." Upon the trial the defendant stated that its sole defense was based upon the aforesaid clause, and that, unless that defense was sustained by the evidence, the judgment should be given for the plaintiff.

In addition to the general verdict for the plaintiff, the jury returned answers to a number of interrogatories submitted to them. Some of these were in respect to the question whether the fall of a part of the building was before or after the fire started. The answers of the jury stated, in substance, that no part of the building fell before the insured goods were attacked by fire. The several answers clearly imply, although they do not expressly say it, that a material part of the building fell, and that the falling thereof was caused by the earthquake, and not by the fire. The appellant complains of several instructions relating to the subject of the fall of a part of a building and how much of it must have fallen in order to bring about a cessation of the insurance under the clause above quoted. One of them stated that the jury must find that such a portion had fallen as would destroy its distinctive character as a building; another that the fall must have had the effect of increasing the fire risk. We have considered the latter instruction in our decision in Fountain v. Connecticut Fire Ins. Co. (herewith filed) 112 Pac. 546, and held it to be erroneous. The other instruction is too vague to be a safe guide for the jury. Reasonable men might reasonably differ upon the question of its meaning. To destroy a building's distinctive character, as such, might merely refer to a change in its appearance, or to a fall that would require a change of its use, or its practical destruction as a building. But in view of the clear, conclusive and uncontradicted evidence that the entire upper story was shaken down by the earthquake alone, so that the roof fell down upon the second floor, we cannot believe that the instructions on this branch of the subject could have prejudiced the defendant in the least. The proof showed conclusively that the earthquake alone caused the fall of a sufficient part of the building to destroy its distinctive character as a building and to increase the risk from fire. There was, in fact, no real controversy at the trial in regard to this point. The interrogatories and the answers thereto show that this fact was conceded and, indeed, the jury could not have found otherwise upon the evidence, for there was absolutely none to the contrary. The whole defense turned upon the question whether or not the fire attacked the goods before a part of the building had fallen. The jury answered that it did. It is claimed that this finding is not supported by sufficient evidence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The strongest evidence in favor of the proposition that the fire attacked the goods before the walls fell is the testimony of the witnesses Duncan, Bailey, and Faught. Bailey testified that he was running a livery stable, situated near the Davis building, and that from his stable, not more than three or four minutes after the earthquake, he saw fire in the rear of the Davis building. Faught testified that he was a fireman and slept in the engine house which was situated on a lot fronting on Fifth street and running back toward Fourth street; the rear thereof being about 50 feet from the rear of the Davis store. He said: "It did not take very long that morning to get out of the engine house. I saw the rear of the buildings where the Davis drug store was about three or four minutes after I got out of the engine house. I saw the fire started. I saw a volume of smoke come up right behind the Davis drug store. I saw quite a volume; enough to indicate to me the existence of a good fire there." Duncan was a fireman, and lived in a cottage in the rear of the Davis drug store. At the time of the earthquake he was in the engine house, about 50 feet from his cottage. He got out of the engine house about five minutes after the earthquake and went to the back door of his cottage from which he saw fire in the back end of the Davis building. The back end of it was then burning. The inside of the building was then on fire and the smoke and flames were coming out of the windows and through the roof. Muther, chief of the fire department, a witness for plaintiff, testified that 10 minutes after the shock he climbed to the top of the Davis building and found that the roof had fallen and rested upon the first story; that he saw at once that there was a fire coming fast "eating into" the building, and little blue blazes climbed up all around the brick; and that the fire was of an absolutely unnatural color, a kind of blue color all through the bricks. It was admitted that the building was lighted with electric lights, and, in effect, that the wires were at the time charged with electricity.

It is not improbable that the first effect of the strain caused by the earthquake was to break some wire charged with electricity, thereby instantaneously starting a fierce fire, and that the falling of the wall did not occur until the last severe vibration and after the fire had begun. The earthquake continued for 45 seconds. Even this brief period was long enough for the two events to occur consecutively, with an interval between them of more than half a minute. The evidence does not show the particular place in the building where the inflammable drugs were kept. The testimony of Muther that the flames were of an unnatural blue color inside the building 10 minutes after the earthquake indicated that some inflammable substance different from the wooden part of the building was then burning. It is common knowledge that the breaking of a charged electric wire will instantly cause a very hot flame, and that if combustible materials are near by such a fire will spread with great rapidity. Under all these circumstances, we cannot say that the finding of the jury on this point was not sustained by the evidence.

The appellant contends that it is immaterial whether the building was on fire or not at the time the wall fell, provided fire did not cause the fall. The court charged the jury that if it found that a material part of the building fell from a cause other than fire, before the insured goods were attacked by fire, the plaintiff could not recover. The case appears to have been tried upon the theory that this was the extent of the burden of proof resting upon the defendant. The jury, as we have said, obviously found that the goods were on fire before any part of the building fell. It appears from the evidence, however, that at the time the walls were thrown down by the earthquake only a small part of the goods could have been consumed or injured by the fire. The claim is that if there was a falling of the wall, not caused by fire, the clause of the policy thereupon immediately became operative, the insurance immediately ceased, and that, although the fire began before the wall fell, the defendant is liable only for so much of the goods as were consumed or injured by fire before the wall fell and for none that were consumed or injured afterward.

The case of Kiesel v. Ins. Co., 88 Fed. 243, 31 C. C. A. 515, is cited in support of this proposition. That was a loss of insured goods in a building. Counsel quotes from the opinion in that case the following: "If it (the building) was on fire, and it would have fallen by the force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable. * * * The cause of the fall was the test of liability." Wrenched from its context, this passage may seem to support appellant's claim. But a reading of the entire decision shows that the precise question here in issue—the liability where, after a fire has attacked insured goods but before it has done much damage, a material part of the building containing them falls from a cause other than fire—was not under consideration in that case; that, as appears by stipulation in that case, the only questions for decision were whether or not the fire began before the building fell, and if it did whether the fall was caused by the wind or the fire. The discussion shows that the court, in effect, held that the insurer was liable if the wind blew the wall down, after the fire started, but before it reached the insured goods, and, by implication, at least, that it would not have been liable if the wall had been blown down before the goods were attacked by fire. The trial court in its instructions to the jury had said: "If this building, or any substantial part thereof, fell before the fire, or before any portion of the merchandise insured was injured by fire, and it so fell, not as the result of the fire, but as the result of something else, your verdict should be for the defendant." And further: "If that building fell, even after the fire had originated—if the fall was not caused by the fire —and if at the time it fell the goods had not caught fire, and had not been damaged by fire, the defendant would not be liable. * * * If, on the other hand, those goods had been damaged by fire, or had caught fire prior to the falling of the building, you will find for the plaintiff." This instruction was approved. The judgment in that case was for the company and the plaintiff appealed, and, while the question whether or not the charge was too favorable to the plaintiff was not material, the instruction shows, as also do the comments thereon, that the court did not mean to decide that it was immaterial whether the building was or was not burning at the time the wall fell from the wind and that it did not hold that if a building fall, other than by fire, while goods therein are burning, the loss will be divided by that event, and the company held only for the goods consumed or injured before the fall.

Upon the question last stated, we think the most reasonable interpretation of the fallen building clause is that it does not apply to the case of a building, or part thereof, falling after it has begun to burn, if the insurance is on the building, and perhaps even if it is only on goods therein, and that, where goods only are involved, it does not apply where the goods have begun to burn before, and are burning at the time, the fall occurs. When the fire begins to burn the property insured, the thing insured against has happened, the liability has begun, some loss has become inevitable. It is true that it might happen that a fall occurring during a fire would prevent it from being put out, and thus cause greater loss than would otherwise have been suffered, and the insurer might wish to contract for exemption in such a contingency. But in such a case it would be practically impossible to make an intelligent division, separating the loss occurring before the fall, from that occurring afterward. No person owning goods would be willing to make such a contract and assume the burden of such a division, if he understood its effect. If it was the intention to provide for the case of the falling of a building after a fire had attacked the goods and to exempt the insurer from liability for the goods burned after the fall took place, while holding him for that which occurred before, surely more explicit language would have been used. Other events which the policy declares shall avoid it, such as a change of interest, an assignment of the policy, or the execution of a mortgage thereon, might occur after the goods began to burn. Would it be contended, in such cases, that an account must be taken and the insurer held only for the goods burned and the injury caused before the event? The division would in most cases necessarily be a mere guess. It is obvious that the parties did not contemplate the application of the fallen building clause in this manner. The better rule is to hold that the liability of the insurer, so far as this clause is concerned, is fixed by the conditions existing at the time the fire and consequent loss begins, and is not affected or changed by the fall of the building, or a part thereof, subsequently but before the destruction is complete.

The witness Muther was asked the question: "Was the falling of the Davis building the result of fire?" An objection to the question was properly sustained. It called for a mere conclusion or opinion as to a fact which was not the subject of expert testimony. If the testimony he had previously given as to the facts was true, the conclusion that the fall was not the result of fire necessarily followed. Moreover, as we have stated before, the entire evidence showed conclusively that the earthquake caused the fall, and there was not even an attempt to show the contrary. The refusal to allow the question was therefore not injurious to the defendant. This also applies to the refusal to allow the witness Wilson to answer a general question as to the condition of all the buildings on Fourth street after the earthquake. Furthermore, the evidence was properly confined to the Davis building, and in addition to that, the witness was afterwards allowed to say that he could not tell one building from another, because they were all down, and thereby he did, in effect, answer the question.

We find no prejudicial error in the record. The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

MELVIN, J. I dissent. I think the conclusion by the jury that the fire attacked the goods before a part of the building had fallen is not supported by sufficient evidence. To hold that the testimony of Duncan, Bailey, and Faught sustains such a finding, is to ignore the rule that the plaintiff's case must be sustained by a preponderance of evidence. All of these men saw the fire some minutes after a material portion of the building had fallen. Their stories comport as well with the theory that combustion followed the greatest and most destructive movement of the earthquake as with the deduction that the first vibration broke the electric light wire and so caused the fire. Indeed, according to the doctrine of probabilities, it is very likely that the same force which destroyed the upper walls of the building broke the wire and liberated its current. Whether a mass of loosened brick can leave a wall sooner than a vagrant electric current can set fire to a stock of goods is a question too difficult for satisfactory solution even by all the combined wisdom of the members of a trial jury, and, unless we can ignore the necessity of plaintiff's establishing his case by preponderance of evidence, I cannot see how the proof sustained the jury's finding. I think it clear that, the destruction of a portion of the building having been shown, the burden was on the plaintiff to prove the occurrence of the fire in some manner other than from any of the accepted risks. Beach on Insurance, § 1329; Pelican Insurance Co. v. Troy Co-operative Association, 77 Tex. 225, 13 S. W. 980; Insurance Co. v. Boren, 83 Tex. 97, 18 S. W. 484. In California this rule with reference to the burden of proof has, I think, long been established, although at least one learned judge has cited one of our leading cases as announcing the opposite doctrine. In Western Assurance Co. v. Mohlman Co., 83 Fed. 813, 28 C. C. A. 157, 40 L. R. A. 561, the court refers to Blasingame v. Home Ins. Co., 75 Cal. 635, 17 Pac. 925, as authority for the rule that the defendant must by a preponderance of evidence establish the performance on plaintiff's part of prohibited acts or show in like manner that the loss occurred from an accepted risk. An examination of that case, however, shows that a rule of pleading and not of evidence was announced. Broadly speaking, the court in the Blasingame Case held that in an action on a policy of insurance a condition precedent may be generally pleaded under the provisions of section 457 of the Code of Civil Procedure, and that the complaint need not contain averments intended for the purpose of meeting or cutting off a defense. Yet in that case the learned commissioner wrote: "One seeking to recover on an insurance policy must aver the loss and show that it occurred by reason of a peril insured against." This doctrine was asserted with even greater emphasis in the case of Rankin v. Amazon Ins. Co., 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460, in which the policy under consideration provided that the plaintiff should keep a watchman on the premises day and night when the mill was not in operation; this court holding that, after the defendant had shown that the mill was idle, the burden of proving compliance with the warranty rested upon plaintiffs. So, in this case, it seems to me, the fall of a material part of the building being shown, it is for the plaintiff to prove by a preponderance of the evidence that the fire was burning his property while the building was intact. This, I think, he utterly failed to do. I am aware that the opposite rule is adopted in some jurisdictions and the burden of proof held to be on the defendant (see Trans-Atlantic Fire Ins. Co. v. Bamberger [Ky.] 11 S. W. 595; Western Assurance Co. v. Mohlman Co., supra), but I think the other, which I believe has been the California rule, is based upon sounder reasoning.

The order should be reversed.

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158 Cal. 748

GEIMANN v. BOARD OF POLICE COM'RS et al. (S. F. 5,378.)

(Supreme Court of California. Dec. 13, 1910.)

1. MUNICIPAL CORPORATIONS (§§ 1022, 1025*) — CLAIMS — ACTIONS—LIMITATIONS—VALIDITY.

Provisions requiring a presentation of a demand as a condition precedent to an action thereon against a city, and limiting the time thereafter in which such action may be brought, are valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2193, 2196; Dec. Dig. §§ 1022, 1025.*]

2. CONSTITUTIONAL LAW (§ 308*)—MUNICIPAL CORPORATIONS (§ 1025*)—CLAIMS—ACTIONS—CONDITIONS PRECEDENT — CONSTRUCTION OF STATUTES.

The charter of the city and county of San Francisco, art. 8, c. 4, § 1, providing that any demand under the charter shall be forever barred, unless presented for payment, properly audited, within one month after such payment became payable, in so far as it provides for an audit within 30 days, the effect of which would be that if, upon presentation within the 30 days, the auditor should fail or refuse an audit, the claim would be barred, is invalid; but by eliminating such invalid part the remainder of the provision may be construed as allowing the claimant a reasonable time in which to commence action for enforcement of his demand, which time, in the absence of charter provisions, would be governed by the general statute of limitations applicable to the particular character of the demand, and upheld as fixing a time limit for presentation of claims and a condition precedent to the right of action on them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 925; Dec. Dig. § 308;* Municipal Corporations, Dec. Dig. § 1025.*]

3. MUNICIPAL CORPORATIONS (§ 1022*) — CLAIMS—PRESENTMENT.

Where a municipal charter provided that claims against it be presented for payment within a certain time to the auditor, and no provision thereof made it the duty of either the chief of police or the board of police commissioners to present demands of members of the police force to the auditor, if such a custom had grown up, their failure to present a claimant's demand would not excuse him from performance thereof, since it would be but the failure of his agent, for which he alone, and not the municipality, would be responsible.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1022.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by George Geimann on behalf of himself and others against the Board of Police Commissioners and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Costello & Costello, for appellant. Percy V. Long, City Atty., and John T. Nourse, Asst. City Atty., for respondents.

HENSHAW, J. Plaintiff sued for mandate against the chief of police, board of police commissioners, the auditor, and the treasurer of the city and county of San Francisco, to compel the approval and payment of his salary demand as police officer for the month of July, 1906. Judgment passed for defendants, and plaintiff appeals.

Plaintiff, with other police officers, was compelled by the chief of police to take leave of absence without pay for the month of July, 1906, after the earthquake and fire. His action is to enforce his demand for salary for the month when he was thus upon compulsory leave of absence.

Respondents successfully urged against appellant's claim that it was nonenforceable, for the latter's failure to comply with certain requirements of the charter of the city and county of San Francisco. If respondents' position is sound in this respect, it precludes all consideration of the merits or demerits of the claim. Respondents' contention is that appellant's claim is barred for nonpresentation and nonaudit within the time limited by the charter. Section 1, c. 4, art. 8, of the charter of the city and county of San Francisco provides as follows: "Any demand upon the treasury accruing under this charter shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such payment became due and payable." Appellant to this makes answer that the charter provisions are unreasonable, unconstitutional, and void, as conferring judicial power upon the auditor, and as depriving claimant of his just demand without due process of law, in that the section requires that his claim, properly audited, must be presented to the treasurer within one month from the date of its becoming due, and that this leaves the enforcement of his demand at the mercy, or whim, or caprice of the auditor, who, by his arbitrary rejection, may make it absolutely impossible for the claimant to present a "properly audited" claim to the treasurer within the 30 days' limitation; that the language of the charter is so plain as to forbid the need of construction; that its language does not import a condition precedent, but in terms declares it to be a statute of limitations, and that to it or from it the court can neither add nor detract. This provision of the present charter of the city and county of San Francisco is, so far as quoted, practically identical with section 90 of the former consolidation act of the city and county of San Francisco. The earlier provision was upon two occasions considered by this court, and in the first instance it was held that the design of the provision was to prescribe a uniform rule for the presentation of all demands upon the treasury and fix a uniform bar for nonpresentation. Paxson v. Holt, 40 Cal. 466. In the other case, the statute under which the claimant demanded his salary provided that he should be entitled to the salary allowed by the board of supervisors, and this court held that even if that relieved from the necessity of presenting the claim to the auditor for audit, still, under section 90 of the consolidation act, it required a presentation to the board of supervisors, which had never been made, and that therefore as it "was never presented for audit at all, it follows that it was not and could not be presented for payment." Section 90 of the earlier consolidation act made provision for an appeal by any person from the decision of the auditor to the board of supervisors upon the former's rejection or refusal to approve any demand. By a singular oversight, neither this nor any equivalent provision is found in the present charter; the unmodified language being that above quoted. It may not be gainsaid that if this provision must be held to mean that a claimant shall present his demand to the treasurer, properly audited by the auditor, within one month after the demand has become due, or otherwise he has no other recourse or redress and his claim is "forever barred by limitation of time," if thus this section contemplates that a claimant's demand, to be paid, must be first audited within 30 days, leaving the question of audit or nonaudit to the whim or caprice of the auditor, then it would require no elaboration of argument to demonstrate that the provision was unreasonable and unconstitutional, as an attempt to deprive, or as putting it within the power of an executive officer to deprive, a claimant of his demand against the city and county of San Francisco without due process of law.

It is to be considered, therefore, whether the charter will bear any other reasonable construction than this. For, if so, such construction will be adopted to save the provision from condemnation. It is proper to say, in approaching this consideration, that we are not unmindful of the rules which courts have imposed upon themselves in dealing with statutes of limitations and conditions precedent to the right to maintain action. Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Vandall v. Teague, 142 Cal. 471, 76 Pac. 35. A presentation of a demand as a condition precedent to the beginning of an action against a municipal corporation, and a special provision limiting the time thereafter in which such action may be brought, are measures which, without doubt, the Legislature may ordain. Thus the provision of the Los Angeles charter, which, in slightly varying form, is common to most charters, is a reasonable and valid provision as a condition precedent. That charter provides (section 222): "No suit shall be brought upon any claim for money or damages against the city of Los Angeles * * * until a demand for the same has been presented as herein provided and rejected in whole or in part." Bank v. Los Angeles, 151 Cal. 655, 91 Pac. 795. And so it is said, in Jones v. City of Albany, 151 N. Y. 226, 45 N. E. 557: "The Legislature may regulate the right to bring an action against a municipal corporation for a tort or upon contract, by imposing conditions precedent to be observed by the plaintiff, or it may make a special statute of limitations, thereby changing the ordinary rule and restricting the usual remedy in such cases." What, then, may be gathered by fair construction from the provision of the charter of the city and county of San Francisco, which would be legal, conceding the condition that if a properly audited demand be not presented within 30 days, the demand is forever barred, to be invalid? The provision manifestly aims to compel a presentation of all demands within 30 days. The requirement that every demand shall be presented to the auditor for audit within 30 days is reasonable and will be upheld. If the auditor does audit it, it is, within the language of the provision, properly audited, and so its presentation to and payment by the treasurer become matters of course. But if, upon presentation within the 30 days the auditor shall fail or refuse his audit, under circumstances which, as usually would happen, would forbid the possibility of the claimant's presenting his duly audited demand within the time limited, what result would follow? Under the strict terms of this provision the claim would be forever barred. This, however, cannot be, and to this extent the provision is unlawful and void. The necessary result would be that upon such rejection the claimant would have a reasonable time in which to commence action for the enforcement of his demand, and if the charter itself contained no special provision (and this charter does not) touching the matter, such reasonable time would be governed by the general statute of limitations applicable to the particular character of the demand. So construed, the obnoxious part of this provision is regarded as severable from the unobjectionable part, which latter then fixes a time limit for the presentation of claims and a condition precedent to the right of commencing action upon them.

The due presentation of the claim to the auditor being thus held an essential prerequisite to the right of commencing action, appellant insists that by the admissions in the pleadings, such due presentation exists in this case, and that therefore his action is properly brought and may be maintained. Respondent contends against such admission in the pleadings, and asserts that issue was joined upon the matter, and that the court's finding is against appellant. The pleadings thus involve consideration. But before considering them it is proper to say that where a material allegation has either been expressly admitted, or admitted by failure of denial, no finding upon the matter, since none can properly be made, will countervail against the admission; yet, where any doubt may be fairly said to exist as to the full and complete sufficiency of the admission, the court will not construe such a pleading so as to deprive the party of his right to a contest of the alleged fact, and to a determination of the existence or nonexistence of the alleged fact after hearing.

The plaintiff in this case averred "that before the commencement of this action he duly demanded of and from the chief of police of the city and county of San Francisco, defendant aforesaid, that he, the said defendant, approve the said warrant and demand of said plaintiff for his salary for the month of July, 1906, and that he demanded of and from the said board of police commissioners of the city and county of San Francisco that they sign the said warrant and demand, and that he duly demanded from the said auditor of the city and county of San Francisco, defendant aforesaid, that the said auditor audit the same, but in this connection plaintiff avers that the said defendants and each of them refused and denied, all and singular, his demand as aforesaid." The answer seems to admit that plaintiff demanded of the police commissioners "that the auditor of the city and county of San Francisco audit said demand." But in the same connection it undertakes to aver "that plaintiff failed and neglected, * * * or that the said plaintiff demanded of the said auditor of said city and county of San Francisco that he audit, allow, and approve said demand within six months after said demand became due and payable." The language of this averment is inartificially drawn. Grammatically it is a compound of affirmation and denial. It seems, however, to charge that plaintiff failed and neglected for six months after his claim became due to demand audit from the auditor. Even if this averment be not made as plain as it should be, there was enough to move the court to take evidence upon the question, as though under issue regularly joined. The court did so and found "that plaintiff has not demanded verbally, or otherwise, of the auditor of the city and county of San Francisco that he approve or allow the demand of plaintiff for his salary for the month of July, 1906." This finding is not attacked and is conclusive against appellant.

The determination that the claim was not presented to the auditor for audit within the time limited by the charter renders it unnecessary to consider in detail the law touching the other defendants. Suffice it to say that the treasurer was not bound to pay, except upon presentation of an audited demand, or its equivalent—the judgment of a competent court. Neither the chief of police nor the board of police commissioners is required by law, or by any rule cited, to approve the salary demand of plaintiff, and their failure to do so upon the showing here made would not excuse plaintiff's neglect to present it to the auditor. No provision has been pointed out making it the duty of either the chief of police or the board of police commissioners to present plaintiff's demand to the auditor, and if such a custom had grown up, without authority in law, the failure of either of these so to do would not excuse plaintiff, since it would be but the failure of his agent, for which he alone, and not the city, would be responsible.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.

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158 Cal. 742

HARTER v. BARKLEY et al. (L. A. 2,495.)

(Supreme Court of California. Dec. 12, 1910.)

1. Municipal Corporations (§ 597*)—Police Power—Constitutional Provisions.

Under Const. art. 11, § 11, authorizing municipalities to make local, police, and sanitary regulations, a city may under its police power provide by ordinance for the construction, maintenance, and repair of sewers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1325; Dec. Dig. § 597.*]

2. Municipal Corporations (§ 270*) — Powers—Construction of Sewers.

The power of a city to construct sewers and drains is incident to the power to construct and maintain streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 725; Dec. Dig. § 270.*]

3. Municipal Corporations (§ 712*)—Powers—Construction of Sewers.

The power of a city of the sixth class conferred by Municipal Corporation Act (Gen. Laws 1910, Act 2348) § 862, authorizing the construction, establishment, and maintenance of sewers, carries with it the power to provide reasonable regulations for the tapping of, and connection with, sewers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1522; Dec. Dig. § 712.*]

4. Municipal Corporations (§ 712*)—Powers—Construction of Sewers.

A city ordinance requiring the payment of five dollars for a permit for a sewer connection, to be paid into the sewer fund, is reasonable; the sewer fund being used for the benefit of the property of the city and in the interests of owners of real estate within its limits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1522; Dec. Dig. § 712.*]

5. Municipal Corporations (§ 712*)—Powers—Construction of Sewers.

A city ordinance which reserves to the city the exclusive privilege of building lateral sewers from the property line to the public sewer, and which makes a uniform charge of $20 therefor, is not so unreasonable as to be void, merely because the expense to the city is not the same in every case, because some lots are nearer to the sewer than others.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 712.*]

6. Municipal Corporations (§ 625*)—Police Power—Validity.

A municipal ordinance enacted under the police power is not invalid as unreasonable, unless it is clearly so, and every intendment will be indulged in favor of its validity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1378; Dec. Dig. § 625.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Mandamus by A. M. Harter against S. D. Barkley and others. From a judgment entered on sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Davis, Kemp & Post and Minor Goodrich, for appellant. Frank L. Perry and Williams, Goudge & Chandler, for respondents.

MELVIN, J. Appeal from a judgment entered after a demurrer to a petition for writ of mandate had been sustained, without leave to amend.

The matter involved is the validity or invalidity of a certain ordinance of the city of Redondo Beach. The petitioner alleged the existence of a public sewer in front of his property in said city; and after reciting the pertinent provisions of the ordinance above mentioned, averred that he applied to the trustees of Redondo Beach, and the plumbing inspector of said city offered to make connections between his property and said public sewer in a manner and with materials prescribed by ordinances and regulations of the said city, agreed to pay 50 cents for a permit to do the work, and promised to do all things required by the said trustees, except the payment of $5 for the sewer fund and $20 to the city or its agent for doing the work. He further recited in his petition the refusal of the trustees to comply with his request, stated that the charges for sewer fund and construction were unreasonable and without authority of law, and asked for a writ of mandate directing the issuance of the desired permit.

The ordinance which we are here considering, after providing that no connection shall be made with any public sewer of the city of Redondo Beach until a permit has been obtained from the plumbing inspector, and that all connections must be made pursuant to sections 15 and 16 thereof, declares that a fee of $5.50 shall be collected by the inspector for each permit for a sewer connection, of which 50 cents shall be a fee for the issuance of the said permit and $5 shall be paid into the sewer fund of the city. It does not appear in the petition what use is made of the sewer fund.

Sections 15 and 16 are as follows:

"The city of Redondo Beach, its duly authorized agents, servants, or employees, shall have exclusive right to make connections with the public sewer of Redondo Beach, and for laying laterals therefrom through the streets and alleys of said city to the property line.

"Upon written request by the owner of any property who has first obtained a permit for a sewer connection, as hereinbefore provided, the city of Redondo Beach, its agents, servants or employees shall forthwith make a connection with said sewer at the nearest Y branch, and place a house connection sewer therefrom to the property line of said owner. For making the connection with said sewer and laying house connection sewer therefrom to the property line of said owner, the said owner of said property shall pay to the authorized agent or collector of the said city of Redondo Beach, the sum of $20. Such sum shall be payable as follows: One-half (½) upon making application, and the balance ten (10) days after the completion of the said work."

The remaining sections declare it unlawful for any person to make any connection with a public sewer, except as provided in the ordinance, and prescribe a penalty for a violation of any of the provisions of that by-law.

The regulation of the right of laying sewers in public streets is unquestionably a power conferred upon municipalities, partly by virtue of the provisions of section 11 of article 11 of the Constitution of California. The proper protection of the public health depends very largely upon the maintenance of a thorough and sanitary sewer system, and the restoration of the streets after the laying of pipes is an important subject of police control. In many cities, the carelessness of contractors, both in the work of connecting private residences with public sewers and in the filling of the trenches after the laying of the pipe, has become a matter of great scandal and has in some instances led to the adoption of very stringent rules for the regulation of sewer laying. It has been held, and we think very properly, that ordinances of a municipal corporation providing for the construction, maintenance, and repairs of sewers and drains are to be sustained as a valid exercise of police power. Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805. The power of a city to construct sewers and drains is also incident to the power to construct and maintain streets. Kramer v. Los Angeles, 147 Cal. 674, 82 Pac. 334.

The city of Redondo Beach is one of the sixth class and as such has power "to construct, establish, and maintain drains and sewers." Municipal Corp. Act (Gen. Laws 1910, p. 847) par. 862.

The power of maintenance of public sewers carries with it the power to provide reasonable regulations for the tapping and connection with such sewers. Upon this subject, Judge Dillon, in his work on Municipal Corporations, vol. 2, § 805, thus expresses the rule: "Authority to a municipal corporation, by its charter, to repair and keep in order its streets, is sufficient, without special grant, to authorize it to construct drains and sewers; and, when constructed, the corporation will incidentally possess the power to pass ordinances regulating their use and the price at which private persons may tap them, and also to protect them against injury or invasion."

As we have before observed, the use to which the fee for connecting the sewer is applied cannot be learned from the pleadings. We must therefore conclude that the "sewer fund" mentioned in the ordinance is lawfully expended for the benefit of the defendant's property, as well as in the interest of other owners of realty within the city. We know of no case in which such a reasonable charge (and we cannot say that $5 is an unreasonable imposition) has not been sustained. In many well-considered cases, such power has been upheld. Van Wagoner v. Paterson, 67 N. J. Law, 455, 51 Atl. 922; Patton v. Springfield, 99 Mass. 632; Fergus Falls v. D. C. Edison, 94 Minn. 121, 102 N. W. 218, 70 L. R. A. 238.

We next come to the consideration of the right of the city to reserve to itself the exclusive privilege of building the lateral sewer from the property line to the public sewer and making a uniform charge therefor. The petition shows that some lots are nearer to the sewer than others and that therefore the expense to the city is not the same in every case. We cannot say that this fact alone makes the ordinance so unreasonable as to be void. Hellman v. Shoulters, 114 Cal. 146, 44 Pac. 915, 45 Pac. 1057; In re Zhizhuzza, 147 Cal. 334, 81 Pac. 955.

It seems to us that the case last cited furnishes an excellent authority both for a uniform charge and for the reservation by the city to itself of the right of laying sewers in its streets from the property lines to the main public sewers. The ordinance considered in that case had reference to the disposal of garbage by the city's agents. Speaking of the alleged unfairness in the difference of rates charged owners of hotels and householders, this court said, as might well be said here: "A municipal ordinance must be very clearly obnoxious to such objection before it will be declared invalid. 'Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution, or laws made in pursuance thereof.' Ex parte Haskell, 112 Cal. 416, 44 Pac. 725 [32 L. R. A. 527]; Ex parte McKenna, 126 Cal. 432, 58 Pac. 916; Ex parte Lemon, 143 Cal. 563, 77 Pac. 455 [65 L. R. A. 946]." In the majority opinion in that case, signed by six of the justices, the following language is adopted with approval from the case of California Reduction Co. v. Sanitary Reduction Works, 126 Fed. 29, 61 C. C. A. 91: "Laws or ordinances enacted under the police power for the protection of the public health, reasonably adapted to that end, are not unconstitutional, because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business or occupation; private rights being required to yield in such case to the public good." And in the concurring opinion, Mr. Chief Justice Beatty says: "The only objection to the validity of the ordinance which the petitioner is in a position to urge relates to the power of the municipality to reserve to itself the exclusive right, through its own selected agents, to collect and remove those refuse matters which are, or by delay in removal may become, a public nuisance. That the city has this right I think is clear, and so far as the ordinance secures it, no doubt it is valid. The petitioner has therefore violated its valid provisions, and subjected himself to the penalty imposed."

By a parity of reasoning we may well say that in so important a measure for the protection of the public health as the laying of sewers in the public streets, we must construe all ordinances relating to that subject with a view to giving them operation, unless they are clearly obnoxious to reason, and obviously violative of constitutional provisions or general laws; and that in such a matter, in which a city is given a wide discretionary power, the reservation to itself of the right to do the actual work of laying and connecting the lateral sewers is not only lawful, but perhaps laudable. We cannot say that either the charge of $5 for connecting with a public sewer or that of $20 for construction is unreasonable.

It follows that the judgment should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

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14 Cal. App. 502

PETERSON v. CODY et al. (Civ. No. 764.)

(Court of Appeal, First District, California. Nov. 16, 1910. Rehearing Denied by Supreme Court Jan. 9, 1911.)

WATERS AND WATER COURSES (§ 156*)—CONVEYANCES—RESERVATION.

Plaintiff whose land was bordered by a stream conveyed water to his residence by means of a flume and thereafter he conveyed a strip of land bordering on the stream, and the deed reserved the right to "take and use the water as now taken and used" and the right to repair and maintain flumes "necessary to conduct the amount of water now appropriated and used that are accustomed to flow across the lands conveyed." *Held*, that plaintiff's rights were limited to the amount of water used by him at the time of conveyance, irrespective of the amount that flowed in the flume.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 178; Dec. Dig. § 156.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Thomas H. Peterson against F. A. Cody and another. Appeal by plaintiff from an order denying his motion for a new trial. Affirmed.

Cassin & Lucas, for appellant. H. C. Wyckoff and W. M. Gardner, for respondents.

KERRIGAN, J. This is an appeal from an order denying plaintiff's motion for a new trial.

In the year 1885 the plaintiff owned a tract of land in Santa Cruz county consisting of 159 acres, which land for some distance bordered on a stream of water known as Marshall creek. From this creek to his residence, which was some distance back from the creek, plaintiff had a flume by means of which he carried water from the creek to his residence. On February 12, 1885, plaintiff and his wife conveyed to James P. Pierce a portion of said tract which bordered on Marshall creek, but they retained the back portion of the farm on which their residence was situated. Part of plaintiff's flume was built upon lands conveyed to Pierce. The deeds from plaintiff and his wife to Pierce contained the following reservation: "Reserving hereby from the operation of this deed the right to take and use the water as now taken and used by the parties of the first part, and the right to enter upon said land to repair and maintain proper flumes, pipes, or conduits necessary to conduct and lead on to the lands of the parties of the first part, the amount of water now appropriated and used by said parties of the first part that are accustomed to flow on, upon, and across the lands hereby conveyed." In 1889 Pierce conveyed the said land along Marshall creek to the Ben Lomond Land & Lumber Co. This company installed a four-inch pipe by which it carried water from Marshall creek to the town of Ben Lomond, using the water in a logging pond, and also as a supply for people living in Ben Lomond, and for other purposes. In 1892 D. W. Johnston purchased the property from the Ben Lomond Land & Lumber Company, together with the water system for the supply of Ben Lomond. In 1901 the defendant Cody purchased the property and water system from Johnston, and he has owned and operated it ever since. The case was tried with an advisory jury, which adopted that view that the plaintiff was entitled to the waters of the creek to the extent of the full carrying capacity of his flume, and rendered a verdict, finding that the plaintiff was entitled to $700,000 gallons of water per 24 hours; but the court accepting the defendants' theory, namely, that the plaintiff was entitled only to the amount of water actually taken and used by him at the time of the conveyance by him above mentioned, rejected the verdict of the jury, and found that the amount of water taken and used by the plaintiff at said time was 1,000 gallons per 24 hours, and rendered judgment accordingly.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff contends here, as he did in the lower court, that under the reservation just quoted he is entitled to the amount of water that was accustomed to flow in the flume. Defendants, on the other hand, have contended throughout the case that the amount of water reserved is not what had been accustomed to flow through plaintiff's flume, but the amount that he actually used for beneficial purposes at the time of the execution of the deed from himself and wife to Pierce.

In his complaint plaintiff alleged that he was entitled to all the waters in said creek. Defendants denied that he was entitled to more than 100 gallons per day. On the issue thus framed the court found, as just seen, that the plaintiff was entitled to 1,000 gallons per 24 hours. Under no theory of the case is plaintiff entitled to the entire flow of Marshall creek, or to the maximum carrying capacity of his flume, nor does he in fact claim to be thus entitled. As before stated, he asserts that the measure of his right is the accustomed flow of water through the flume; but he introduced absolutely no evidence to show what this amount was. The defendants, on the other hand, to support their position, produced evidence showing the amount of water required by plaintiff in the year 1885, considering the size of his family, the number of head of stock he had, and the size of the vegetable garden which he irrigated. Based upon these circumstances one expert witness testified that the plaintiff was entitled to not to exceed 725 gallons per day. Another expert said that 20 gallons of water per day is considered in the engineering profession to be necessary per capita per 24 hours for household and culinary purposes, including all household uses; 15 gallons a day for a horse, and 10 gallons a day for each cow; that 100 gallons a day would be more than enough to irrigate plaintiff's small garden; therefore, that the amount of water probably used by plaintiff in 1885 was 450 gallons per day. The superintendent of the Santa Cruz City Waterworks testified that 250 gallons a day was sufficient for all plaintiff's enumerated purposes. There was other evidence on this subject.

The evidence thus introduced by the defendants showed the amount of water which in all probability was taken and used by the plaintiff at or about the time of the conveyance; and as there is no evidence in the case that a greater amount of water than 1,000 gallons per day flowed through the flume, we are at a loss to understand how the plaintiff at this time can successfully complain. However, we think, under the proper construction of the reservation, that plaintiff was entitled, not to the amount of water that ordinarily flowed through the flume, but to the amount of water that he was accustomed to use at the time of the conveyance.

There are two clauses in the reservation of the water right from which the intentions of the parties to the deed as to the amount of water reserved may be gathered. It is first stated that the grantors reserve "the right to take and use the water as now taken and used by the parties of the first part." Then follows the reservation of the right to maintain "proper flumes, pipes, or conduits necessary to conduct and lead on to the lands of the parties of the first part the amount of water now appropriated and used by said parties of the first part that are accustomed to flow on, upon, and across the lands hereby conveyed."

In both of these clauses the word "used" is employed; and for this court to hold, as plaintiff alleged in his complaint, that the amount of water so reserved was the total flow of Marshall creek, irrespective of whether that quantity was put to a beneficial use or not, would be to put a very extravagant construction upon the deed. The same observation will apply, though with somewhat less force, to the construction at present contended for by plaintiff, namely, that the amount of water, reserved was the quantity accustomed to flow through his flume, for it might be that more was accustomed to flow through it than was used by him. Such a construction would ignore the presence of the word "used." We think that the words "taken and used," and "appropriated and used," found in the two clauses of the reservation above quoted, may well be given the ordinary legal meaning of the word "appropriated," as used in connection with the acquisition of water rights. The authorities hold that an appropriator's rights are measured not by the capacity of his conduit, nor by the amount taken from the stream, but by the amount actually applied to a beneficial use. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454. We are therefore of opinion that the court correctly construed the reservation in the deed by limiting the plaintiff's rights (in the absence of evidence of the exact amount of water used by him at the time of the conveyance) to about the amount of water presumably so used; and we think that he cannot be heard to complain of such construction, especially as the court was quite liberal in computing the amount of water on this basis.

It may further be said on this point that the conduct of the plaintiff and the predecessors in interest of the respondents is inconsistent with the claim of plaintiff as set up in the complaint, for the evidence shows that Pierce, the grantee of plaintiff under the deed in question, shortly after its execution took water from the creek through a three-inch pipe from a point above the intake of plaintiff's flume, and no claim was at that time made by plaintiff that he had reserved all the water of the creek.

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

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14 Cal. App. 551

INMAN et al. v. L. E. WHITE LUMBER CO. (Civ. 767.)

(Court of Appeal, Third District, California. Nov. 19, 1910. Rehearing Denied by Supreme Court Jan. 12, 1911.)

1. PARTIES (§ 88*)—MISJOINDER.
Where one is improperly joined as a plaintiff, the remedy is by a special demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 145–147; Dec. Dig. § 88.*]

2. SALES (§ 351*)—ACTION—PARTIES.
Where F. and I. contracted in writing to sell and deliver ties to defendant, and F. was to furnish supplies for the camps and the money to carry on the business which was to be the source of his profit, and I. was to get out of the ties the product of his own timber and to receive the entire profit from the ties themselves, it was proper for them to join in an action for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 993, 994; Dec. Dig. § 351.*]

3. SALES (§ 164*)—EXCESSIVE QUANTITY—LIABILITY.
Where plaintiff contracted to sell and deliver a certain number of ties to defendant, and he accepted and used a number in excess of the amount specified, he was bound to pay for the excess at least their reasonable value, as to which the contract itself was evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 386–390; Dec. Dig. § 164.*]

4. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADING.
Where, in an action for the price of ties sold and delivered, plaintiff alleged that defendant agreed to pay a certain price for the ties, and recovery was had for the reasonable value, if the complaint should have been more specific, defendant was not harmed, there being no evidence of any difference between the reasonable price and the agreed price.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by John Inman, Jr., and others against the L. E. White Lumber Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Campbell, Metson, Drew, Oatman & Mackenzie and McNab & Hirsch, for appellant. Robert Duncan, for respondents.

BURNETT, J. The action was to recover $2,585, the balance due for the sale and delivery of redwood ties at 50 cents apiece. The court found, upon sufficient evidence, that "said plaintiffs sold and delivered to said defendant at said defendant's special instance and request 24,473 split and hewn merchantable redwood railroad ties; that said ties were 8 feet in length and 6 inches by 8 inches in size; that said ties were delivered to and received and accepted by said defendant at its flume near Rollerville, in the county of Mendocino; that said defendant agreed to pay said plaintiffs 50 cents for each of said ties so delivered; that said defendant became indebted to said plaintiffs in the sum of $12,236.50 on account of said ties so delivered; that said defendant paid to said plaintiffs for and on account of said ties so delivered the sum of $9,651.50 and no more." The judgment thereupon followed in favor of plaintiffs for the balance due.

The main reliance of appellant seems to be upon the claim that "The evidence fails to show that the plaintiffs Inman and Foster were jointly entitled to recover any sum whatever from defendant, the evidence showing affirmatively that any sum or amount which might be due was due to the firm of Inman and Foster, a copartnership." But if we concede the soundness of appellant's statement of the legal proposition involved, it cannot avail to overthrow the judgment. This follows from the consideration that there was evidence that the transaction was not with any partnership, but with plaintiffs in their individual capacity. The testimony of Mr. Foster is to the effect that he was to furnish the supplies for the camps and the money necessary to carry on the business and this was to be the source of his profit, but that Mr. Inman was to have charge of the getting out of the ties, that they were the products of his own timber and that Inman was to receive the entire profit from the ties themselves. In this view of the matter the action could have been brought by Inman alone, but since the written contract was made with Inman and Foster as individuals it was at least proper that both should join in the action. It is at least entirely clear that if Foster was improperly joined as a party the remedy was by special demurrer and no possible prejudice has been suffered by defendant. The judgment is certainly a bar to any suit that might be brought by either of the plaintiffs for the same cause of action.

But if the foregoing objection should be considered meritorious its effect is nullified by the assignments introduced in evidence. On January 3, 1908, a communication was addressed to L. E. White Lumber Company in the following language: "Dear Sirs: Please transfer all credits standing to the account of Messrs. Inman & Foster to the account of W. E. Foster and oblige, Yours truly, Inman & Foster, per W. E. Foster, John Inman." Defendant recognized this order as an assignment and acted upon it. Appellant is therefore in no position to question it, although as a matter of fact it was made as a mere matter of convenience to enable Mr. Foster to collect the money due for the ties without being subjected to the trouble of finding Mr. Inman.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But, accepting the theory that the claim was transferred to Foster, then any difficulty in this contingency is obviated by the reassignment of Foster to Inman as follows: "The undersigned W. E. Foster hereby assigns to John Inman, Jr., an undivided half interest in all moneys due to said Foster and Inman, Jr., in that certain contract dated May 23, 1907, between the L. E. White Lumber Company, a corporation, and the said W. E. Foster and John Inman, Jr., for the sale and delivery of certain ties to said L. E. White Lumber Company. W. E. Foster." As to this, the contention is made by appellant that as the contract under which the ties were delivered provided for the delivery of from 10,000 to 20,000 of the kind of ties in question, and as 19,303 had been paid for, this assignment could operate only to transfer a half interest in the balance, to wit, 697 ties. Appellant, however, cannot successfully urge this objection. The court was entirely justified in holding that all the ties were delivered under the contract. Appellant could have declined, of course, to receive any number in excess of 20,000, but after accepting and using them appellant manifestly assumed the corresponding obligation to pay for them. In the case of Randall v. National Ice Co., 19 N. Y. Supp. 633,[1] there was a contract to deliver 800 or 900 tons of ice. The party delivered 1,314 tons, and sued for the excess over the amount named in the contract. The court said: "Having received this ice in excess of the amount called for by the contract the law would hold the defendant liable to pay for the same, and, in the absence of any agreement to the contrary, at the price stipulated in the contract." This case was appealed to the Court of Appeals and the decision affirmed. 138 N. Y. 644, 34 N. E. 513.

In Hermann v. Littlefield, 109 Cal. 430, 42 Pac. 443, it is held, as stated in the syllabus, that "when a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term of service agreed without a new agreement, the law presumes, in the absence of proof to the contrary, that the terms of the original contract are continued; and, in an action of assumpsit for work and labor performed after the agreed period, the original contract is admissible in evidence as showing the terms under which the labor was performed." But, if this were not so, plaintiffs could at least recover the reasonable value of the ties in question. No inquiry was made as to the reasonable value, but the contract itself is evidence of this, and controlling in the absence of all other evidence. Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Hermann v. Littlefield, supra; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073.

The only plausible objection to this theory is that it is inconsistent with the allegations of the complaint. Therein it is alleged that defendant agreed to pay a definite sum for the ties. Under such a complaint it is held, though, in the Donegan Case, supra, that plaintiff many recover debts due upon different contracts. It is stated that "the plaintiff may recover in one count under an executed express contract for grading completed, and also under an implied contract for extra work, as together constituting the whole indebtedness due, and, where an account was stated for the whole indebtedness, the law implies a promise to pay it." But even if the complaint should have been more specific it is clear that defendant suffered no injury, since there was no evidence of any difference between the reasonable value and the agreed price.

The contentions of appellant seem to us destitute of merit, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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14 Cal. App. 495

DIEHL v. SWETT-DAVENPORT LUMBER CO. (Civ. 834.)

(Court of Appeal, First District, California. Nov. 12, 1910. Rehearing Denied by Supreme Court Jan. 9, 1911.)

1. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The general rule is that one who remains in the service of his employer after notice of a defect in the machine operated by him, which increases the danger to which he is exposed, assumes the increased risk; but where the employé, electing not to abandon his employment, gives notice of a defect in the machine operated by him, and the employer promises to remedy the defects, the employé does not assume the increased risk, and unless the employer remedies the defect within a reasonable time, and accident results, the employer is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641–644; Dec. Dig. § 220.*]

2. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK—TIME TO REMOVE DANGER.

When the employer is notified by the servant of defects in the machine operated by him, the promise of the employer that the danger will be removed, without naming a definite time, is in effect an agreement by the employer that he assumes the risk incident to the danger for a reasonable time.

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[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 64 Hun, 636.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641–644; Dec. Dig. § 220.*]

3. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK—TIME TO REMOVE DANGER.

When the promise of the master upon notice by the servant of defects in the machine operated by him is that the repair shall be made upon the happening of a certain event, the master assumes the risk until the event has happened, and a reasonable time thereafter.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641–644; Dec. Dig. § 220.*]

4. MASTER AND SERVANT (§ 220*)—INJURY TO SERVANT—ASSUMPTION OF RISK — PROMISE TO REPAIR.

In an action by a servant for injuries caused by falling through a hole in a platform against a planing machine, where the testimony showed that the master had made a definite promise to repair the platform upon the completion of a particular job, and that he was still on that job when the accident happened, plaintiff did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 641–644; Dec. Dig. § 220.*]

5. MASTER AND SERVANT (§ 235*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—REPAIRS.

Where a person is specially employed by the master to make repairs, it is not the duty of a servant, injured through lack of repair, to make them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 711, 713; Dec. Dig. § 235.*]

6. MASTER AND SERVANT (§ 274*)—INJURY TO SERVANT—EVIDENCE.

In an action for injuries by servant from falling through a hole in a platform against a planing machine, evidence for plaintiff, that the engine driving the machine was too small for its load, and at times it was necessary to shut down the machine, and that when the machine was again started the increased burden reduced the pressure of the steam, and therefore strict orders had been given not to shut down the machine, unless absolutely necessary, was competent for the purpose of explaining why plaintiff did not stop the machine before attempting its adjustment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 945, 946; Dec. Dig. § 274.*]

7. TRIAL (§ 237*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action for personal injuries, the court specifically instructed that if the evidence was evenly balanced, the verdict must be for the defendant, it was not reversible error to instruct that if the evidence tending to prove a fact is of greater weight than all the evidence tending to disprove that fact, and if the evidence tending to prove the facts plaintiff is required to prove is of more weight than the evidence tending to disprove such facts, then the plaintiff has proven such facts by a preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 548–551; Dec. Dig. § 237.*]

8. MASTER AND SERVANT (§ 293*)—INJURY TO SERVANT—INSTRUCTIONS.

An instruction requested by defendant, in an action for injuries by a servant in a factory, "that after an accident has occurred it may be easy to see what would have prevented it, but that of itself does not prove that reasonable or ordinary care would have anticipated and guarded against it. For plaintiff to show what would have prevented the accident complained of is not proof of negligence on the part of the defendant"—has no application to a case where the accident arose from some admitted defect which had been called to defendant's attention.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1150–1154; Dec. Dig. § 293.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Henry N. Diehl against Swett-Davenport Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Wilson, for appellant. Bishop, Hoefler & Harwood, for respondent.

KERRIGAN, J. This is an action for damages for personal injuries sustained by plaintiff while in the employ of the defendant corporation in operating a planing machine at defendant's mill. The planing machine was provided with a wooden platform which was necessary for its proper operation. On the day that plaintiff began to operate the machine, one of the surface boards of the platform was broken by a timber falling upon it. This defect was known to the defendant's superintendent. For several weeks plaintiff operated the machine while it was in this condition, during which time he complained on a number of occasions to defendant's foreman regarding this defect. The foreman promised to remedy the same, and plaintiff's testimony is that because of such promise he remained in defendant's employ. On the day of the injury, and while the plaintiff was operating the machine, it became necessary for him to go upon the platform to adjust the gauge, and while so employed, the machine being in motion, his foot slipped into the hole in the platform, causing him to be thrown against the knives connected with the machine, and his right arm was cut off at the elbow. The jury brought in a verdict for $5,000, upon which judgment was entered. This appeal is from the judgment and from an order denying a motion for a new trial.

The defendant asks for a reversal of the judgment and order upon several grounds, viz., that the trial court erred in the admission of evidence, that it improperly instructed the jury, and erroneously refused to give certain instructions requested by the defendant. It is also contended by defendant that the evidence does not sustain the verdict, and that the amount of the damages given is excessive. We will consider these questions in the order stated.

On the trial of the cause, plaintiff introduced evidence showing that at times during the operation of the machine at which the accident occurred it was necessary to shut it down, for the reason that the engine driving the same was too small for its load, and that when the machine was again started the increased burden thereby put upon the engine would reduce the pressure of the steam, and that, for this reason, strict orders had been given that the machine should not be shut down, unless absolutely necessary. Defendant contends that the court committed error in admitting this testimony, for the reason that it was immaterial, and also tended to confuse the jury and to make them believe that the defendant was negligent generally in the conduct of its business. The answer of the plaintiff to this contention is that the evidence in question was offered for the purpose of explaining why he did not stop the machine before attempting its adjustment, and we think it was competent for that purpose.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant next contends that the court erred in giving to the jury that part of instruction numbered 9, to the effect that if the evidence tending to prove a fact "is of greater weight than all the evidence tending to disprove that fact," and also, if the evidence tending to prove the facts plaintiff is required to prove "is of more weight than the evidence tending to disprove such facts," then the plaintiff has proven such facts by a preponderance of evidence. Defendant argues that the words quoted in effect, inform the jury that if the plaintiff produces evidence to prove the facts necessary to confer upon him a right to recover against the defendant, then he shall recover, unless the weight of defendant's evidence in disproof thereof is of more or greater weight, and that such an instruction implies that plaintiff can recover without a preponderance of evidence. We think the instruction contains no such implication. Under this instruction the evidence, which must be of more or greater weight, was the plaintiff's, and not the defendant's. By it the jury was merely instructed that the plaintiff's evidence of the existence of certain facts must be of more weight than the defendant's evidence tending to disprove such facts; which was only another way of instructing that before a plaintiff is entitled to recover he must have produced a preponderance of evidence in his favor. If the evidence were equally balanced, plaintiff's evidence could not be of more weight than the defendant's. Besides this, in the very first portion of the instruction complained of, and repeatedly in other portions of the charge, the court directly stated that in order for the plaintiff to recover he must establish the facts of his case by a preponderance of evidence. Moreover, the court specifically charged the jury that if the evidence was equally balanced, the verdict must be for the defendant. The instruction in question standing alone was not subject to the objection urged, and certainly was much less so when the instructions are read and considered as a whole.

Defendant also complains of the action of the court in refusing to give a portion of one of its requested instructions. The part rejected was as follows: "After an accident has occurred, it may be easy to see what would have prevented it; but that of itself does not prove that reasonable or ordinary care would have anticipated and guarded against it. For plaintiff to show what would have prevented the accident complained of is not proof of negligence on the part of the defendant." In place of this proposed instruction the court charged as follows: "The defendant in this case cannot be held guilty of negligence, if the evidence shows that he failed to provide against an accident that would not have been foreseen by a reasonably careful person, or against an accident such as reasonable prudence would not have anticipated the need of guarding against." We think the instruction given stated the law applicable to the case, and that the defendant under the evidence in this case was not entitled to the one offered by him. While that instruction might have been applicable in a case where some precaution against accident had been omitted, the advisability of which had been made apparent by the happening of the accident, it was hardly to the point in the case of an accident arising from some admitted defect which had been called to the attention of the party charged. Here the whole cause of action was based upon the defect in the platform, known to the defendant and its superintendent.

Error is also charged to have been committed by the trial court in refusing to charge the jury, in effect, that an employé may rely on the promise of his employer to repair defects existing in a machine which the employé is operating only for so long a time as is reasonably necessary to repair the defect. This proposition is involved in defendant's contention that the evidence is insufficient to justify the verdict, and in our opinion is the principal question involved in the case. Undoubtedly the general rule is that one who remains in the service of his employer after notice of a defect in the machine operated by him, which increases the danger to which he is exposed, assumes the increased risk. Where, however, the employé, electing not to abandon his employment, gives notice of such defect in the appliance used by him, and the employer promises to remedy the defect, the relationship of the parties undergoes a change. The promise of the employer that the danger will be removed, without naming a definite time, is in effect an agreement by him that he assumes the risk incident to the danger for a reasonable time. Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521. But when the promise is that the repair shall be made upon the happening of a certain event, the master assumes the risk until the event has happened and for a reasonable time thereafter. In this case the promise to repair was made on several occasions, and during a time that the defendant was engaged upon "rush" orders, which it had not completed at the time of the happening of the accident. But defendant contends that in this case the plaintiff was not justified in relying upon the promise to repair, for the reason that the promise was too indefinite, and for the further reason that the time between the promise and the injury was longer than was reasonably required to make the repairs. From all the testimony it appears that the promise to repair was definite, and referred to the completion of a specific job upon which the defendant was very busy, and that it remained busy upon this particular job from the time of the promise until the accident occurred. The case of McFarlan Carriage Co. v. Potter, 153 Ind. 107, 53 N. E. 465, cited in Anderson v. Seropian, supra, is on all fours with the case at bar. In that case it appeared that the table of a machine was defective, and that plaintiff was injured by reason of the defect, operating independently of the saw, after a promise had been made to repair it as soon as the particular work then in hand was completed; and it was held that the employer was liable, although it was not shown how long it would take to finish that work; it appearing, however, that the injury occurred within the time the defect was promised to be remedied. It is unnecessary to review the authorities upon this point. A number are cited in Anderson v. Seropian, supra, where the reason for the rule is clearly stated. Applying these principles to the present case, the instruction was properly refused, and there was sufficient evidence to justify the verdict.

Defendant also contends that the repairs to the platform did not require mechanical skill, and that therefore it was the plaintiff's duty to make them. This point is without merit. Plaintiff claimed that the necessary materials to make the repairs were not on hand, and that, besides, plaintiff was ordered by representatives of the defendant to continue the operation of the machine until the completion of the job. Moreover, he had no authority to make repairs, as there was a person specially employed for such purposes. Anderson v. Seropian, supra.

It is also contended that the trial court erred in refusing to submit to the jury, at defendant's request, the special issue set forth in the thirty-fifth assignment of error. The issue proposed was fully covered by the third issue given by the court, and that being so, was properly refused.

There is no merit in the point that the amount of the verdict was excessive.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

14 Cal. App. 414

CLARK v. TULARE LAKE DREDGING CO.

(Civ. 739.)

(Court of Appeal, Third District, California. Oct. 31, 1910. Rehearing Denied by Supreme Court Dec. 27, 1910.)

1. APPEAL AND ERROR (§ 999*)—REVIEW—WEIGHT OF EVIDENCE—JURY CASE.

A verdict will not be questioned on appeal, if there be nothing to show that it has been planted on evidence inherently improbable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3924; Dec. Dig. § 999.*]

2. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a boy 16½ years of age, employed as a leverman on a dredger, the burden was on defendant to show by a preponderance of the evidence that his contributory negligence was the proximate cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—YOUTHFUL EMPLOYÉ—WARNING.

Where a boy 16½ years of age, inexperienced with machinery, was employed as a leverman on a dredgeboat, it was negligence to put him in charge of the machinery, even if he was warned that this unusual position was hazardous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 180–192; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—BURDEN OF PROOF—WARNING.

In an action for the death of a youthful and an inexperienced employé in charge of dangerous machinery, the burden was on defendant to show that those in authority warned deceased of the danger in such a manner that he fully appreciated the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for the death of an inexperienced servant, injured while in charge of dangerous machinery, it was for the jury to say whether deceased was warned of the danger in a manner to impress on him a full appreciation of the hazard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010–1050; Dec. Dig. § 286.*]

6. APPEAL AND ERROR (§ 994*)—REVIEW—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES.

Under Code Civ. Proc. § 1847, declaring that the jury are the exclusive judges of the credibility of the witnesses, section 2061 providing that they are judges of the effect and value of evidence, and section 2061, subd. 2, that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, a verdict that a warning of danger to a youthful and inexperienced servant was not given, or that if given it was insufficient, cannot be reviewed, though no one directly contradicted the testimony of defendant's witnesses that they had given deceased such warning.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

7. Master and Servant (§ 276*)—Injury to Servant—Sufficiency of Evidence.

In an action for death of a servant while in charge of dangerous machinery, evidence *held* to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

8. Death (§ 99*)—Damages—Loss of Minor's Services.

In an action by a mother for the negligent death of her son, 16½ years of age, it appeared that deceased at the time of his death was contributing to plaintiff's support; that his services were reasonably worth the sum of $85 per month, though he was receiving only $40 per month; that he was intelligent and apt at learning. *Held*, that the verdict for $5,000 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

9. Death (§ 88*) — Damages — Loss of Society.

In an action by a mother for the death of her son, 16½ years of age, the jury may consider as an element affecting the pecuniary value of the services of deceased to plaintiff the fact that plaintiff has been deprived of the comfort, society, and protection of her son.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. § 88.*]

10. Death (§ 87*) — Damages — Measure — Loss of Services.

In an action by a mother for the death of her minor son, plaintiff can recover an amount which will justly compensate her for the probable value of the services of deceased until he had reached his majority, taking into consideration the cost of his support and maintenance from the time of death until such majority.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. § 87.*]

11. Death (§ 87*)—Damages—Services of Minor.

In an action for the death of plaintiff's minor son, plaintiff may recover for the probable value of the services of deceased until majority, regardless of the fact that at the time of his death he was intending to return to school after earning sufficient money therefor.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. § 87.*]

12. Appeal and Error (§ 1048*)—Harmless Error—Examination of Witness.

Where, in an action for the death of a servant, a witness was asked if he remembered a conversation with deceased, and denied having had such conversation, even if such question called for improper testimony, no harm resulted therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

13. Evidence (§ 219*)—Admissibility—Attempt to Suppress Testimony.

In an action for the death of a servant while employed on defendant's dredger, evidence was admissible that a machinist employed by plaintiff with a view of becoming a witness, made an effort to go aboard defendant's dredger to inspect the machinery, to enable him to describe the same, and that those in charge of the dredger refused to allow inspection, as tending to establish an effort to suppress testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 762-770; Dec. Dig. § 219.*]

14. Trial (§ 28*)—Order for Inspection of Premises.

Code Civ. Proc. § 128, subd. 5, clothes courts with control over every person connected with a judicial proceeding in so far as such proceeding is concerned. Section 610 authorizes the court to order an inspection of machinery by the jury. *Held* that, on trial of an action for the death of a servant caused by dangerous machinery, the court was authorized to make an order that a witness for plaintiff be allowed to inspect the machinery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.*]

15. Master and Servant (§ 153*)—Injury to Servant—Youth and Inexperience.

Where a master employs a servant to do dangerous work, who, from youth or inexperience, may fail to appreciate the danger surrounding him, it is a breach of duty for the master to expose such servant, even with his consent, to such danger, without giving him such full instructions as to enable him to fully comprehend them, and to do the work safely, with proper care on the servant's part.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Myra M. Clark against the Tulare Lake Dredging Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dixon L. Phillips, for appellant. Frank H. Short and H. P. Brown, for respondent.

HART, J. This is an action for damages for the death of a minor son of plaintiff alleged to have been caused through the negligence of the defendant, a corporation. The cause was tried by jury. The plaintiff, in her complaint, claimed damages in the sum of $10,000. The jury, however, returned a verdict for the sum of $5,000, for which amount the court entered judgment in favor of plaintiff. This appeal is from the judgment so entered and from the order denying defendant a new trial.

The general points made by appellant are that the evidence does not support the verdict; that the court erred, to the prejudice of defendant, in the admission and rejection of certain testimony, and that the court erred, to defendant's damage, in giving and refusing to give certain instructions, and by the modification of others which were requested by defendant. The specific contention with respect to the specification of the insufficiency of the evidence to uphold the verdict is that the proofs disclose that the proximate cause of the accident by which the deceased received the injuries culminating in his death was his own negligence, and upon this ground a motion for a nonsuit was, upon the close of the case for plaintiff, presented and urged by defendant, said motion having been denied by the court. A similar motion on the same ground was made and denied on the close of the case by both sides. The consideration of this point will, of course, necessitate a careful scrutiny of the testimony, particularly so in view of the fact that a coemployé of deceased was the only other person present—one John Burnett—when the accident occurred, and was, therefore, the only living eyewitness who was or could be produced at the trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It appears that the deceased, Ray Clark, at the time of his death, was a minor of the age of 16 years and 6 months, approximately. He had been for a few weeks prior to his death an employé of defendant on its dredger, which was being operated in Tulare Lake, in Kings county. On the 1st day of May, 1907, while thus engaged, according to the averments of the complaint and the undisputed evidence, his foot "was so caught and entangled in a large shaft (connected with said dredger) and the machinery running and operated thereby that his foot and leg were crushed, broken, and mangled," and from the effects of the injuries so received he died on the 2d day of May, 1907. From the evidence it further appears that the deceased was one of three children of the plaintiff, from whom the father of said children had been separated and had lived separate and apart for some eight years prior to the trial of this action, and had during that period contributed nothing toward the support of his family. At the time of the employment of the deceased by the defendant and for some time prior thereto, the plaintiff resided with her children and her aged mother near Merced, although the deceased, at the time he accepted, through his mother, employment with defendant, was and had been for some time attending school in the city of Fresno. The accident causing the death of the deceased happened at about the hour of 2 o'clock in the morning, the deceased and said Burnett, the coemployé to whom we have referred, being at that time on the night "shift."

As stated, the deceased was, through plaintiff, employed by the defendant in the month of April, 1907. As to the circumstances of said employment, the plaintiff testified: "Mr. Lewis (president of defendant) said that he wanted him for a leverman. I asked him if he thought he could do it. He had already seen the boy, and he said yes, he thought he could do it nicely. That he seemed to be a fine looking boy, and he was well pleased with him, and that he would teach him how to do it or have him taught. And that it was a perfectly safe place up in the lever room, and that he was going to put him to work in the lever room. He asked me if the boy—or rather it came up in the conversation—if the boy knew anything about machinery. I told Mr. Lewis no, he did not, and I wanted him to be put in there where there was no danger. Mr. Lewis said there was no danger. That he liked the appearance of the boy and would teach him. Ray asked me about going to work for Mr. Lewis, I told him yes. He wanted to go and earn some money to finish up his schooling and help me. I told Mr. Lewis that, and he told me that he would take good care of Ray and that his wife would look out for him. I told him the boy hadn't been away from home much."

The witness C. E. Traves gave the details of a conversation with defendant's superintendent, had prior to the time at which negotiations for the employment of deceased were carried on with plaintiff, in which the proposed employment of the boy and the character of the duties which it was proposed that he should perform on the dredger were discussed. The witness testified: "I am 52 years old. My occupation or business is mechanical engineer and machinist. Have had about 25 years' practical experience in mechanical engineering. I know Mr. Lewis, I know Mrs. Clark, and I know the boy that was killed. Mr. Lewis came to my place of business at Fresno and wanted to get a man. I told him I didn't know of any, but I knew a good boy. I asked him what he wanted him for, and he said he wanted him to handle levers, and I said to handle levers on what, and he said on the dredger—down to our dredger. I said this boy has no experience, but he is willing to learn, and he is about the only support of his mother. And he said we don't want experienced hands because the captain would rather have the men and break them in, as he gets better men than we do with some man that is already broke in. So I brought the boy down, or sent the boy down, rather. I told Mr. Lewis that the little boy did not know anything about machinery; that he was inexperienced, but that he wanted to learn, and was ambitious and wanted to learn. Mr. Lewis replied that he wanted a leverman. Mr. Lewis said there was no danger whatever above in the lever room and that it would require but very little skill. He said it was away from the machinery and above, the lever room was."

Burnett, the coemployé of and on duty with deceased when the accident happened, described the dredger as follows: "Its hull is probably 50 or 60 feet long and about 20 or 25 feet wide. There is a bulk heading around it and an open space in the front part, and the engine is on the inside of that, and the shaft just in front of the engine. Forward and on the outside of the bulk heading is the turntable and boom. Above the roof in the forepart is the lever house and cables from the drums running through sheaves at the end of the boom and makefast to the clam-shell bucket. * * * There are three levers in that lever room, but only two operated, and there is a lever that is operated by the boat. There is no other machinery in this lever room. These levers operated the machinery that is down below; that is, it operates the friction where the drums are, operates the drum that rolls and reels up the cable to hoist the bucket and to swing the boom around. * * * The levers operate certain machinery that is inside the inclosure, and the machinery consists of drums and spools. * * * In describing to the jury the spools and drums that are operated by these levers I will do so in relation to the location of the engine. The engine is located on the inside in the central part. The engine transmits the power to the cogwheels. I am not much of a machinist and it is pretty hard for me to remember. Just in the fore part of the engine there is a wheel—a cogwheel—as near as I can remember, and connected with that is a larger cogwheel directly in front of it." Further description of the machinery and its operation will appear from this witness' testimony respecting the circumstances immediately preceding and attending the accident, from which it will further be observed that as to the precise manner in which the accident happened Burnett was unable to furnish any particular information—that is to say, that the witness could not tell exactly how the foot of the deceased was caught in the spider wheel. This paucity of information may be accounted for in the fact that, when the accident occurred, both deceased and Burnett were engaged in attempting to readjust or restore to its proper place a steel cable which had left its groove on the drum and doubtless their minds and attention were entirely absorbed by that performance. We will, however, present the story of the accident, as far as he was able to describe the circumstances thereof, as related by Burnett himself on the witness stand. After giving his age as 25 years and stating that he worked on the dredger in the capacity of a leverman before and at the time Ray Clark was killed, and declaring that there was very remote danger involved in the operation of the levers, this witness testified, in part, as follows:

"At the time Ray was killed, we were trying to clear a 'fouled' cable. It is a steel cable on a drum, and it should run in its proper groove. Each turn of the cable should run alongside of the other preceding turn. But, instead of that, it got outside in some manner of itself and that turn got twisted in some way, became fouled—that is what I mean by being 'fouled.' * * * That spool goes around and takes up the cable and this spool by revolving it became fouled, the cable became crossed over and was piling up. * * * In the first place there was a noise, a sort of knocking noise that seemed to come from the end of the boom, and I believe I called Ray, to stand on the fore part of the dredger to see if he could locate what was wrong. I believe that he went aft, I couldn't say, but I believe when I came down he said that the cable was fouled on the drum, and we went I believe to try to clear it. * * * I don't remember what we said. I know that we decided that we would try to clear the cable; don't remember what words we said, though. * * * Well, we got bars; something to pry the cable over to its proper place. * * * And part of the time I tried to get the slack of the cable in the fore part. I tried to get the slack pulled in of the cable while Ray was trying to clear it with the bars on the drum. And I believe he stepped upon this block (which was located within a few inches of the wheel in which deceased's foot was caught) and in some manner got his foot in the spider wheel that was revolving just back of him, and was taken over and crushed. * * * The wheel is located directly in front of the engine. * * * It is called a spider wheel; I suppose it is made of cast iron, but in the center the standards or spokes are wider than at the top. I think the diameter is about two and a half feet and it is connected with what we call a friction which jams into the other wheel —it is a friction wheel, but there was no immediate connection between the wheels and the lever. * * * Q. Tell us the dimensions of that wheel or any of those wheels around there, if you can. Ans. Well, I have down here two feet seven and a half inches, the diameter of the wheel. * * * It might not be exact measurement, but quite close, I believe. I took this measurement at the time the wheel was actually revolving. * * * The length of that block that Ray was standing on, the place where he was standing, is 18 inches. That is in the place for him to stand—where he was standing. That is the entire length of the block—that is, from the bearing to the end of the block where he was standing was 18 inches. The block is located between the drum and the wheel, that is what I call the spider wheel, which is about two feet seven and a half inches in diameter. * * * The distance from the block to that wheel in the center is from an inch and a half to three and a half inches. * * * This block was lying, horizontally, alongside of the wheel; that is, fore and aft. * * * The wheel is attached to a shaft, * * * and revolves the long way of the dredger. * * * The block that I have mentioned was also lying the long way of the dredger. * * * The distance from the block to the center of the wheel is an inch and a half—that is, from the center of the wheel—the parts, the ends or rim of the wheel, it would be three and a half inches. * * * At the time Ray was busy unfouling this cable I was bringing down the slack of the cable; that is, pulling from forward—aft toward the drum. I know that I was just about in front of the drum. I was probably two or three feet, maybe four feet, away from him, I was moving around at the time. He was facing the side of the dredger and so was I. I was looking practically in the same direction as he was and pulling on this cable for this slack so he could pry off the cable and make it move properly. We did not succeed in clearing the cable because the accident occurred. * * * When Ray was caught in this wheel he cried out and as soon as I turned around to my right I saw him going over the wheel, and I jumped around and stopped the lever, and pulled him out and called for help. The time that elapsed between the time that I first heard his cry for help and the time I succeeded in stopping this wheel from rotating was just a few seconds, just as quick as I could get to the engine to stop it; just as soon as the engine stopped the wheel stopped. The engine probably made one or two revolutions after shutting off the distillate, then stopped. This engine makes about 20 revolutions a minute. When I got back to where Ray was I pulled him clear of the wheel. There was no one else there when I got there. His legs were underneath the wheel, and he was lying flat on his back; he was lying back on the deck on his back, and his legs were underneath this wheel—he was lying there. The wheel I think is about three or four inches off of the deck as near as I can remember; that is the outer rim of the wheel is about four inches above the floor of the deck. * * * I think Ray, when endeavoring to release the cable, was standing over here in the fore part of that block. I believe that he had both feet on the fore part of it, but he would be moving around half of the time and maybe at some time he was standing with both or one foot across there, but I am not certain, as I was looking the other way; but at times he was standing with one foot on one side and then shifted one to the other, shifting his position. I don't remember seeing him standing that way. We were moving around, and I was looking the other way at the time." Continuing, Burnett declared that he was not in charge of the machinery of the dredger on the occasion of the fatal accident; that his duties at that time were to operate the levers in the lever room, and that Ray Clark was, on said occasion, the "deck hand," and as such had charge of the machinery. He testified that it was the duty of the deceased to "oil the machinery and watch and see that nothing went wrong—nothing got heated down below there. * * * Ray also run the engine and supervised the machinery and was doing this at that time." He stated that the dredger was lighted fairly well, although he admitted that, being oil lamps, they did not produce a particularly brilliant light. A hand lantern was necessary to be used about the dredger after dark. He admitted that, when the machinery did not work as it should, he, "being older than Ray, assumed the lead. * * * Ray was running the engine on the dredger on that watch, of course. That watch consists of myself and Ray Clark, a deck hand, just two of us, and the watch was from 12 at night to 6 in the morning—six hours work. * * * This was not the first dredger of that kind that I ever worked on. Previous to working on this dredger, I worked on other dredges near Stockton, where they built dredgers, and then I worked as a fireman on the dredger."

On cross-examination Burnett said that "there was plenty of room on the floor of the deck for him to stand there and do this prying with the bar on this cable," the inference from this statement being that deceased would then have been in a position in which his foot could not have come in contact with the spider wheel. The block on which deceased stood was some 18 inches higher than the deck floor. Burnett had no distinct recollection whether the wheel in which deceased's foot was caught had guards around it or not.

The witness Traves, who is a practical machinist, visited and inspected the dredger during the trial, and, after describing the machinery by which the dredger is operated and the manner of its operation, testified that the wheel in which the deceased's foot was caught had no guards around it. "I examined the machinery carefully this morning," he continued, "and know how it is assembled and put together, and I know the usual practice of guarding and protecting such machinery as I saw there." He further testified that there was no other way in which the deceased could have done the work which it was necessary for him to do to replace the cable in its proper groove than in the very manner in which he did attempt it. He said that he might have gone "clear around the dredger and come back on the other side," but that, had he done so, "he would have to step up on the same place and do the same work on this side. He couldn't do that very well on account of that large gear. There is a number of other gears going there; he couldn't get in there in the first place."

The plaintiff testified, in rebuttal, that, after the death of her son, she held a conversation with Lewis, president of defendant, relative to her son and the manner of his death. She said that Lewis "said he was sorry that the accident occurred, but that wouldn't bring back my boy. He said that he did not intend to keep him there; that the boy wasn't capable of that work, and that he had a man engaged to take that place, and that man had been allowed to go to a picnic, I believe at Laton. He said that if the man had been there that day you would have your boy. It seemed to be fate. I remember his using that particular word; that it seemed to be fate in the way I lost the boy. That this man wanted to go to that particular picnic and he let him go. That he didn't intend to keep Ray at all. He did not consider him competent to do that work, and was not intending to keep him there." In this connection, it may at this time pertinently be stated that Lewis admitted having in substance said to Mrs. Clark, on the occasion referred to by her, that "he had another man engaged to do the work that Ray was doing the day he met with the accident, but that this man wanted to attend a picnic at Laton, and that if he had not gone down to the picnic her boy would have been living yet."

For the defense, Lewis, president of the corporation defendant, testified, in part, as follows: "A day or two before I saw Ray at Corcoran, I saw Mr. Traves, the witness in this case, at a shop in Fresno. * * * I asked Mr. Traves if he knew of any experienced leverman and he said no. I told him I could use some gas engine men and that they could have an opportunity to learn and that Mr. Huntington (general superintendent of the dredger) had told me I could get better levermen by learning them aboard the machine than by shipping them down from the city. * * * Mr. Traves said he did know some young men and he said one of them had been in the shop that morning. He said he didn't know but what he would see him again probably and send him down. I told him all right, send him down. I told him that we paid $40 a month and board to beginners—we paid $60 a month at that time to experienced levermen; that a man qualifying himself as leverman would get a raise in pay. * * * After I saw Ray at Corcoran that I have just spoken about, I saw Mr. Traves that same day in Fresno. I think I went to his shop. He was doing some work for us. At all events he brought Mrs. Clark and introduced her to me in the afternoon at the Santa Fé depot. * * * I liked the looks of the boy, and thought he would make a good subject to make a leverman of, and have an opportunity to learn the levers, and if he got proficient in that he could get leverman's wages, which was $60 per month. Mr. Huntington was superintendent of construction and had control of things generally under me. Ray was a well set-up youngster; he told me he was about a certain age and he looked it. He was a bright boy, intelligent looking, and his movements were quick, I think he was about 5 feet 4 or 5 inches in height and might have weighed 140 pounds. I thought I would give him an opportunity to learn the work and when Ray went to the dredger to work they put him to running the gasoline engine on the dredger. I did not direct his work on the dredger at all. I did not give any instructions to the men about him. The boy was on watch 12 hours a day. The rate of wages that the defendant was paying were allowing the deceased for his work on the dredger during the time that he worked there was $40 per month."

C. T. Huntington, general superintendent of the dredger, stated that his business was that of the assembling of machinery for dredger work, and the construction "and placing in operation dredgers and particularly what is called clam-shell dredgers. * * * In this state I have been working on dredgers of this kind for about 12 years in all capacities, from fireman to captain, and during the last 4 years I have been superintendent of the construction and of the assembling of the machinery itself. * * * When Ray Clark came there to go to work the most of the machinery was to be assembled and this shaft that is spoken of had not been assembled. Ray was there and working from the 10th of April, 1907, and he was helping the crew assemble the machinery. * * * Before I began to try out the machinery to test it, to see whether it would do the dredging, I instructed each man individually to be very careful about getting around any moving portion of the machinery, explaining to him that a gas engine couldn't be stopped instantly, and to get caught in the machinery meant a serious accident. * * * When we went or started to operate the dredger to see whether it would do the work Ray was doing what we call deck work. That is to say, his duties consisted of looking after the gas engine and machinery, and oiling the machinery at regular intervals, and keeping general supervision of things, and to see that everything ran smoothly on deck. I gave instructions to the deck hands and to Ray Clark that in the event that anything should happen or go wrong or serious trouble, they were to call me. * * * I had occasion to say something to Ray Clark about going in and about that machinery. I spoke to him as I spoke to all the rest, cautioning him. * * * After I had given these instructions to Ray and all the others in the first instance, I did not say anything further to Ray about going about the machinery." On cross-examination Huntington said: "If I said on my direct examination that I showed Ray how to start the gas engine, I didn't mean it. I don't remember having said that and if I did say it, I am mistaken. * * * It is dangerous to go near this revolving wheel which is left uncovered; and it is not usual to guard such wheel and it is entirely unnecessary."

T. Wiley, who testified that, after the machinery was assembled and placed on the dredger, "the work that was assigned to me and my duties were nothing in particular and everything in general," said that, "as it was brought to my notice that Ray Clark was inclined to be careless about dangerous machinery, I told him personally, over and above collectively to the crew, that it was dangerous—certain parts of it were dangerous—and especially these wheels that were turning in close proximity to those pedestals. I mean by these wheels the spider wheel, because they were shown to me very distinctly and pointed out, and I carried out my orders to that effect." By cross-examination of this witness, it developed that he had ceased work for defendant, and that at about the time preparation was being made for the trial of this action he was stopping in Los Angeles. He said, referring to Lewis, president of defendant, "I wrote him about two months ago that I would like to go down on the Colorado river and he wrote me, saying he wanted me to make an affidavit before I left. I wrote him that I would rather take charge of the dredger, so I got a telegram from him about two weeks ago to come and take charge. We started up the dredger just about a week before this suit commenced. I am at present captain of the ship and have the supervision of the whole matter and at nighttime I am not disturbed for minor things that happen, and I am not called when the cable is foul as it was when Ray was killed. *If the cable is fouled those in charge have to disentangle it.* (Italics ours.) * * * I have had about 25 years' experience in running machinery."

Testimony offered by both sides, was received by the court as to the height and weight of deceased. Lewis said that, in his opinion, the deceased was about 5 feet 4 or 5 inches in height and "might have weighed 140 pounds." In this connection, he declared that Ray was a lad of intelligence and appeared from his talk to be familiar in a general way with machinery. Wiley expressed the opinion that deceased was about 5 feet 6 or 7 inches and that he would weigh about 150 pounds; that "he was well built, a stout young man." Plaintiff testified that she knew exactly the height and weight of her deceased son at the time of his death, and said that "he was just a fraction of an inch shorter than I am," and that he weighed 138 pounds, and that "he was not fleshy." Francis Cunningham testified: "I measured plaintiff's height this forenoon. She is exactly 5 feet 2¾ inches in height. And I consider that a correct measurement, as I used the same measure as I use in registration."

We have now presented, in substance, a fair statement of the evidence from which the jury reached the conclusion, under the court's instructions containing the law pertinent to the case, that the proximate cause of the death of plaintiff's minor son was the culpable negligence of the defendant. But, as stated, the defendant vigorously protests that the evidence clearly discloses gross negligence upon the part of the deceased, and that but for such negligence he would not have met with the accident which cost him his life. Upon most all the salient facts in the case there is a conflict in the evidence, but it is, of course, the duty of this court to treat all the facts brought out by the evidence which are necessary to support the verdict as having been found to be true by the jury, notwithstanding the fact that there may be evidence in flat contradiction of such facts. Obviously, under our system, the jury are the exclusive judges of the weight of all evidence and the credibility of all witnesses, and it is, as has often been repeated, peculiarly within their right and province, when considering the evidence, to give to it whatever weight it may in their deliberate judgment be entitled to, or, if it be their judgment that it is entitled to no weight in the determination of the ultimate issue disregard it altogether. And, having done this in a given case, their conclusion cannot be questioned by an appellate court, if there be nothing to show that their verdict has been planted upon evidence which is, on its face, or inherently, improbable and unbelievable. While a verdict returned for defendant on the evidence before us would undoubtedly stand upon a firm foundation, viewed from the standpoint of an appellate court, we, on the other hand, doubt not that a careful examination of the record by the light of the constitutional provision limiting the power of appellate tribunals in this state to the consideration of questions of law only, can lead to no other conclusion than that the evidence displayed before us is sufficient to render the conclusion of the jury immune from successful attack here.

We have before us a case where a lad of tender years, of immature judgment, and without previous experience in dealing with and in handling complicated and dangerous machinery, at an hour of the night when a boy of his age should be conserving by sleep his developing physical power, is put in entire charge, according to the only witness to any of the circumstances attending the accident, of the most dangerous part of the machine or the dredger on which he was employed, after having been expressly engaged to perform other service—that of a leverman —the performance of which was attended by very remote, if any danger, according to Burnett. He had then had, let it be noted, only three weeks' experience of any character on a clam-shell dredger.

Lewis, president of the defendant, himself testified that he employed the boy as a leverman, and the plaintiff testified that Lewis promised her, when the contract of employment was made, to assign the deceased to duties on the dredger in the execution of which he would be free from danger of accidents. Lewis further admitted, at least in effect, that the day the lad lost his life he was engaged in performing the duties of another employé, who had absented himself from the dredger for the purpose of attending a picnic. He said to plaintiff, after the tragic death of her son, that had said other employé remained on duty that day the deceased "would have been living yet." The irresistible inference from this statement is, it seems to us, that the deceased had been assigned to duties on the day of the accident which he was not only not employed to perform, but which he was not in truth qualified to perform. Burnett, who, though called as a witness for the plaintiff, apparently displayed little disposition to squarely and unhesitatingly detail the circumstances of the accident, said that the deceased was in charge of the deck and the machinery on that night. It is true that this witness stated that, when the cable became disarranged, he and deceased "mutually decided" to attempt restoring it to its proper groove on the drum, the manifest purpose of such statement being to convey the impression to the jury that deceased voluntarily and without suggestion by or directions from the witness, took the part that he (deceased) did in assisting in an attempt to restore the cable to its proper place. But, assuming that the deceased acted in the matter largely, if not entirely, upon his own initiative and volition, it still remained for the jury to say, from a consideration of all the evidence, whether he acted negligently or without due care in the performance of a duty which, it clearly appears, from the fact of having been taken from the service for which he was expressly employed and placed in charge of that part of the dredger where the greatest degree of danger existed, was forced upon him by those in authority.

It must be borne in mind that the burden was upon the defendant to establish by a preponderance of the evidence its defense of contributory negligence by deceased, and that such negligence was the proximate cause of the accident and its direful consequences. There is no direct evidence showing negligence on the part of the deceased. The precise manner in which he received the injuries which produced his death is, as before stated, unknown, so far as this record is concerned. On the other hand, there are circumstances from which the jury could with good reason infer negligence on the part of the defendant, and that the accident would not have occurred and the boy's life forfeited but for such negligence. To begin with, the act of the defendant in putting the deceased in charge of the machinery under the circumstances was negligence, even if it be true that the boy was warned that this, to him, unusual position involved a hazardous undertaking. Then there is the testimony of Burnett to the effect that the lights on the dredger at the time of the accident were not "particularly bright," and the testimony of Traves that the spider wheel in which the deceased's foot was caught was without the guards usually placed about such wheels.

The burden was upon the defendant to show that those in authority over the dredger not only warned the boy of the danger attendant upon the discharge of the duties of a "deck hand" having charge of the principal machinery of the dredger, but it was also incumbent upon it to show that, if such warning were given, it was so given as that the deceased fully appreciated and realized the danger by which he was thus surrounded. And, at last, it was for the jury to say, from a review and consideration of the whole record, whether the deceased was warned by his superiors of the danger or risk to which he was negligently subjected, and, if so, whether such warning was such as to properly impress upon his judgment a full appreciation of the hazard.

It is very clear, from the verdict, that the jury concluded either that such warning, if given, was not sufficiently explicit and specific to influence the judgment of the deceased in any perceptible degree, or, in other words, not so comprehended by him that he fully realized the danger surrounding him, or that deceased was not cautioned at all by his superiors. It is no answer to say that, no one having been produced to directly contradict the testimony of Huntington and Wiley with regard to cautioning deceased about the danger of the machinery, the jury were not authorized to find that either no caution or insufficient caution was given. How can this court determine how the testimony of Huntington and Wiley on this point impressed the jury? It may be that the very manner of giving their testimony was itself, in the judgment of the jury, a complete contradiction of the truth of their statements. It may be (and who can gainsay their right to have done so?) that the jury felt justified in disregarding in toto the testimony of these witnesses. And, if they did, may an appeal court declare that they were wrong in so doing and in effect say to the jury: "You misinterpreted the manner in which these witnesses testified. You should have given their statements full weight and credit, and, as no other testimony was brought before you directly contradicting them, you should have found that the deceased was sufficiently warned as to the great danger of the machinery to have fully put him on his guard"? And so would this court be compelled to hold if we were to say that the testimony of Huntington and Wiley should have been, in the absence of direct contradictory proof, accepted by the jury as conclusive upon this point. And thus would this court clearly invade the province of the jury by passing upon the weight of testimony and the credibility of witnesses. Our Code explicitly declares that the jury are the exclusive judges of the credibility of witnesses (section 1847, Code Civ. Proc.); that they are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive (section 2061, Code Civ. Proc.); and that they "are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds." Code Civ. Proc. § 2061, subd. 2. No one has ever doubted the right of a judge or jury to believe one witness as against another where they have testified in direct opposition to each other, and the power and right of the judge or jury, in dealing with questions of fact, is no different and no less where the witnesses all testify one way, and when a verdict has been returned in opposition to the testimony of all the witnesses, such verdict, it seems clear to us, must be accepted by appellate courts in this state as a rejection of such testimony on the ground that it is unworthy of belief and weight, unless from the face of the record itself it can be said that the jury's action is inherently unjustifiable. And interference with a verdict by an appeal court because it appears on the face of the record on appeal to be opposed to the testimony of all the witnesses cannot be, logically, any less an invasion of the province of the jury than if there appeared to be a direct substantial conflict in the evidence. It often happens, it may be said as a matter of common knowledge, that the most complete and conclusive contradiction of the truth of a witness' testimony is his own manner on the witness stand when giving it. And it is the very fact that juries and trial judges have the peculiar advantage of determining whether witnesses have contradicted themselves, not in terms, but by their manner of testifying, that has given rise to the familiar rule that appellate courts will not and cannot set aside verdicts of juries or findings of a trial court based upon evidence in which there appears to exist a substantial conflict. It is the duty of this court to conclude that the jury either attached no weight to the testimony of Huntington and Wiley to the effect that they cautioned the deceased, or that, although they might have cautioned him, the deceased was not thus made to clearly realize and appreciate the great danger lurking in the powerful complicated machinery of which he was negligently put in charge.

It was, furthermore, for the jury to determine, from all the facts and circumstances, whether the deceased, in taking the position near the spider wheel for the purpose of prying or attempting to pry the cable back to its groove, acted under the directions of Burnett. The latter, it is true, testified, as we have seen, that he gave deceased no directions, but that they "mutually decided" to act in a certain way; yet, Burnett was older than deceased by about 10 years, and had had some previous experience with dredger machinery, having been employed on other dredgers. This fact, we doubt not, was known to the deceased, who perhaps recognized the former's superior knowledge of such machinery and of how to handle and replace parts which had become disarranged. Burnett admitted that "in these cases (referring to occasions when the machinery became disarranged) being older than Ray, I assumed the lead." From all the circumstances it is not difficult to understand how the jury could have justly come to the conclusion that Burnett "assumed the lead" on the occasion of the accident, and directed the course and movements of deceased in the attempt to rectify the difficulty with the cable. But no useful purpose can be subserved by pursuing this question further. It must suffice to say that we have examined the testimony with extreme care, and have thus been led to the discovery of no just reason for interfering with the verdict upon the proposition that there is insufficient evidence to justify it.

Nor can we say that the verdict is excessive or beyond what the evidence justifies as fair and just compensatory relief. The boy was, at the time of his unfortunate death, lacking in his majority by 4½ years. Plaintiff testified that he had contributed, and was, when killed, contributing to her support. She was entitled to this during the remaining 4½ years of his minority. The earnings of the lad during these remaining years of minority cannot, as is the assumption, justly be computed alone upon the wages he was receiving at the time of his death. One of the witnesses, Williams, an engineer by occupation, testified that the services which young Clark was performing when killed were reasonably worth the sum of $85 per month. Besides, it is proper to assume that had he lived and continued in the employment for which he was originally engaged—that of leverman—he would, as he progressed in skill in that capacity, be entitled to an increase in salary from time to time until he would have received the highest rate paid for such services. He was, according to the witnesses, intelligent and apt at learning, and the jury were the sole judges of what, from all the evidence, his probable earnings would be during the remainder of his minority had he lived. Moreover, the jury were authorized, as the court properly instructed them, to consider and take into account, as an element affecting the pecuniary value of the service of deceased to the plaintiff, the fact that plaintiff has, by his death, been deprived of the comfort, society and protection of her son. Beeson v. Green Mountain, etc., Co., 57 Cal. 38; Lange v. Schoettler, 115 Cal. 388, 47 Pac. 139; Harrison v. Sutter Street R. R. Co., 116 Cal. 156, 47 Pac. 1019; Fox v. Oakland Con. St. Ry., 118 Cal. 67, 50 Pac. 25, 62 Am. St. Rep. 216; Dyas v. Southern Pacific Co., 140 Cal. 308, 73 Pac. 972. And, obviously, this element of loss of society, comfort and protection of the son to be reckoned in determining the pecuniary value of the service of the deceased to his mother is difficult to measure in mere dollars and cents, and manifestly must, with the whole question of damages, be left to the good sense and sound discretion of the jury to be exercised in the light of all the circumstances of the case. As is said by the authors of Graham & Waterman on New Trials, p. 451, "in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated. * * * The law that confers on them this power and exacts of them the performance of this solemn trust, favors the presumption that they are actuated by pure motives. It, therefore, makes every allowance for different dispositions, capacities, views and even frailties in the examination of heterogeneous matters of fact where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose." See Scally v. W. T. Garratt & Co., 11 Cal. App. 147, 104 Pac. 325, and cases therein cited.

It was the duty of the jury in this case, as the court in its charge clearly told them, to award to the plaintiff "an amount which would justly compensate plaintiff for the probable value of the service of deceased until he had attained his majority—the age of 21 years—taking into consideration the cost of his support and maintenance from the time of his death until he would have reached the age of 21 years," and we perceive no just reason arising from the record for holding that the verdict, under all the circumstances appearing, represents anything beyond a fair and reasonable admeasurement of the compensation to which plaintiff is entitled for the damage she has sustained.

There is very clearly nothing in the argument that, because the boy, prior to his employment by defendant, had been attending school, and that the purpose he had in view in seeking and securing employment was to earn means by which he might be able to give himself the advantages of an education, the time served in his attendance at school and the service he rendered to further his purpose in that laudable direction could not be considered as service of the minor to the plaintiff. No more important and imperative duty rests upon parents than that of giving their offspring the advantages of a sound educational foundation, and the earnings of a minor dedicated to such purpose become for that reason no less the result of service to the parents than if he should turn them over directly to those naturally responsible for his custody, care, maintenance and education to be used for some other purpose within the scope of the duties of the parents as such.

2. There are 41 assignments of error involving the court's rulings upon the evidence. We cannot give, nor is it necessary to give, all these special attention in this opinion. We shall, however, notice some of the exceptions on this score, and as to the others —indeed, as to all—it may be said generally that we have discovered nothing prejudicial to the rights of the defendant.

The motions for a nonsuit were based upon the alleged ground that the evidence shows that the accident in which the deceased lost his life was proximately occasioned by his own negligence. The view which we have expressed respecting the point that the evidence does not justify the verdict is a sufficient answer to the contention that the exceptions to the court's adverse rulings on said motions are well taken.

Exception No. 2 is addressed to the ruling of the court allowing the witness Burnett to answer the following question over the objection of defendant: "You remember having a conversation with Ray Clark, just a short time before the accident occurred, and saying that the reason they didn't have more lights there (referring to the dredger) was because they were afraid of an explosion?" The witness denied having had such a conversation with the deceased at the time mentioned, and, even if the question called for testimony which was for any reason improper, manifestly no harm could have resulted to the defendant either by the question or the answer.

The witness Williams, with a view of becoming a witness for plaintiff, made an effort to go aboard the dredger for the purpose of inspecting the machinery, and thus equipping himself with such knowledge as would enable him to describe to the jury the dredger and the operation of its machinery. He was accompanied by counsel for plaintiff and one of the latter's surviving sons. The parties in charge of the dredger at the time would not permit them to go upon the dredger. Plaintiff introduced Williams to show the attitude of the employés of defendant in this matter, and the court, over an objection by defendant, permitted the witness to testify that the officers in charge of the dredger had flatly refused to allow him to inspect and examine its machinery while in motion or at all. It is claimed that the allowance of said testimony was prejudicial error. We do not think so. Williams is a machinist and a stationary engineer, and it was proper to admit testimony which would bring clearly before the minds of the jury a description of the character of the machinery which the defendant had put the deceased in charge of and the nature of the operation of said machinery for the purpose of illustrating the probable manner in which the accident occurred. The refusal by the defendant's employés to permit this inspection, knowing, as they did, the purpose for which it was to be made, was a circumstance—whether of much weight or little weight it mattered not—tending to disclose a disposition on the part of the superintendent or captain to prevent plaintiff from presenting as complete a case as the circumstances would permit. It was, in other words, a circumstance having a direct tendency to establish an effort on the part of the defendant to suppress testimony, and there has never been any doubt that testimony showing or tending to show an attempt upon the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court or jury is competent and proper.

Exception No. 16 involves the action of the court in making an order that a witness for plaintiff be allowed to inspect or examine the machinery. It is contended that the court acted in excess of its authority in making this order, and thus committed error which was damaging to the defendant's rights. There is, so far as we know, no express provision of law authorizing the course adopted by the court. But every court has certain inherent power—power which, exercised within reasonable and proper limits, authorizes it to go beyond its express powers where the interest of justice imperatively demands such a course. Moreover, by section 128, subd. 5, of the Code of Civil Procedure, every court is in general language clothed with full control and power over every person connected with a judicial proceeding before it, in so far as said proceeding is concerned, and we fail to see in the action of a court compelling the production of any relevant and competent testimony which will make clear or tend to make clear the truth as to a disputed question of fact anything in contravention of either the letter or spirit of subdivision 5 of that section of our Code. We perceive no distinction between the proposition here and the one presented and discussed in the case of Johnston v. Southern Pacific Co., 150 Cal. 536, 540, 89 Pac. 348, 351, where, in an action for personal injuries, the trial court was appealed to by the defendant for an order allowing the plaintiff to be examined as to her injuries and the effect thereof by physicians of the defendant's own choosing, testimony bearing upon that subject having been given by physicians who had been employed by and were introduced as witnesses for plaintiff. The court denied this application upon the ground that it had no power to make the order, and on appeal the Supreme Court held that the ruling was erroneous; that the court was authorized to make said order by virtue of the provisions of subdivision 5 of section 128 of the Code of Civil Procedure, supra, and quotes, approvingly, the following from the case of Wanek v. City of Winona, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448, 79 Am. St. Rep. 354: "To allow the plaintiff in such cases to call in as many friendly physicians as he pleases, and have them examine his person and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call constitutes a denial of justice too gross in our judgment to be tolerated for one moment." See the innumerable cases in Johnston v. Southern Pacific Co., supra, cited to this point and in confirmation of the rule laid down in the Minnesota case.

In the case at bar, the only eyewitness to the accident was an employé of defendant. In fact, as counsel for plaintiff suggested at the trial, the plaintiff was compelled to secure her witnesses "from the ranks of the defendant." As stated, we see no difference in principle between the action of the court in the case at bar in ordering defendant to permit an expert witness for plaintiff to examine its machinery and the order which the Supreme Court declares that it was prejudicial error for the trial court to have refused to make in Johnston v. Southern Pacific Co. Most certainly the same reason exists why the court in this case should have made the order complained of as exists for making an order for the purpose for which the order in the cited case should have been made. If the testimony relative to the nature and character and construction and operation of defendant's machinery had been confined exclusively to that received through defendant's own employés, it is safe to say that the jury would have received an unsatisfactory description of the general and the particular situation on the dredger on the occasion of the accident as to all the important objective or physical facts that might or did tend to reflect some light on the manner and circumstances of the accident. And the testimony of the expert, having been confined to a description of the machinery and the manner of its operation, could no more operate prejudicially against the rights of the defendant than a diagram or a model of the machinery, a familiar method adopted by courts for clarifying testimony otherwise not easily or readily understood. Furthermore, the court could, in the exercise of its discretion, have ordered an inspection of the machine by the jury (section 610, Code Civ. Proc.), and manifestly this course would have involved greater risk of error than that pursued by the court. Our conclusion is that the court in no manner or degree transcended its power or authority in ordering defendant to allow plaintiff's expert to examine the machinery and give testimony relative thereto.

3. Instruction No. 1, given to the jury by the court, and which is objected to as erroneous, reads: "You are instructed that where a master employs a servant to do dangerous work, or to do work that must necessarily require him to move in and about moving machinery of a dangerous nature, who, from youth, inexperience, ignorance, or want of capacity, may fail to appreciate the danger surrounding him at such work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same without first giving him such full and complete instructions as will enable him to fully and completely comprehend them, and to do the work safely, and with proper care on the servant's part." The foregoing instruction is founded upon language used in the case of Foley v. California Horseshoeing Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87, and very clearly states the law with regard to the duty imposed upon a master in his relations as such with a minor in his employ as a servant. That

there is a well-defined distinction between the duty resting on a master toward a minor in his employ and the duty he owes to an adult servant, is a proposition thoroughly settled both in principle and by the cases.

In the case just referred to the facts are strikingly similar to those in the case at bar. There the minor, who was of the age of 14 years, was originally "employed by defendant to punch holes in horseshoes by means of a machine known as a horseshoe punching machine." Subsequently the boy was ordered by an assistant foreman of defendant "to adjust a portion of the mechanism operating the punching machine," to adjust which involved a hazardous undertaking. Plaintiff was not "familiar with the mechanism and the manner of adjusting the same, and was ignorant of the hazard." The boy, obeying the order thus given him, was engaged in correcting the defect when the machine, by reason of said defect, was suddenly set in motion and the injuries complained of were thereby sustained. It was contended that plaintiff, according to his own testimony, "knew the special danger and risk which, because of the defective appliance, must have attended the working of the machine, and that, having this knowledge, and his injury having resulted from this known defect, he stood as an adult with respect to his master's liability from any injury arising from it, and cannot recover." In reply to this contention, Mr. Justice Henshaw, in characteristically clear and forceful language, thus states the rule in cases of this character: "The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. * * * Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but in addition to this, and more important than all, the judgment of the child is the last faculty developed. * * * Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or reason upon his facts comes to him later in life. The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment. * * * Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act, and it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability." See, also, O'Connor v. Golden Gate, 135 Cal. 545, 67 Pac. 966, 87 Am. St. Rep. 127; Mansfield v. Eagle Co., 136 Cal. 622, 69 Pac. 425; Killelea v. California Horseshoe Co., 140 Cal. 605, 74 Pac. 157; Fries v. American Lead Pencil Co., 2 Cal. App. 148, 83 Pac. 173.

Instructions 2, 3, 4, 5, 7, and 15, which are also criticised, involve substantially the statement in different language of identically the same principle that is enunciated in the first instruction, and we need not, therefore, give the assignments as to them further attention.

Against the court's instructions there are other criticisms in which we see no merit.

The entire charge of the court, taken as a whole, stated to the jury the law applicable to the issues fully, fairly, and correctly.

After an exhaustive examination of the record, we have not been able to discover any reason which would justify interference with the judgment and order appealed from.

For the reasons herein given, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 522

HAMMOND v. HASKELL et al. (Civ. 799.)

(Court of Appeal, Second District, California. Nov. 17, 1910.)

1. CORPORATIONS (§ 127*) — SURRENDER OF SHARES — AGREEMENT — PERFORMANCE — "WAIVER."

Where a note was executed in consideration of an agreement by the payee to surrender to a corporation its corporate stock owned and held by him, but the manner of the surrender was not prescribed, a delivery of the stock to the president of the corporation with whom and others the agreement was made was proper, and a failure to make objection to the mode of performance was a waiver within Civ. Code, § 1501, and Code Civ. Proc. § 2076, declaring that objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which can be obviated by him, are waived if not then stated, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 448, 476; Dec. Dig. § 127.*

For other definitions, see Words and Phrases, vol. 8, pp. 7375–7381; vol. 8, pp. 7831, 7832.]

2. CORPORATIONS (§ 127*) — SURRENDER OF SHARES — CONSIDERATION — AGREEMENT — PERFORMANCE.

An indorsement on the certificate of stock surrendered, "Not accepted, no consideration," and a letter from the president and one of the other persons to the agreement reciting that they authorized no one to transfer the stock to them, and, as officers of the corporation, they could not cancel a certificate, were not an objection to the mode in which the payee surrendered the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 448, 476; Dec. Dig. § 127.*]

3. CORPORATIONS (§ 127*) — SURRENDER OF SHARES—CONSIDERATION—AGREEMENT—PERFORMANCE.

Where the payee of a note executed in consideration of his agreement to surrender to a corporation its stock owned by him delivered the stock to the makers, who made no objection, but who, by their silence, led the payee to believe that his act was accepted as a performance of his agreement, and they retained possession of the stock until after action was brought on the note, the makers were estopped from pleading nonperformance so as to show a failure of consideration, especially where it was not claimed that they sustained any damages by reason of the alleged breach of the agreement.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 448, 476; Dec. Dig. § 127.*]

4. Corporations (§ 376*)—Purchase of Own Stock—Validity of Contract.

An agreement by the payee of a note to surrender to a corporation its corporate stock owned by him in consideration of the note is susceptible of the construction that the makers were making a purchase of the stock on their own account, and directed the delivery to the corporation for their benefit, and, so construed, the agreement is not invalid as involving a sale and transfer to the corporation of its own stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. § 376.*]

5. Contracts (§ 153*)—Construction.

Where a contract is capable of two constructions, one making it valid and the other void, the first ought to be adopted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 734; Dec. Dig. § 153.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. F. Hammond against Loring B. Haskell and others. From a judgment for plaintiff, certain defendants appeal. Affirmed.

Roland G. Swaffield, for appellants. John E. Daly, for respondent.

SHAW, J. Action to recover upon a promissory note made and executed by defendants to plaintiff. Judgment went for plaintiff, from which defendants Haskell and Pike appeal upon the judgment roll accompanied by bill of exceptions.

It appears from the findings that the note was made and delivered in consideration of an agreement whereby plaintiff promised defendant to return and surrender to a corporation known as the Home Bond & Building Association certain shares of stock which he owned and held in said corporation. Contending that they are not supported by the evidence, appellants attack certain findings to the effect that plaintiff indorsed the certificate for the said shares of stock so owned by him, and surrendered and delivered the same to defendant Loring B. Haskell on behalf of the said Home Bond & Building Association, who received and accepted the same from the plaintiff for and on behalf of the association; that at said time Haskell did not make any objection whatever to the mode of delivery so made by plaintiff to him on behalf of said corporation.

The note was delivered on November 19, 1907, and payable December 1, 1907. The testimony of Haskell is to the effect that he was elected president of the corporation on the date of the delivery of the note, and that about December 7th one Redburn handed him an envelope containing the certificate of the shares of stock of said corporation so owned by plaintiff, which certificate was indorsed to Loring B. Haskell and M. Pike; that upon receipt of same Haskell and Pike indorsed upon the certificate, "Not accepted, no consideration, L. B. Haskell, M. Pike," and, as thus indorsed, returned it to plaintiff with a letter, wherein, among other things, it was stated: "We authorized no one to transfer this stock to us, and as officers of the company we cannot cancel a stock certificate. We have also had notice from our principal creditor not to transfer a share of this stock at our peril. * * * We are trying to adjust matters and conserve the assets of the company for the benefit of all concerned. Mr. Pike and myself have put more cash into stock than any one else. We have also spent some of our personal cash, as well as our time, with no money in the treasury at present to pay us for a very trying, annoying service, since the company stopped active business. We feel that every one should stand up and share the loss, especially the officers and stockholders, and not try to put the burden on any few men." The agreement did not specify how or in what manner the stock should be surrendered to the corporation, and, in the absence of such specification, plaintiff very properly delivered the shares to Haskell, who was president of the company, and with whom and other defendants advancing the consideration therefor the contract was made. When the shares of stock were delivered to appellants they knew that such delivery was in performance of plaintiff's agreement to return and surrender the stock to the company. If they objected to the mode of performance, they should have stated such objections, thus enabling plaintiff to obviate the same; otherwise, the objections must be deemed to have been waived. Section 1501, Civ. Code; section 2076, Code Civ. Proc.; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115. The words indorsed on the certificate, "Not accepted, no consideration," could not be regarded as an objection to the mode or manner in which plaintiff offered to surrender the stock to the corporation. Neither is there anything in the letter showing that appellants objected either to the manner or time of the surrender of the stock. On the contrary, the letter indicates a desire on the part of appellants to repudiate the agreement and refuse to accept the surrender on behalf of the corporation, not on account of objections to the manner of performance, but because of the fact that they felt plaintiff should continue in the enterprise and share the loss, which appellants deemed inevitable. A further objection was that one of the principal creditors objected to the carrying out of the transaction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Moreover, when plaintiff, shortly after December 7th, again delivered the shares of stock to appellants they made no objection to the mode of performance, but, on the contrary, so far as disclosed by the record, by their silence led plaintiff to believe that such renewed act on his part was accepted as a full and complete performance. They retained possession of the shares of stock, and not until they filed their answer was he apprised of the fact that they claimed nonperformance by reason of his failure either to deliver the stock in time or to the proper parties for and on behalf of the company. Such circumstances, even in the absence of a complete technical performance, should, in our judgment, estop defendants from pleading want of performance, especially where it is not claimed that defendants sustained any damage by reason of the alleged breach. Herberger v. Husman, 90 Cal. 583, 27 Pac. 428.

The validity of the agreement construed as a contract involving the sale and transfer to the corporation of its own shares of stock is not argued or presented. Conceding that such interpretation would render the contract invalid, nevertheless, this contract is susceptible of the construction that under its terms the defendants were making a purchase of the stock upon their own account and directing the delivery to the corporation for their benefit. "Where a contract is capable of two constructions, the one making it valid and the other void, * * * the first ought to be adopted." McVicer v. McKenzie, 136 Cal. 660, 69 Pac. 496.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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14 Cal. App. 507

PEOPLE v. DRIGGS. (Cr. 180.)

(Court of Appeal, Second District, California. Nov. 16, 1910.)

1. FORGERY (§ 44*)—EVIDENCE—SUFFICIENCY.

On a prosecution for forgery, evidence *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117–121; Dec. Dig. § 44.*]

2. FORGERY (§ 16*)—EVIDENCE.

Where a forged lease was filed for record in the recorder's office at the instance of defendant and she paid the fees, it amounted to the uttering of the forged instrument.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 51–53; Dec. Dig. § 16.*]

3. INDICTMENT AND INFORMATION (§ 125*)—INFORMATION.

An information charging defendant with forgery by feloniously, etc., making a certain lease and, at a subsequent date, of uttering the same, charged but a single crime, the offense defined by Pen. Code, § 470.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 339; Dec. Dig. § 125.*]

4. CRIMINAL LAW (§ 681*)—EXPERT EVIDENCE.

That certain exemplars submitted to experts had not theretofore been established as genuine signatures was not error, where their validity was subsequently established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611–1612; Dec. Dig. § 681.*]

5. CRIMINAL LAW (§§ 404, 491*)—EXPERT EVIDENCE.

Under Code Civ. Proc. § 1944, when the court was satisfied that exemplars offered were genuine, it was proper to submit the same to an expert witness or to the jury for comparison with the signature in question, and a comparison might be made by the jury without the aid of experts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 892, 1080; Dec. Dig. §§ 404, 491.*]

6. CRIMINAL LAW (§ 741*) — QUESTION FOR JURY.

The weight of opinion of experts or the result of comparisons between exemplars and the signature in question was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

7. WITNESSES (§ 269*)—CROSS-EXAMINATION.

Where, on a prosecution for forgery, witnesses called by the people testified not as experts from comparison, but based their opinions solely upon familiarity with the signature of the person whose name was claimed to have been forged, and they were not examined in chief as to the exemplars, and no foundation was laid qualifying them as experts, cross-examination testing their qualifications in that regard was not permissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

8. WITNESSES (§ 216*)—COMPETENCY.

On a prosecution for the forgery of a lease, communications made by defendant to the notary who took the acknowledgment relating only to the acknowledgment and made to him merely in his capacity as notary were not privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 779; Dec. Dig. § 216.*]

9. CRIMINAL LAW (§ 742*) — QUESTIONS FOR JURY.

Where a witness admitted that he had testified falsely on former occasions and the transcript of his evidence abounded with admitted falsehoods, and he sought to explain why he had falsely testified, his credibility was for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1719–1721; Dec. Dig. § 742.*]

10. WITNESSES (§ 396*)—IMPEACHMENT.

It was proper to permit the whole of his testimony to be read to him that he might, as he desired, make corrections.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261–1264; Dec. Dig. § 396.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Gertrude Driggs was convicted of forgery, and she appeals. Affirmed.

See, also, 12 Cal. App. 240, 108 Pac. 64.

Paul W. Schenck and Geo. L. McKeeby, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant was found guilty under an information charging her with the crime of forgery by willfully, unlawfully, falsely, fraudulently, and feloniously making, forging, and counterfeiting a certain lease, a copy of which is set forth; and, at a subsequent date, of uttering, publishing, and passing as true the same, with full knowledge, etc. From the judgment pronounced, and from an order denying a new trial, this appeal is taken.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant offered no evidence and the verdict was based upon that given on behalf of the people. It is insisted that the evidence is insufficient, either to establish the forgery in the first instance or the subsequent utterance. We find competent evidence in the record to the effect that the signature to the lease was not that of Charnock, the purported lessor, and other evidence—by experts, it is true, but competent —to the effect that, by comparison of the signature to the lease with the admitted handwriting of defendant, employed as exemplars, the defendant attached the forged signature. The notary who made the acknowledgment testified that Charnock never acknowledged the signature and that his certificate to that effect was false, and that he attached his certificate of acknowledgment solely because defendant had stated to him that Charnock had signed the lease. The circumstance that the party who signed Charnock's name had attempted to make the signature appear as that of the lessor; in addition, that defendant represented that in fact the lessor had attached his signature, together with many other circumstances, all tend to show want of authority and were inconsistent with any other hypothesis. The evidence tends to show that defendant signed the name of the lessor, and that she had no authority so to do. There is evidence in the transcript tending to show that the lease, the subject of the forgery, was filed for record in the recorder's office at the instance and request of defendant, and that she paid the filing and recording fees. This was a sufficient uttering of the alleged forged instrument. People v. Baker, 100 Cal. 190, 34 Pac. 649, 38 Am. St. Rep. 276. The allegations of the information stated but a single crime. The offense charged was that defined by section 470, Pen. Code. No other offense was attempted to be charged. People v. Driggs, 12 Cal. App. 240, 108 Pac. 62, 64, and authorities there cited. Upon the whole record, we are of opinion that there is evidence embraced therein tending to support every material allegation of the information, and as a consequence no question of law in connection therewith is presented.

The fact that certain exemplars submitted to experts had not theretofore been established as genuine signatures is of no consequence, where, as in this case, their genuineness was subsequently established by uncontradicted testimony. Estate of Marchall, 126 Cal. 96, 58 Pac. 449. When the court was satisfied that the exemplars offered were genuine, it was proper to submit the same to the witness or jury for comparison. Section 1944, Code Civ. Proc. When so submitted and in evidence, a comparison may be made by the jury with or without the aid of experts. Castor v. Bernstein, 2 Cal. App. 706, 84 Pac. 244. The weight and effect of the opinion of experts, or the result of comparisons, was a matter for the jury. The admission in evidence of photographs of signatures and papers was within the discretion of the court, and no abuse in connection therewith is shown. People v. Crandall, 125 Cal. 132, 57 Pac. 785. After an examination of the various exhibits which are on file in this court, we feel able to say that no reasonable doubt can exist as to who wrote the signature upon the lease.

We find no error in the action of the court sustaining objections to certain questions propounded to witnesses called by the people, and who testified not as experts from comparison, but based their opinions solely upon familiarity and acquaintance with Charnock's signature. They were not examined in chief as to the exemplars, no foundation was laid qualifying these witnesses as experts, and the cross-examination testing their qualifications in that regard was not permissible.

We find nothing in the record supporting the contention that privileged communications were improperly admitted. The communications made by appellant to Ackerman, admitted in evidence, were only such as related to the matter of the acknowledgment and were made to the witness in his capacity as a notary, and we think properly admitted. The record discloses that Ackerman, the notary, admitted upon this trial that he had testified falsely upon former occasions, and the transcript of the evidence upon such former hearing abounded with admitted false statements. He sought upon this trial to correct the same and to attempt an assignment of the reasons why he had falsely testified upon previous examinations. His credibility and the effect which should be given his testimony was a matter for the jury, and, under the peculiar circumstances presented by this record, we see no error in the action of the court permitting the whole of his testimony, permeated, as it was, with admitted false statements, to be read to him that he might in such instances as he desired make the corrections; and it is a well-recognized proposition that under such circumstances an opportunity is afforded the witness to give reasons, if such he may have, why former statements were made.

The claimed error in relation to the giving and refusing of instructions is not supported by any reason why appellant thinks the action of the court in reference thereto was error prejudicial in its character, which, in People v. Fossetti, 7 Cal. App. 629, 95 Pac. 384, is said to be necessary. We have, however, examined the record in relation thereto and see no error in connection with the giving or refusing of instructions, nor any misconduct during the progress of the trial, either upon the part of the court or the district attorney, warranting a reversal.

The very voluminous record in this case is full of other exceptions taken during the progress of the trial, and some of which are presented by appellant in her points and authorities; but aside from those heretofore noticed, we find nothing meriting extended comment, nor any error in the record which can be said to have a prejudicial tendency, the onus of establishing which upon appeal is cast upon appellant. People v. Cain, 7 Cal. App. 168, 93 Pac. 1037. The verdict in this case seems to us to be the only one which a rational jury could return, and the denial by the court of a new trial proper.

Judgment and order affirmed.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 515

PEOPLE v. WILSON. (Cr. 261.)

(Court of Appeal, First District, California. Nov. 17, 1910. Rehearing Denied by Supreme Court Jan. 12, 1911.)

1. Homicide (§ 177*)—Suicide Theory—Evidence.

The evidence that defendant sent to deceased the letter, signed in the name of an unknown person, containing powders recommended for his stomach trouble, and which being taken caused his death, the substance being strychnine, being dependent almost entirely on opinions of handwriting experts, and deceased having taken the powders without any steps to test their character, though he was cautioned that they might be poisonous, and reminded of a notorious poisoning case, defendant, whose theory was that deceased committed suicide, was entitled to introduce evidence that deceased was erratic at times, wrote letters to himself, and was able to write several kinds of writing, as this, in connection with the other facts, might reasonably aid the jury in determining whether deceased wrote, or might have written, the letter, and who caused the death; liberality in admission of evidence, which might in any way so aid, being required by the circumstances.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 306; Dec. Dig. § 177.*]

2. Criminal Law (§ 452*)—Evidence—Opinions.

A witness, who has for a long time been a post office inspector, being shown an envelope purporting to be postmarked at station H, Philadelphia, and to have a cancellation mark of the postage stamp, is properly allowed to give his opinion that the postal mark is not genuine, in connection with his testimony that he knew that three years before the purported date there was no station H at Philadelphia, and his pointing out in detail the differences between a reproduction of the cancellation stamp in use at Philadelphia and the cancellation stamp on the envelope in question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053–1055; Dec. Dig. § 452.*]

3. Criminal Law (§ 369*)—Evidence—Connection with Another Crime.

Evidence, if otherwise relevant to an issue in the case being tried, is not inadmissible because tending to connect defendant with another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

John Walter Wilson was convicted of murder, and he appeals. Reversed and remanded for new trial.

C. H. Wilson, Samuel M. Shortridge, A. M. Cunning, M. H. Farrar, and T. N. Harvey, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

HALL, J. The defendant was charged by information filed by the district attorney with the crime of murder for the killing of one Henry Bose, and upon his trial the jury returned a verdict, finding him guilty of murder in the first degree, and fixing the punishment at imprisonment for life. After the rendition of the verdict a change of attorneys for defendant took place, a motion for a new trial was made and denied. Upon the rendition of judgment in accordance with the verdict, defendant appealed to this court from the judgment and order denying his motion for a new trial.

Harry Bose conducted in the city and county of San Francisco a small business in the way of supplying globes for electric lights. The defendant was engaged in this business with Bose, either as an employé of Bose, or as his partner. Harry Bose at times suffered from stomach trouble. On the 2d day of December, 1908, he received through the United States mail by special delivery a letter addressed to him, signed "Charles M. Hawer, M. D.," and enclosing two powders, which by the terms of the letter were recommended as a cure for stomach trouble. The writer of the letter claimed to have learned from an unnamed friend of Bose that he suffered from stomach trouble, and represented that he, the writer, was sending the powders at the request of the friend. Harry Bose exhibited the letter and powders to several persons, including his mother and sister, and before retiring for the night, on December 2, 1908, took the powders as directed by the letter, and shortly afterwards died with the usual symptoms of strychnine poisoning. The powders contained a fatal dose of strychnine. There appears to have been no such person as "Chas. M. Hawer, M. D.," and certainly the evidence shows that Bose knew no such person. The theory of the prosecution was and is that the letter containing the two powders was written and sent to Bose by the defendant. There was no evidence that defendant and Bose were upon unfriendly terms, and the only motive suggested for defendant killing Bose was that defendant might upon the death of Bose acquire the business that Bose alone, or Bose and defendant, had been conducting.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Each of three experts in handwriting testified that the letter containing the two powders was in his opinion written by the same person who wrote various exemplars, including a dictated copy of the "poison" letter, proven to have been written by defendant. Besides this opinion evidence there was little that tended to prove that defendant wrote or sent the "poison" letter. In the "poison" letter the words "until" and "already" were both misspelled, thus, "untill" and "allready," and the same errors appear in the copy written by defendant at dictation. These errors, however, are common, and such as are made by many people. Some other circumstances are relied on as indicating guilt on the part of defendant, but it is clear that the backbone of the case for the people was the opinion evidence of the experts. Certain it is that upon the theory of the prosecution, Bose administered the powders with his own hand, and that the powders came into his possession under circumstances that would have excited the suspicions of a prudent person, and ought to have suggested caution in the use of the powders by the recipient. In this connection it may be noted that one witness, to whom Bose exhibited the letter and powders, cautioned him against using the latter, reminding him of the Botkin poisoning case, and tossed the powders into a waste basket, from whence Bose recovered them.

It is not claimed that the verdict is not supported by the evidence; and we have thus adverted to the salient features of the evidence as showing a case which we think demands of this court careful scrutiny of the rulings of the trial court attacked by appellant, and which rulings the counsel for the appellant earnestly contend deprived him of the benefit of material testimony.

Defendant advanced the theory that Bose committed suicide, and himself wrote the "poison" letter, and in support of this theory offered certain testimony which appellant contends tended to support such theory. It is the action of the court in excluding this evidence that appellant in part relies upon as grounds for a reversal of the judgment and order.

Where the deceased, with his own hands, administered the poison that caused his death, and the theory of the defense is that the deceased committed suicide, any evidence which tends to support such theory, or that tends to show that it may be true, is admissible. In such case the deceased, as well as the defendant, is, in a certain sense, upon trial, and evidence of any acts, conduct, or declarations of deceased tending to prove that he may have committed suicide is relevant and material. Nordan v. State, 143 Ala. 13, 39 South. 406; People v. Gehmele, Sheld. (N. Y.) 251. In the case at bar the crucial test as to whether or not deceased committed suicide is presented by the question, Did he write the "poison" letter? It is thus apparent that any evidence that would reasonably tend to prove that he wrote or may have written the "poison" letter was relevant and material to the issues involved in the case.

We now come to the particular rulings of the court claimed by appellant to have resulted in depriving defendant of the benefit of material evidence. Counsel for defendant asked a witness called for the defense, "Did you ever see deceased write any letters to himself?" and the witness answered, "I have." Of another witness he asked, "And, in your opinion, what was the character of deceased?" and the witness answered, "I think—I should say that he was rather erratic." In each case the district attorney, after the answer had been given, objected to the question, and the court after some discussion, in which both attorneys and the court took part, sustained the objection. The court did not in either case in express terms strike out the answer, but the discussion and ruling were such in each case as to indicate to the jury that the court did not regard the evidence as relevant or proper, and intended that the answer should be disregarded. Of another witness counsel for appellant asked the question: "Did you ever have any conversation with the deceased?" and the witness answered, "I did." Counsel then asked, "Relative to handwriting?" whereupon the district attorney asked, "What is the purpose of that question?" to which counsel for defendant replied, "We want to show by this witness that he boasted of doing several kinds of writing." A discussion between the court and attorneys followed, from which it is apparent that all concerned treated the question and offer as having been objected to by the district attorney. The matter ended by the court saying, "The objection is sustained." By these rulings we think the court deprived the defendant of the benefit of evidence relevant and material to the vital issue in the case.

Evidence that deceased was erratic, at times wrote letters to himself, and was able to write several kinds of writing, though when considered apart from all other facts and circumstances in the case might be of little weight as tending to prove that deceased wrote or may have written the "poison" letter, yet in connection with other facts in evidence we think this evidence might reasonably aid the jury in determining the question whether or not deceased wrote or may have written the "poison" letter. Confessedly deceased took two powders which upon the theory of the prosecution came from an unknown source. He took these powders without taking steps to test their character, although he was cautioned by at least one person that they might be poisonous. The danger was impressed on him by a reminder of the notorious Botkin poisoning case. The theory that defendant wrote the "poison" letter depended almost entirely upon the opinion evidence of experts in handwriting, which is a class of evidence which is subject to some infirmities, to say the least. The circumstances surrounding the death of Bose were such as to require the court, in the interest of justice, to be liberal in permitting evidence offered by the defendant that might in any way aid the jury in determining who caused the death of deceased. We think the excluded evidence was of this character, and should have been allowed.

For the purpose of supporting the theory that the "poison" letter came from defendant, the prosecution produced several envelopes that were found in the possession of defendant shortly after the death of Bose, and which appeared to be the same kind in all respects as the envelope containing the "poison" letter. These envelopes, however, appeared to be addressed to defendant, and bore what appeared to be the post and cancellation mark of the United States post office at divers places outside the state of California. It thus was necessary, in order to give the envelopes any evidentiary value against defendant, as tending to show that he had had in his possession a supply of envelopes similar to the one containing the "poison" letter, to prove that the post and cancellation marks on these envelopes were not the genuine marks of the United States postal department. For this purpose the prosecution examined as a witness one James O'Connell, who testified that he had been for nine years a United States post office inspector employed at San Francisco, and was able to tell whether a postmark was genuine or not. He was shown by the district attorney one of the envelopes above referred to, bearing what purported to be a postmark of the United States postoffice at station H, Philadelphia, Pa., dated March 3, 9:30 p. m., 1908, and also a cancellation mark of the postage stamp, and was asked if the postmark and cancellation mark on the envelope were the genuine postmark and cancellation mark of the United States post office. To this question the defendant objected as calling for a conclusion of the witness. The objection was overruled, and the witness answered that "The postmark is not genuine." Similar questions were asked of the witness and similar answers made concerning the post and cancellation marks on five other envelopes, without repetition of the objection.

It is now claimed that the court committed reversible error in overruling the objection. While the question is probably close to the border line, we do not think that the court erred in overruling the objection. The witness upon cross-examination stated in detail the facts and reasons why he was of the opinion that the postmark was not genuine. In such a case, even though the question should not have been allowed, a case will not always be reversed for the erroneous ruling, for the opinion usually has but little or no weight independently of the facts upon which it rests. Sampson v. Hughes, 147 Cal. 62, 81 Pac. 292. In the case at bar the witness had been at Philadelphia four years before the date of the trial, which would be three years before the date of the postmark, and testified that he knew that at that time there was no station H in Philadelphia. He also had in his possession a reproduction of the cancellation stamp in use at Philadelphia, and pointed out in detail the differences between such cancellation stamp and the cancellation stamp upon the envelope in question. "The general rule is that the testimony of a witness shall be limited to the facts of which he has personal knowledge, and that he shall not give his individual opinion thereon; but in many instances the opinion of a witness may be received in connection with his statement of the facts upon which it is based. The border line between fact and an opinion is often very indistinct, and the statement of a fact is frequently only the opinion of the witness." Healy v. Visalia, etc., R. R. Co., 101 Cal. 585, 36 Pac. 125. We think it was proper for the witness to give his opinion as to the genuineness of the postal mark in connection with his statement of the facts upon which it was based.

Neither was the testimony objectionable as tending to connect the defendant with the commission of a crime not charged. If otherwise relevant to any issue involved in the charge before the court, the mere fact that the evidence may tend to connect the defendant with some other crime is not ground for rejecting such evidence. The evidence in question was relevant to an issue involved in the case on trial.

Inasmuch as the judgment and order must be reversed for the errors committed by the court in excluding testimony as hereinbefore indicated, we do not find it necessary to pass upon the questions raised by the affidavits concerning newly discovered evidence, and the failure of the court to render judgment within the time required by section 1191 as amended in 1909. Upon a retrial, the defendant will have an opportunity to introduce the testimony of experts upon handwriting, and any other relevant and material testimony, and if he shall be again convicted the court will no doubt strictly follow the provisions of section 1191 of the Penal Code in the matter of rendering judgment.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

14 Cal. App. 512

Ex parte MILLS SING. (Cr. 181.)

(Court of Appeal, Second District, California. Nov. 16, 1910.)

1. STATUTES (§ 183*)—CONSTRUCTION—LEGISLATIVE INTENT.

In construing a statute to ascertain the legislative intent, regard must be had not so much to the exact phraseology as to the general tenor and scope of the legislative scheme embodied in the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

2. STATUTES (§ 195*)—CONSTRUCTION—DOCTRINE OF EJUSDEM GENERIS.

The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, but does not warrant the court in confining the operation of a statute within narrower limits than was intended by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 273; Dec. Dig. § 195.*]

3. INFANTS (§ 16*)—"DEPENDENT CHILD"—OFFENSES—STATUTES—"ANY OTHER PERSON."

Under the juvenile court law (St. 1909, c. 133) defining, in section 1, a "dependent child" as any child found wandering and not having any home or proper guardianship, or who has no parent or guardian capable of exercising proper parental control, or whose home, by reason of neglect of his parents or guardian or person in whose custody he may be, is an unfit place, and providing in section 26 that in all cases where any child shall be dependent or delinquent, the parent or parents, guardian or person having the custody of such child "or any other person" who shall, by any act, contribute to the dependency or delinquency of the child, shall be guilty of a misdemeanor, any one who contributes to the dependency of a child, whatever may be his relation thereto, becomes subject to punishment, the words "any other person" including all persons committing the acts specified.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 1, pp. 434–437; vol. 8, p. 7577; vol. 2, pp. 1991–1993.]

4. STATUTES (§ 205*)—CONSTRUCTION—MEANING OF WORDS.

The court, in construing a statute, must consider together all its provisions, and they must be reconciled as far as possible, and particular provisions must be so construed as to promote the general purposes of the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.*]

Application for a writ of habeas corpus by Mills Sing. Writ discharged, and petitioner remanded.

Geo. L. McKeeby and Paul W. Schenck, for petitioner. J. D. Fredericks, Dist. Atty., and J. A. Donnell, Deputy Dist. Atty., for respondent.

ALLEN, P. J. Whether or not the writ shall issue in this case depends upon the construction which should be given section 26 of the juvenile court law. St. 1909, p. 225. That section provides: "In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having the custody of such child, *or any other person* who shall, by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor," etc.

Petitioner's contention is that, applying the doctrine of ejusdem generis to the act in question, the words "any other person" are limited in their application to those who stand in loco parentis, and it being conceded that petitioner stands in no such relation he cannot be charged with the crime as defined by such section. "In the construction of statutes for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed as to the general tenor and scope of the entire legislative scheme embodied in the statute." Palache v. Pacific Ins. Co., 42 Cal. 418. An examination of the entire act discloses that section 1 of the act provides that the words "dependent child" shall mean, any child "(4) who is found wandering and not having any home, or any settled place of abode, or any proper guardianship; (5) who has no parent or guardian willing to exercise, or capable of exercising, proper parental control; * * * (7) whose home by reason of neglect," etc., "of his parents or either of them, or on the part of his guardian, or on the part of the person in whose custody or care he may be, is an unfit place for such child." It will be observed that dependent children may be of a class who have parents, guardians, or custodians, while others may be of a class with neither. It is apparent from a reading of the entire act that the Legislature was intending to provide protection to all children who, by the terms of the act, were either dependent or delinquent, by attaching a penalty to any act contributing to such delinquency or dependency. "The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining the meaning of the Legislature, and does not warrant a court in confining the operation of a statute within narrower limits than was intended by the lawmakers." Black on Interpretation of Laws, p. 143. To give the narrow construction claimed by petitioner would be to say that the Legislature intended to confer a benefit by protecting one class of dependents with whom some one was standing in loco parentis, while at the same time those dependents with whom no one stood in such relation should be unprotected. To give the words "any other person" a broader and more comprehensive interpretation, by saying that it was intended to include all persons committing the acts specified, would make the act applicable to all who are so unfortunate as to be included in the term "dependent." As said by our Supreme Court in Welch v. Williams, 96 Cal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

365, 31 Pac. 222: "In the construction of a statute, all its provisions must be considered together, and must be reconciled as far as possible, and particular provisions must be so construed as to promote and not to defeat the general purposes and policy of the law." We are of opinion, therefore, that any one who contributes to the dependency of a child, whatever may be his relation thereto, becomes amenable to punishment under the provisions of section 26.

The writ is therefore discharged and petitioner remanded.

We concur: SHAW, J.; JAMES, J.

14 Cal. App. 468

HUNTINGTON et al. v. CURRY, Secretary of State. (Civ. 789.)

(Court of Appeal, Third District, California. Nov. 7, 1910.)

1. Street Railroads (§ 14*)—Incorporations—Statutes—"Railroad."

Civ. Code, § 291, providing that the articles of incorporation of any "railroad" must state the kind of road intended to be constructed, the places from and to which it is intended to be run, its estimated length, and that 10 per cent. of the capital stock subscribed has been paid in; section 293 providing that such a proposed corporation before filing articles must have subscribed to its capital stock $1,000 for each mile of contemplated work; section 294 providing that before the articles are filed there must have been paid for the benefit of the corporation, 10 per cent. of the amount subscribed; and section 295 providing that before the Secretary of State issues to such a corporation a certificate of filing of articles of incorporation, there must be filed in his office an affidavit that the required amount of stock has been subscribed, and 10 per cent. thereof paid in—have no application to street railroad corporations.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 22-28; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

2. Street Railroads (§ 18*)—Articles of Incorporation—Motive Power.

The provision in articles of incorporation authorizing the operation of "street railroads" by electricity "or other motive power" does not authorize the conducting of an ordinary commercial railroad; but such reference to "other motive power" relates only to the provision of Civ. Code, § 497, that permission may not be granted to propel street cars otherwise than by electricity, horses, mules, or cable, "unless for special reason in this title hereafter mentioned," and to section 509, authorizing permission to a street railroad to lay a track for grading, and to use steam or any other power in propelling cars thereon, when public convenience demands it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 39; Dec. Dig. § 18.*]

3. Street Railroads (§ 18*)—Articles of Incorporation—Field of Operation.

The provision in articles of incorporation authorizing the operation of street railroads in the city of L. "and in the territory immediately adjacent thereto in the county of L." does not take from the corporation the essential characteristics of a street railroad; a street railroad not becoming an ordinary commercial railroad by its road being extended, under the authority of its articles of incorporation and the franchises granted by local authorities, beyond the limits of the city in which its principal business is conducted, for no other purpose than to extend its local street car traffic.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 18.*]

Petition by Howard Huntington and others for mandamus to C. F. Curry, Secretary of State. Granted.

White, Miller & McLaughlin, for petitioners. Malcolm Glenn, Asst. Atty. Gen., for respondent.

HART, J. This is a petition for a writ of mandate to compel the respondent, as Secretary of State, to file certain articles of incorporation, to issue the certificate of incorporation, and "do all other acts and things which are necessary or proper to be done in the matter of filing, certifying and issuing articles of incorporation," etc. The articles of incorporation which respondent has refused to file in his office are annexed to and made a part of the petition.

From the allegations of the petition it appears that the petitioners, at some time prior to the 19th day of October, 1910, associated themselves together for the purpose of forming a corporation under the laws of this state, to be known as the "Los Angeles Railway Corporation"; that, pursuant to said purpose, there were prepared, in alleged compliance with the requirements of the law, articles of incorporation of said railway corporation, and said articles, so prepared, and "duly subscribed and executed," were filed in the office of the county clerk of the county of Los Angeles, who, upon the filing of said articles, made and delivered to petitioners a copy thereof, duly certified and attested by him as county clerk, under the seal of his office.

The petition further alleges that, on the 20th day of October, 1910, the petitioners presented said certified copy of articles of incorporation to the respondent for filing in his office, and requested him to file the same therein, but that, notwithstanding that at the time of said request and demand so made of and on respondent the sum of $2,000, the filing fee required by law, together with the sum of $187.50, the license fee for said corporation for one year, and the further sum of $7.50 for recording the articles of incorporation, issuing his certificate of incorporation, and issuing a certified copy of said articles of incorporation, were tendered to said respondent, as such Secretary of State, he refused and still refuses to accept said fees and to file said articles of incorporation, or to perform the other acts mentioned and required of him in his official capacity in such case.

It is averred that the refusal by the respondent to file said articles of incorporation is founded solely upon the ground that said articles of incorporation were not prepared in obedience to, and are therefore not in accord with, the requirements of sections 291, 293, 294, and 295 of the Civil Code of this state. The Attorney General has appeared here for the respondent, and vigorously insists upon the impregnability of the Secretary's construction of the sections of the Civil Code mentioned. The question to be decided is raised by demurrer to the petition.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 291 of said Code reads as follows: "The articles of incorporation of any railroad, wagon road, or telegraph organization must also state:

"1. The kind of road or telegraph intended to be constructed;

"2. The place from and to which it is intended to be run, and all the intermediate branches;

"3. The estimated length of the road or telegraph line;

"4. That at least ten per cent. of the capital stock subscribed has been paid in to the treasurer of the intended corporation."

Section 293 provides that each proposed corporation mentioned in section 291, "before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit:

"1. One thousand dollars per mile of railroads. * * *"

By the terms of section 294, before the articles of incorporation referred to in the "preceding section" are filed, "there must be paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent. of the amount subscribed."

Section 295 reads: "Before the Secretary of State issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary, or treasurer named in the articles, that the required amount of the capital stock thereof has been actually subscribed, and ten per cent. thereof actually paid to a treasurer for the benefit of the corporation."

The petitioners here did not, at the time of requesting and demanding the filing of the articles of incorporation involved in this proceeding, present therewith for filing the affidavit required by section 295, nor do their articles of incorporation contain the statement required by section 291, their contention being that the sections of the Civil Code referred to have no application to street railroad corporations; and after a careful examination and analysis of the Code sections pertaining to railroad corporations of both kinds, the ordinary commercial railroads and street railroads, we are persuaded that the position of petitioners is sound.

But the Attorney General first takes the position that the articles of incorporation concerned here themselves disclose that the proposed corporation is not thus confined to the operation of a street railroad, but that, should the organization be consummated according to law, it would be authorized, by a certain provision of the articles, to conduct and operate an ordinary commercial railroad. This contention proceeds from the following language in said articles enumerating the powers of the proposed corporation: "To construct, or acquire by purchase or lease, or otherwise, and to operate, control, maintain, improve, and extend street railroads propelled or operated by electricity or other motive power, within the city of Los Angeles, California, and within the territory immediately adjacent thereto in the county of Los Angeles."

It is claimed that the authority thus vested in the corporation to propel or operate street railroads by means of "other motive power" than electricity, etc., is evidence of an intention or purpose on the part of and will authorize petitioners to operate, under said articles of incorporation, a regular commercial, and not a street, railroad; that such intention or purpose is further disclosed by the fact that the laying of the tracks of the railroad proposed to be constructed or acquired and operated by said intended corporation is not, as is required of street railroad corporations by section 497 of the Civil Code, limited to the use of the streets of the city of Los Angeles for that purpose, since it is also provided that the tracks of such railroad may be extended to any point "within the territory immediately adjacent" to said city in the county of Los Angeles.

The argument in effect appears to be, as to the first of these two propositions, that had the petitioners intended to construct and operate, under their articles, a street railroad only, they would not have authorized themselves by their charter to operate such a road by means of any other motive power than those to the use of which section 497 limits street railroad corporations. By that section it is provided that in no case shall permission be granted by the governing board of any municipality to any street railroad corporation to propel cars upon railroad tracks laid for street railroad purposes "otherwise than by electricity, horses, mules, or by wire ropes running under the streets and moved by stationary engines, *unless for special reasons in this title hereinafter mentioned.*" (Italics ours.)

We think that a sufficient answer to this contention may be found in the fact that the articles of incorporation expressly declare that the purpose of the corporation is "to construct or acquire * * * and to operate, control, maintain, improve and extend street railroads," and if the language in said articles to which the Attorney General objects clothes the corporation with more power as to the means of propelling its cars than it is entitled to under the law, it must be presumed that the local authorities through whom its franchises must be secured, if at all, will not override the law, but will require the corporation, by appropriate and legal conditions and restrictions, to conduct the business for which it has been given existence in all respects strictly according to the mandates of the statutes. But we are not prepared to say, in view of the language of section 509 of the Civil Code, that it is not proper to make provision in the articles of incorporation for propelling and operating street railroads by "other motive power" than by electricity, horses, mules, etc. Said section reads, in part, as follows: "The corporate authorities of any city or town, or city and county, may grant the right to use steam or any other motive power in propelling the cars used on such grading-track, when public convenience or utility demands it, but the reasons therefor must be set forth in the ordinance, and the right to rescind the ordinance at any time reserved." Of course, it is the policy of the law, founded on excellent reasons, that street railroads shall not be customarily operated by means of steam power, and it is clear that, under the section from which we have just quoted, such motive power may be used only on the happening of the contingency provided for by said section; yet we can perceive no harm, even if it is not required, in inserting in the articles of incorporation a provision authorizing the use of steam power when the occasion for its use, as contemplated by said section 509, arises. It is not to be assumed that the provision in the articles for "other motive power" than those means of propelling street cars expressly enumerated by section 497 is intended to invest the corporation with power in that respect, in any measure in excess of that prescribed by the several Code sections on that subject.

The fact that the articles of incorporation contain authority for the extension of the street railroads proposed to be operated by the intended corporation beyond the territorial limits of the municipality of Los Angeles to points within the limits of the county in which said municipality is situated does not take from it the essential characteristics of a "street railroad." There is a clear and well-defined distinction, in the contemplation of our law upon the subject of railroads, between street railroads and those other railroads, which may, for convenience, be designated "commercial" railroads, whose termini may be situated many hundreds of miles apart. Our Supreme Court has pointed out this distinction in many cases, notably in San Francisco, etc., Ry. v. Scott, 142 Cal. 222, 75 Pac. 575, wherein it is established that, for purposes of taxation, the term "railroads," as employed in section 10 of article 13 of the Constitution, is not to be interpreted to include street railroads, although the latter may be extended beyond the limits of one county and into another. It is perhaps true, as the Attorney General suggests, that, while the term "railroads" may not, for a certain purpose, include street railroads, for other purposes such railroads may come within the generic term "railroads." And, while the Scott Case is not an authority directly in point here, it is, nevertheless, valuable in the case at bar, in that it demonstrates that there is essentially a difference between the two classes of railroads following from the different sources from which they respectively derive their authority to construct, maintain, and operate railroads and the difference in the specific objects and purposes of the two.

In the Scott Case, supra, it is said: "The franchise of an ordinary railroad is obtained upon terms and conditions equally applicable to all roads of its class by a compliance with the general law, which empowers corporations to construct and operate a railroad between the designated termini, located, it may be, in counties widely separated. Civ. Code, § 291. At the time the Constitution was adopted, the law provided that franchises for the construction and operation of street railroads along the streets and public highways could be obtained only from the governing body of the city or town in which it was situated. Civ. Code, § 497. The law has been changed in some respects since that time, but the substantial provision still remains that the franchise can only be obtained through the action of the council or governing body of the municipality. Civ. Code, § 497; St. 1901, p. 265; St. 1903, p. 90. * * * The only way by which a company can operate a street railroad in more than one county is by obtaining separate franchises from the local authorities of the respective counties, so located that the ends of the two roads coincide at the county line, so that the two can be in fact operated as a continuous line running from one county into another. But the franchises must remain separate and distinct, and *local in origin, situation and character.* (Italics ours.) * * * In the case of an ordinary railroad, the right which it may acquire to operate its roads along a public street is, strictly speaking, a mere right of way, similar to the right it may acquire from landowners along the route. It is a part of its roadway, and not a part of the franchise, within the meaning of the word in the phrase in question. It imposes no implied obligation upon the grantee or donee to facilitate the local public use of the street by carrying persons from place to place thereon. The right which a street railroad obtains from the city to lay its track and operate its road on a street, on the contrary, is the most valuable part of its franchise. It carries the obligation to serve the public in the use of the street, and is in furtherance of the original use. It does not receive this franchise by becoming incorporated, as an ordinary road receives its franchise to operate its road between its termini, but obtains it afterward by special grant from the municipality, and the thing thus obtained includes both the roadway and the franchise." See Railroad Com. v. Market St. Ry., 132 Cal. 677, 64 Pac. 1065; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; U. R. Co. v. Colgan, 153 Cal. 53, 94 Pac. 245.

Thus it will be observed that there is a marked distinction between the two classes of railroads, both as to the mode and manner in which they are authorized to do business and their objects and purposes. And we think that this distinction has been observed and recognized by the Legislature in its varying legislation with regard to the two classes of roads, as we shall later on more particularly undertake to show.

Aside from the proposition that a street railroad corporation must, after it has become such, under our law, consummate the purposes of its organization in a distinctly different manner from that by which an ordinary railroad corporation may, after establishing its legal entity, carry on the business for which it is organized, the important feature which, in our opinion, differentiates the two, and upon which line of differentiation the Legislature has framed our system of laws with respect to railroad corporations, is to be found in the fact that the street railroad is designed to solely and exclusively transact a purely local traffic; a traffic which it would be impracticable for the ordinary railroad to carry on, even in those cases where its road runs through certain streets of a city as a necessary part of its main road. But we think the phrase "street railroad," as used in our Civil Code, has acquired and imports a much broader signification than the word "street," taken alone, would imply. Instances are numerous where street railroads are extended a considerable distance beyond the limits of the city or town to points where there are maintained pleasure parks and gardens for recreation and amusement (which is asserted to be a part of the scheme of the proposed corporation), and, necessarily, in such cases, there will generally be found long stretches of country which such roads must lay their tracks upon which are not within the city limits and over and through which streets are not laid out. May it be said that, merely because the road leaves the city limits for that purpose, it then, ipso facto, ceases to be a street railroad, but takes on the character of an ordinary railroad, subject to the regulations prescribed by the Legislature for the incorporation, organization and operation of such roads? We think the answer is obvious; for we do not think that any court can be found that will sanction the proposition that, where a corporation is legally formed solely for the operation of a street railroad business and the road is extended, under authority of its articles of incorporation and the franchises granted by the local authorities, beyond the limits of the city in which its principal business is conducted for no other purpose than to extend its local street car traffic, such road for that reason becomes in fact an ordinary railroad. No one would say or for a moment contend that because the street railroad company of Sacramento (if it be true) has extended its road to Oak Park or East Sacramento, suburbs of said city, situated outside its municipal limits, thus accommodating a large number of people, many of whom no doubt transact business in said city, becomes any less a street railroad. It in no manner or sense thus becomes a competitor of the ordinary railroads; its purpose and mission being, as are the purpose and mission of all street railroads, to meet a demand which the ordinary railroad, in the very nature of things, cannot meet. The purposes and objects of the two classes of roads may, by way of illustration, be likened to the relative positions of the wholesale and the retail merchant dealing in the same kind of commodities. In a general sense there is, of course, an analogy between them as merchants, but their special objects and purposes are essentially and distinctively different; the one supplying the trade, the other directly supplying the consumer.

But the most important contention of the Attorney General is that the provisions of sections 291, 293, 294, and 295 of the Civil Code apply to *all* railroads, regardless of their character or the particular purpose for which they are designed. We do not assent to this contention.

In addition to what we have already said in support of our view that there is of necessity, in many material respects, a marked distinction—one that is recognized by the Legislature throughout all its legislation with respect to railroads—between street railroads and ordinary railroads, there are other considerations which, in our opinion, confirm the proposition in its application to the present question. In the first place, it is as clear and unquestionable as any proposition can be that it would be absolutely impossible for proposed street railroad corporations to comply with all the requirements of section 291 of the Civil Code, unless the argument goes to the extent of maintaining that on every occasion that such a corporation, having designated the termini of its road in its articles, desired or found it necessary to extend its road to meet new conditions, which are, with respect to street railroads, constantly arising in growing cities, it would, for that purpose, be compelled to file additional or other articles of incorporation. Of course, the Legislature intended to impose upon a street railroad company no such obligation as one of the prerequisites to its right to establish itself as a corporation. And no less impossible would it be for the average street railroad corporation to embrace in its articles of incorporation a statement of the "estimated length of the road" it intended to construct and operate. This would be especially true in large and growing cities. For illustration, we may say that it is known, as a matter of common knowledge, that there are ordinarily large portions of the territory of the larger cities which are slow to build up or to increase in population, and that it is only where such outlying districts grow in population to that extent that there is a demand for street car accommodations, remunerative to the company, that street railroad corporations are justified in extending or will extend their service to such districts. New streets are often opened up and old ones extended or lengthened and thus new conditions arise which necessitate the extension of the local car service. It must therefore be plainly manifest that no street railroad corporation could insert in its articles of incorporation a statement of the probable length of its road. But there is another and more potent reason than any that has yet been suggested which would render it impossible for a street railroad company to give an estimate of the length of its road, and that reason grows out of the fact that municipalities themselves have full and complete control of and power over their streets, and whether such streets may or may not be used by street car companies rests entirely in the discretion of the governing bodies of such municipalities. If, therefore, a street railroad company should, in its articles of incorporation, either designate the termini of their road or give an estimate of the length thereof, or do both, it would still remain with the local authorities to say whether the termini should be as designated or the length of the road as estimated. In other words, the termini and the length of a street railroad are subject to the determination of the local authorities by the franchises which the law provides must come, after the company has been incorporated. Thus it must appear to be very plain that it is impossible for such corporations to designate in their articles of incorporation the termini of their road or roads, or to insert therein even an approximate estimate of the length of such road, or anything like such an estimate as is clearly intended shall be given, and which undoubtedly can accurately be given, by the ordinary railroads.

If, then, for the reasons suggested, these provisions of section 291 are not applicable to street railroads, may it still be held that the other provisions of said section and of the other sections mentioned are, nevertheless, applicable to such railroads? A negative reply to this question will, we think, be found in a further examination of the several titles and sections of the Civil Code bearing upon corporations and their formation.

That the Legislature recognized and intended to classify street railroad corporations as distinct from the ordinary railroad corporations, we think is a proposition which offers little, if any, ground for serious controversy. While there is no provision of the Code expressly classifying corporations, it is, nevertheless, to be observed that the Legislature has practically classified them. There are provided for in the Code 22 different classes of corporations, as to which there is specific legislation, each of said corporations being treated under a separate title; and it is to be remarked that, in the determination of the proposition whether the Legislature recognized and intended to treat as different and distinct ordinary railroad and street railroad corporations, it is a fact of cogent and persuasive significance that the specific provisions relating to said corporations are, respectively, to be found under separate and distinct titles. This circumstance, in connection with the legislation respecting railroad corporations as found in our Civil Code, is, itself, it seems to us, conclusive of the intention of the Legislature to treat the two classes of railroads as different and distinct from each other. This is manifestly not a strained or unnatural interpretation of the intention of the Legislature, but an interpretation which fully harmonizes with the essential distinction in the manner or mode in which the two corporations obtain their right to lay their tracks and operate their roads. Thus it will be noted that we have before us, as a guide to reaching the intention of the Legislature with respect to the meaning and scope of the sections of the Civil Code under consideration, these significant propositions: (1) That it is impracticable to apply subdivisions 2 and 3 of section 291 to street railroad corporations; (2) that street railroads are treated in said Code under the title "Street Railroads," whereas, the specific provisions as to ordinary commercial railroads are presented in the Code under the title "Railroad Corporations." In addition to the foregoing considerations, there is the mandate of section 510 which reads: "Street railroads are governed by the provisions of title three of this part, so far as they are applicable, unless such railroads are therein specially excepted." By the foregoing language, the Legislature very plainly emphasizes its intention to segregate railroads into two distinct classes, and as so segregated to enact as to each legislation peculiarly applicable thereto. If this does not necessarily follow from the terms of section 510, or if both classes of roads were to be governed by all the provisions of the Code relative to railroads, so far as they are applicable, why enact section 510? And if it was intended that, so far as applicable, all said provisions should apply to street railroads, would not the Legislature have expressly and specially so declared, as it has done with respect to the provisions of title 3? There is but one answer to these questions, it seems clear to us.

It is, however, argued that the reason for requiring that it be disclosed by the articles of incorporation and the affidavit that 10 per cent. of the required amount of the capital stock subscribed has actually been "paid to a treasurer for the benefit of the corporation" applies with equal force to street railroad, as well as ordinary railroad, corporations. This may be conceded; but the reply is that the right to incorporate and the prerequisites to the formation of corporations come from the Legislature, and if that body has not seen fit to require one class of corporations, in order to become such, to do things which are required of other classes, it is not for the courts to supply the omission, however weighty and forceful the reasons may be that such omission should be supplied.

Our conclusion is that sections 291, 293, 294, and 295 have no application to street railroad corporations, and that it is therefore unnecessary for petitioners to insert in their articles of incorporation the matters set forth in subdivisions 2, 3, and 4 of section 291 of the Civil Code, or to file with the Secretary of State the affidavit provided for by section 295 of said Code. In other words, we think the articles of incorporation presented for filing to respondent, and of which a copy is annexed to the petition herein, are sufficient in all particulars, and that it is the duty of the Secretary of State to file the same upon the receipt of the proper fee therefor.

The demurrer to the petition will be overruled, and in accordance with this order let a writ of mandate issue out of this court to the respondent, Hon. Charles F. Curry, as Secretary of State, requiring and compelling him to file said articles of incorporation in his said office of Secretary of State.

We concur: CHIPMAN, P. J.; BURNETT, J.

159 Cal. 30

DUNGAN v. CLARK. (Sac. 1,849.)

(Supreme Court of California. Dec. 23, 1910.)

1. Justices of the Peace (§ 36*)—Jurisdiction—Controversy Involving Title to Land.

Under Code Civ. Proc. § 838, providing that no issue involving the title or possession of real property shall be tried in justices' courts, and requiring the certification of such an action to the superior court, an answer in an action in justice's court on a note, which alleged a failure of consideration for the reason that the payee did not own or possess an interest in a pump plant on land which he assumed to sell as a consideration for the note, raised the question of title, as, to maintain the defense, the maker must offer evidence that the payee was not the owner of the plant constituting real property.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83–97; Dec. Dig. § 36.*]

2. Justices of the Peace (§ 36*)—Jurisdiction—Controversy Involving Title to Land.

Where the title or claim of title, the possession or right of possession, of real property, or any right growing out or dependent on either, is alleged in the pleadings in an action before a justice as an issuable fact, the case involves title or possession of real property and must be transferred to the superior court under Code Civ. Proc. § 838.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83–97; Dec. Dig. § 36.*]

3. Justices of the Peace (§ 75*)—Jurisdiction—Transfer to Superior Court.

Where an action begun in justice's court was properly certified to the superior court on the ground that title to real estate was involved by reason of the answer, the fact that the finding on the issue of title urged as a defense was adverse to defendant did not affect the jurisdiction of the superior court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 243–245; Dec. Dig. § 75.*]

4. Courts (§ 212*)—Jurisdiction—Jurisdiction of Trial Court.

Under Const. art. 6, § 4, the Supreme Court has no jurisdiction on appeal from a judgment of the superior court, where the superior court was without original jurisdiction under section 5, on the ground that the action was a simple action at law in which the demand, exclusive of interest, did not amount to $300.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511–516; Dec. Dig. § 212.*]

Department 1. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by A. C. Dungan against T. E. Clark. From a judgment for plaintiff and from subsequent orders denying motions to vacate the judgment and to quash an execution, defendant appeals. Affirmed.

T. E. Clark, in pro. per. Bradley & Bradley, for respondent.

SLOSS, J. This action was commenced in a justice's court of Tulare county. The complaint was in two counts, one to recover $125 together with $25 attorney's fees on a promissory note, and the other to recover $53.99 for electrical power furnished to the defendant at his request.

The defendant filed a verified answer, setting up as a defense to the action on the note that said note was delivered in consideration of the sale by plaintiff to defendant of a half interest in a pumping plant situated upon a described tract of land, and a like interest in a pipe line extending from said pumping plant to defendant's premises; that the consideration for the note wholly failed, for the reason that plaintiff did not own or possess the half interest which he undertook to convey. The defendant alleges that in consequence he has never been able to obtain from said pumping plant any water for the irrigation of his land. Upon the coming in of this answer, the justice, finding that the question of title and possession of real property was involved, certified the pleadings to the clerk of the superior court of Tulare county. Code Civ. Proc. § 838. The case was tried by the superior court, which, after making findings to the effect that all the allegations of the complaint were true and that none of the allegations or denials of the answer were true (except that the consideration of the note was the sale of a half interest in the pumping plant and pipe line, and that plaintiff had conveyed such interest to defendant), entered judgment in favor of plaintiff as prayed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant appeals from the judgment, and from subsequent orders denying motions to vacate the judgment and to quash an execution.

On all three appeals the appellant presents the same point, which is that the action was one within the exclusive jurisdiction of the justice's court, and that the superior court was without jurisdiction to hear and determine it. The suit being one "on an action arising on contract to recover money only," in which "the sum claimed, exclusive of interest, does not amount to $300," the complaint was properly filed in the justice's court. Code Civ. Proc. § 112. The appellant's argument is that the answer fails to show that the title or possession of real property was involved in such manner as to justify a transfer of jurisdiction to the superior court.

Section 838 of the Code of Civil Procedure provides that "the parties to an action in a justice court cannot give evidence upon any question which involves the title or possession of real property * * *; nor can any issue presenting such question be tried by such court; and if it appear from the answer of the defendant, verified upon his oath, that the determination of the action will necessarily involve the question of title or possession to real property * * * the justice must suspend further proceedings, * * *" etc., and certify the pleadings to the clerk of the superior court, which court shall have the same jurisdiction as if the action had been commenced therein. The purpose of this section is to secure to the superior court the right to hear and determine the causes that are, by the Constitution, placed within its jurisdiction. The defendant, by the verified answer here filed, based his defense upon the proposition that the plaintiff had no title to the pumping plant and pipe line which he assumed to transfer as a consideration for the note sued on. That the pumping plant and pipe line were real property is not questioned. To maintain his defense, the defendant was bound to offer evidence to show that plaintiff was not the owner of this real property, and the court was required, in order to determine the rights of the parties, to decide whether or not plaintiff was such owner. Under the construction given to Code of Civil Procedure, section 838, by this court, the question of title was involved. It is true that in Schroeder v. Wittram, 66 Cal. 636, 6 Pac. 737, one of the opinions contained expressions to the effect that the justice's court is not ousted of jurisdiction where the title of real property is only incidentally involved. But, as is pointed out in later decisions (Copertini v. Oppermann, 76 Cal. 184, 18 Pac. 256; Hart v. Carnall, etc., Co., 103 Cal. 132, 37 Pac. 196), the opinion in question was not that of a majority of the court, and is not to be regarded as authority. In the Copertini Case, the court quoting from the opinion in Holman v. Taylor, 31 Cal. 338, adopts this language: "The idea intended to be embodied in the phrase 'cases at law which involve the title or possession of real property' may be expressed by the paraphrase: 'Cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defense.' When the title or claim of title, the possession or right of possession, of real property, or any right growing out or dependent upon either, is alleged in the pleadings as an issuable fact, the case is within the meaning of the constitutional provision." Similarly in Hart v. Carnall, etc., Co., supra, it is declared that: "If the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original, and this court appellate jurisdiction, whether the involution may be said to be merely incidental or not." See, also, Raisch v. Sausalito Land Co., 131 Cal. 215, 63 Pac. 346; King v. Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10. The justice was therefore right in certifying the pleadings to the superior court, which, under the averments of the answer, had original jurisdiction of the action.

There is clearly no merit in the suggestion of appellant that the superior court lost jurisdiction, because it found against some of the affirmative allegations of the answer. These were the averments that plaintiff had no title to the property which he undertook to convey in consideration of the note, and that thereby defendant lost his opportunity to obtain water. The fact that the finding on the issue of title urged as a defense was adverse to defendant cannot affect the jurisdiction.

It may be noted that appellant's contention that the case is one within the exclusive jurisdiction of the justice's court is destructive of its own purposes. For, if the superior court is without original jurisdiction of the case, because it is a simple action at law in which the demand, exclusive of interest, does not amount to $300 (Const. art. 6, § 5), the Supreme Court (or the District Court of Appeal) is for the same reason without jurisdiction to entertain the appeal. The appellate jurisdiction of this court and of the Court of Appeal is defined by the Constitution (article 6, § 4), and neither tribunal is given such jurisdiction in a case such as the appellant claims this one to be. Accordingly, the only result of appellant's argument, if it were well founded, would be that the appeals must be dismissed as beyond the jurisdiction of this court. Sweet v. Tice, 45 Cal. 71; Edsall v. Short, 122 Cal. 533, 55 Pac.

327; Raisch v. Sausalito, etc., Land Co., supra.

The judgment and orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

159 Cal. 6

PEOPLE v. LOPER. (Cr. 1,546.)

(Supreme Court of California. Dec. 21, 1910. Rehearing Denied Jan. 19, 1911.)

1. JURY (§ 103*) — QUALIFICATIONS — FORMATION OF OPINION—EFFECT ON VERDICT.

Under Pen. Code, § 1076, providing that no juror shall be disqualified by reason of having formed or expressed an opinion founded upon public rumor or statements in public journals, if it appear upon his declaration that the juror can act impartially, the fact that the juror has conversed with witnesses or interested persons regarding the merits of the cause is immaterial, if the statements of such persons merely amounted to public rumor and was so received by the juror.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461–479; Dec. Dig. § 103.*]

2. CRIMINAL LAW (§ 1148*) — APPEAL — REVIEW — DISCRETION OF TRIAL COURT — SELECTING JURORS.

An objection to the competency of a juror, that his knowledge of the English language is imperfect, is addressed peculiarly to the trial court's discretion, and his ruling thereon will not be disturbed, in absence of flagrant abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050–3052; Dec. Dig. § 1148.*]

3. CRIMINAL LAW (§ 1148*) — APPEAL — REVIEW — SELECTION OF JURORS — DISCRETION OF COURT.

Where a juror's voir dire examination is conflicting as to his competency, it is generally for the trial court to decide which of his answers shows his true mental condition in determining whether he is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050–3052; Dec. Dig. § 1148.*]

4. CRIMINAL (§ 311*)—PRESUMPTIONS—SANITY.

All persons are presumed sane until the contrary is proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742–744; Dec. Dig. § 311.*]

5. HOMICIDE (§ 179*) — ADMISSION OF EVIDENCE.

Evidence that accused was sane at a time long before the commission of the homicide is admissible, as tending to establish his sanity at the time of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

6. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETION OF TRIAL COURT—ADMISSION OF TESTIMONY.

In determining whether testimony is admissible in a homicide case, in which insanity is pleaded, as to accused's sanity at a time long before the commission of the offense, the trial court has a wide discretion which will not be interfered with on appeal, in absence of clear abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066; Dec. Dig. § 1153.*]

7. WITNESSES (§ 188*)—COMPETENCY—FORMER WIFE.

Under Pen. Code, § 1322, providing that neither husband nor wife is a competent witness for or against the other in a criminal action to which one or both are parties, except with the consent of both, which is to be construed as containing substantially the same provisions as Code Civ. Proc. § 1881, rendering the wife incompetent to testify to communications between herself and her husband, accused's former wife, who had lived with him a year after their marriage and had known him a year before the marriage, could testify in a homicide case as to his sanity, basing her testimony on her knowledge of him while she cohabited with and knew him; the mental condition not being a matter subject to communication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 734, 736; Dec. Dig. § 188.*]

8. CRIMINAL LAW (§ 522*) — CONFESSIONS — VOLUNTARY CHARACTER.

As a confession must be free and voluntary, a confession made a few days after threats were made to induce accused to confess was not admissible unless it clearly appeared that such threats had ceased to operate upon accused's mind when the confession was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1189–1195; Dec. Dig. § 522.*]

9. CRIMINAL LAW (§ 532*) — CONFESSIONS — ADMISSION.

Whether a confession is voluntary is a preliminary question for the trial court, in deciding which it has considerable discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1218; Dec. Dig. § 532.*]

10. CRIMINAL LAW (§ 519*)—CONFESSIONS—VOLUNTARY CHARACTER.

Accused, without being advised that his confession might be used against him, was cajoled and browbeaten by the prosecuting officials, who called him a "monumental liar," and told him that decedent's friends would have hanged him to the first tree if he had been taken to the place where the body was found. After being talked to in that way for a considerable time, he was put in solitary confinement for the night, and confessed the following morning. *Held*, that the confession was not voluntary, and was not admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.*]

11. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE—INVOLUNTARY CONFESSIONS.

That the evidence other than the alleged confession was sufficient to justify a conviction did not make the admission of a confession improperly extorted harmless, as it could not be said what weight the jury gave to the confession in forming its verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137–3143; Dec. Dig. § 1169.*]

12. HOMICIDE (§ 174*) — PROSECUTION — ADMISSION OF EVIDENCE.

In a prosecution for homicide, a printed copy of a notice published in a newspaper, purporting to be signed by decedent and authorizing accused to settle decedent's affairs, was admissible to show actual publication of the notice by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359–371; Dec. Dig. § 174.*]

13. CRIMINAL LAW (§ 438*)—ADMISSION OF EVIDENCE.

Properly authenticated photographs are admissible in evidence when relevant, so that in a murder case, in which it appeared that decedent's body was dismembered, a photograph showing the nature of the country between decedent's cabin and the place where his body was discovered was admissible in evidence to show the nature of the ground probably traversed by the murderer, and the necessity for dismembering decedent's body.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.*]

Angellotti, Shaw, and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Charles H. Loper was convicted of murder, and from the judgment of conviction and an order denying a motion for a new trial, he appeals. Reversed.

Aynesworth & Sprouse, S. J. Hinds, and Henry Brickley, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

MELVIN, J. Appellant was convicted of the crime of murder and was sentenced to receive the death penalty. He prosecutes this appeal from the said judgment of conviction and from an order denying his motion for a new trial.

Loper, the defendant, lived with Joe Vernet on a ranch near Sentinel post office in Fresno county. On July 13, 1908, Chris. Peterson was at Vernet's cabin, and when he departed he left Loper and Vernet there together. On July 17, 1908, defendant took the stage at Sentinel and went to Fresno, but before his departure he told Mr. Rea, in the presence of the latter's mother and sister, that Vernet had gone to Oregon, having started the night before on the walk of 30 miles to Fresno, and that defendant, after settling Vernet's affairs, would join him in Oregon. After his arrival in Fresno Loper put a notice in a newspaper in which was a statement that he was winding up the affairs of Joe Vernet, and had authority to attend to all necessary business. While in Fresno, Loper stated that Vernet had gone to Oregon, leaving him to settle all business affairs. He also offered to sell certain wood belonging to Vernet, and after returning to Sentinel he collected and receipted for certain money due to that individual. He also sold a wagon and two horses from Vernet's place, and performed other acts as the ostensible agent of Vernet. On July 28th defendant was arrested, and while in custody told the sheriff that he was winding up Vernet's affairs. He also admitted that he caused the notice to be printed in the paper in Fresno. When arrested defendant had on his person two certificates of deposit in favor of Vernet on the Fresno National Bank, and a slip of paper on which was a writing supposed to be Vernet's signature. About August 1st the dismembered body of Joe Vernet was found buried in a hole about three-eighths of a mile from the place where he and defendant had lived, and soon afterwards defendant confessed that he had killed Vernet by shooting him in the back of the head. Insanity was the defense upon which Loper depended.

Appellant's first attack is directed against the selection of the jury. Error is alleged because of the refusal of the court to allow certain challenges proffered by defendant to individual jurors. All of the peremptory challenges allowed by law were exercised by defendant, and that fact makes the errors of the court, if any were committed in ruling upon his challenges for cause, vitally material to defendant and prejudicial to his rights. A number of the challenged talesmen admitted that they had opinions respecting defendant's guilt, and while they all testified that they could put such opinions aside and try the defendant fairly and impartially, it is contended that the prosecution failed to prove affirmatively that the persons with whom they had talked were not witnesses in the action or those deeply interested, and that therefore the opinions of the talesmen were not properly brought within the terms of section 1076 of the Penal Code. People v. Wells, 100 Cal. 230, 34 Pac. 718; People v. Helm, 152 Cal. 538, 93 Pac. 99. A scrutiny of the evidence of those men called for examination as prospective jurors, however, shows either that the persons with whom they had talked were not witnesses nor interested persons, or that the opinions of the talesmen were based solely upon newspaper reports. An earnest contention is made in the briefs that failure to make proof that the persons with whom these talesmen talked were not witnesses nor interested parties removes the opinions of the prospective jurors from the exceptions expressed in section 1076 of the Penal Code, and that the court therefore erred in refusing to allow the challenges. We do not so understand the rule. Where it appears that a man called into the jury box has an opinion respecting the defendant's guilt, based in part upon statements of purported facts relating to the alleged crime, made to him by individuals, it must be shown, in order that section 1076 of the Penal Code may apply, that the persons who stated the supposed facts, or expressed strong belief in the defendant's guilt, were not witnesses nor interested persons, or that they were not so understood to be by the man under examination. The mere circumstance that the persons with whom he talked were or were not witnesses would be immaterial, if his opinion was not founded wholly or in part on what they said, because the court is seeking to learn his mental attitude toward the defendant and the source and quality of any opinion which he may entertain. If he talked with persons understood by him to be possessed only of such information as he himself obtained from his reading, their conversation would naturally amount to public rumor so far as he was concerned. If, on the other hand, some one whom he believed would say, "I saw the crime committed and know whereof I speak," the discussion by that person of the manner of the commission of the offense would almost certainly make a deep impression upon the talesman's mind and conduce to the formation of a strong opinion, even if, as matter of fact, the narration were pure fiction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Two challenges were interposed to Theodore Linden, one based upon his supposed imperfect knowledge of English, and the other upon his admitted opinion which, according to appellant's attorneys, was fixed and was prejudicial to Loper. The first objection was one addressed particularly and peculiarly to the judgment of the trial court, and unless flagrant abuse of discretion clearly appears, rulings of that court on such a subject are seldom disturbed. We cannot say upon reading the juror's answers to the questions propounded to him that he was so deficient in his knowledge of the English language that the court abused its discretion in refusing to entertain a challenge under section 198, subd. 3, of the Code of Civil Procedure. His opinion seems to have been based upon the most casual reading, and he said that he could try the case fairly and impartially, giving to the defendant the benefit of the presumption of innocence.

The statements of those called for jury duty in this case seem quite typical of those given during the selection of a jury in any case about which there has been extensive comment in the daily journals. Almost every person called into the jury box had an opinion of defendant's guilt, based upon what he had read, and some of them stated that such opinion would require evidence for its removal. When, however, they were put to the test of their ability to try the case upon the evidence produced at the trial and uninfluenced by other considerations, each answered that he could and would, if chosen, act fairly and impartially. It was the function of the trial court to determine the true state of mind of each member of the panel who was questioned touching his qualifications to serve as a juror. Frequently there is a conflict between different portions of the testimony given during an examination on voir dire, due not always to the lack of candor on the part of the person examined, but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. When such conflict occurs, the trial court must decide, if possible, which of the answers most truly reveals the state of the talesman's mind. In other words, the questions generally presented are those of fact and not of law. People v. Ryan, 152 Cal. 364, 92 Pac. 856; People v. Ochoa, 142 Cal. 274, 75 Pac. 847; People v. Flannelly, 128 Cal. 86, 60 Pac. 670; People v. Fredericks, 106 Cal. 559, 39 Pac. 944.

A number of witnesses testified, as intimate acquaintances, to defendant's sanity, under the rule expressed in subdivision 10 of section 1870 of the Code of Civil Procedure. Objection was made to the admission of their testimony, upon the ground that some of them had not seen defendant within several years of the time of the trial. This objection goes more to the weight than to the admissibility of their testimony. All persons are presumed to be sane until the contrary is proved. Proof that defendant was sane at a time long prior to the commission of the offense would have some tendency to establish his sanity at the time of the homicide; the weight and value of such proof being a matter for the jury. In ruling upon the admission of such testimony, the trial judge is clothed with a wide discretion, which will not be disturbed, unless obviously it has been improperly exercised. People v. Suesser, 142 Cal. 361, 75 Pac. 1093; People v. McCarthy, 115 Cal. 258, 46 Pac. 1073; People v. Hubert, 119 Cal. 221, 51 Pac. 329, 63 Am. St. Rep. 72; People v. Clark, 151 Cal. 207, 90 Pac. 549. One of the witnesses who testified, as an intimate acquaintance, to defendant's sanity was his former wife, now Mrs. Hendrickson. She had known him about a year before their marriage, which had lasted about two and a half years, although they had lived together a little more than a year. Objection was made to Mrs. Hendrickson's testimony upon the ground that she was prohibited from being a witness by the provisions of section 1322 of the Penal Code. That section is as follows: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in cases of criminal violence upon one by the other, or in case of criminal actions or proceedings brought under the provisions of sections two hundred and seventy and two hundred and seventy *a* of this code, or in cases of criminal actions or proceedings for bigamy or adultery." The above section must be construed as having practically an identical meaning with section 1881 of the Code of Civil Procedure. People v. Langtree, 64 Cal. 256, 30 Pac. 813. Authorities have been cited on both sides; but little assistance is to be obtained from such citations, owing to the varied statutory provisions in the different states. In some jurisdictions statutes are so construed that only the sort of testimony is excluded which the statute specifically interdicts. In others no communication made by one spouse to the other may be stated after the marriage relation has ceased to exist, even when the statute by its terms seems to apply the rule only to the period of lawful matrimonial relation. Some of the cases make an exception, from the rule prohibiting one spouse from testifying against the other, of those things which in their nature are "as likely to have occurred before the public as in private." Owen v. State, 78 Ala. 429, 56 Am. Rep. 40. In the case last cited the judgment of conviction in a burglary case was reversed, because the former wife of the defendant had testified that he returned to his home late on the night of the burglary, and that afterwards he had a considerable sum of money in his possession. The authorities which recognize and those which deny the right of a divorced wife to speak on the witness stand of matters not essentially of a confidential nature, coming to her knowledge during the existence of the marriage relation, are collated in Owen v. State, supra. Wharton, writing of this subject, states the rule in civil cases thus: "Where the relationship has ceased by death, or by divorce, the wife may be admitted for or against the former husband or his representatives (or the converse), though she is precluded from testifying as to information derived confidentially during marital intercourse. The same distinctions are applicable to the husband. It is otherwise as to nonconfidential information." Wharton, Law of Evidence, p. 388. See, also, Gordon, Rankin & Co. v. Tweedy, 71 Ala. 210. Professor Greenleaf thus formulates the rule: "After the parties are separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversations with him, though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation." 1 Greenleaf on Evidence (16th Ed.) p. 393. Again, treating of the subject of marital confidences, the same learned author observes (page 497): "But where such confidences are not involved, the policy of preserving the marital peace does not forbid one spouse from testifying against the other's interests after the latter's death or divorce." While the problem here considered is a matter of first impression in California, this court declared years ago in favor of the liberal construction of section 1322 of the Penal Code, and the admission of testimony not clearly excluded by its terms. In People v. Langtree, supra, decided in 1883, the court in bank adopted with approval the following language of Mr. Schouler: "On the whole, the prevailing tendency of late years in both England and America is to regard the domestic confidence or the ties of a spouse as of little consequence compared with the public convenience of extending the means of ascertaining the truth in all cases; such facilities being increased, it is believed, by hearing what each one has to say, and then making due allowance for circumstances affecting each one's credibility." Schouler on Husband and Wife, 85. It will be noticed that, construing section 1322 of the Penal Code and section 1881 of the Code of Civil Procedure together, the inhibition of testimony extends to communications made by one to the other. Mental condition is not a matter of communication, and in view of the broad rule adopted in People v. Langtree, supra, we are constrained to hold that the testimony of this witness was admissible.

After his arrest, the defendant was submitted to a rigid examination by the sheriff, the district attorney, and others. On the following morning he made a confession, which his counsel contend was due not to his own voluntary impulse, but resulted from this close examination, characterized by them as "a relentless sweating process." The questions propounded to the defendant were reported, and a transcript, admittedly correct in every particular, was introduced in evidence defendant's counsel making only the objection that the reported conversation was inadmissible as it was induced by threats. the effect of which must have extended to and operated to obtain the subsequent confession. A careful consideration of this matter convinces us that the criticism made by appellant's counsel is just. The transcript does not show that at any time the defendant was instructed with reference to his rights under the Constitution, nor was he told that statements made by him might be used against him at his trial. During the long and searching examination to which he was subjected he did not make a confession, but he admitted that if he did kill Vernet the deed must have been accomplished while he was drunk; that his mind was a blank upon the entire subject. It is a fundamental rule of criminal law that a confession may not be used against a defendant, unless the prosecution can show its free and voluntary character, that it was made without previous inducement, and that neither duress nor intimidation caused defendant to furnish such evidence against himself. People v. Miller, 135 Cal. 69, 67 Pac. 12. It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt. People v. Johnson, 41 Cal. 455. After the searching inquiry of the sheriff, district attorney, and deputy district attorney had closed, defendant was locked up in solitary confinement until the following morning, when he informed the sheriff that he desired to tell everything. Undoubtedly there was strong probability that the occurrences of the previous day had much to do with fixing defendant's final resolution to confess, and if coercive threats were made and inducements offered, then we must, in the absence of a contrary showing, find that the confession made on the following day was inadmissible as evidence. The manner of examination to which defendant was subjected may best be understood, perhaps, from a reading of the following quotations from the transcript: "Mr. Hawson: Q. Where were you when you cut the legs off of Joe Vernet? A. I don't know about that at all. Q. What did you cut them off with? A. Good God, is Joe dead? Mr. Chittenden: You know he is dead. A. I do not. If I ever told the truth in my life, I didn't know he is dead. There is no man in the world that would feel worse on his loss than I do. He is the only friend I have. Mr. Hawson: You are the most monumental liar I ever knew. * * * How long did you leave the body in the cabin? Confess up and tell the truth entirely. The sooner you tell the truth about this, the better your mind will be. I don't blame you for not wanting to tell this. This is an awful strain, but when you make this confession, you will be a better man. You will feel better in two minutes; just that quick. A. I don't see how I can. Q. Go on and tell us the story. You will feel better and different, and if you have done wrong, go on and be a man. * * * Mr. Church: As far as I am concerned, personally, as district attorney, I don't care whether you say anything or not. The evidence is absolutely and complete against you, unless you want to implicate any one else. The only way you can do yourself any good in the world, if there was any one else in it, is to tell it. A. I will tell you there was no one in it, and Joe was going to Portland, Or. * * * Q. Who was with you in that trick? A. I have told you all about it. Q. I thought you did it all alone. I thought if you didn't it would be an advantage to you, personally, to let us know who it was, is all. I thought it would perhaps. * * * Mr. Church: I don't suppose there was ever a murder committed in the history of the world like this, just for his money and certificates of deposit, and then killed by a man who pretends to be his friend; just for money. It is terrible. Mr. Chittenden: I want him to tell it. It would make him feel better. A. Don't you think if I had done that, there would be some impression on my mind—there would be something to show to my mind I done it? Mr. Church: Certainly. A. And there has never been anything. Q. I thought it was a cool, calculated piece of work. He has had it on his mind for a year. I think I have figured it out; how he could murder him, and then get out for good. He had no wife. If you have a wife, I would like for you to tell me. A. No. Q. You couldn't pay your board bill. He boarded you for a year; you borrowed money of old Joe, and, in the face of these things, he had gone down in his pocket and loaned you money. You couldn't pay your board bill; you hadn't done an honest day's work in months; you could get no work to do and, even in the face of all this, you took poor old Joe and butchered him in the same manner as you would have butchered a hog. And you tell us in all soberness your mind is a blank, and hasn't been a blank before that time? Mr. Chittenden: There are hundreds of people up there that know him. I think he has been in this line of work for a year. The people up there can tell if his mind has been in a blank; and to think he cut him up and buried him is all bosh. I have got mountains of proof. There isn't anything to it at all. There isn't anything in the case. It has been the easiest thing in the world to hunt, and then for you to sit here and tell us you don't know anything about it—if you want to live in that frame of mind, if you want to live that way —what you are facing at this time right now—I thought it would probably relieve your mind to have that awful truth told. A. I would tell if I could, but I don't see that I done it. * * * Q. (by Mr. Hawson): If you didn't do it, who knows you done it? It was done right at your door, in your house. A. It looks to me if I done that terrible crime, there would be something on my mind. Q. There is something. You have got a load right now. It is as big as that courthouse standing right there. It is heavier than this jail, and the only reason I want you to tell me the truth—there is absolutely nothing to the case—it might be a relief to your mind. Your mind is a little clearer then than it is now, I tell you. Mr. Hawson: If you had been up there yesterday afternoon and seen them dig up that body—some 30 or 40 men who knew Joe Vernet—you wouldn't have had five minutes to tell anything. Sheriff Chittenden: If I had come back and got you —you didn't have any friends up there— they would have strung you up to the first tree, Charlie Loper; a piece of rope would have got to your neck. A. If I had done that deed, they might do it. Q. You did the deed, all right. A. There is nothing in my mind about the thing."

That the rule excluding confessions unless they are free and voluntary was violated in admitting the alleged confession, after such proof of threats, inducements, and coercion, can scarcely admit of a doubt. It has been held in this state that it was sufficient to exclude a confession if, before making it, the defendant had been told that it would be better for him to make full disclosure. People v. Barric, 49 Cal. 344. In People v. Thompson, 84 Cal. 605, 24 Pac. 386, a confession was held inadmissible, because the sheriff had told the prisoner that he "didn't think the truth would hurt anybody," and that "it would be better for him to come out and tell all he knew about it, if he felt that way." The question whether a confession is free and voluntary is a preliminary one addressed to the trial court (People v. Miller, 135 Cal. 69, 67 Pac. 12), and that court is clothed with a considerable amount of discretion in determining it (People v. Suesser, supra); but we know of no case in which such potential influences as are shown by this record have been held harmless and not sufficient to exclude the confession induced by them. So long as the constitutional privilege of a defendant not to give evidence against himself exists, that right must be protected by adherence to the well-established rule intended to guard against undue advantage being taken of his fears, hopes, or mental or physical weakness; and while many thoughtful persons believe that those charged with crime should be compelled, either to testify or to bear an adverse presumption as the result of refusal to take the witness stand, no advocate of that change in the law, we believe, goes so far as to desire the machinery of compulsion to be applied anywhere except in the full publicity of open court. In a recent public address, speaking upon this subject, and advocating a change in the rule whereby a defendant is now enabled to refrain from testifying, Mr. Justice Sloss said: "Side by side with the limitation of the right of the accused to stand mute should go the absolute prohibition of testimony or confessions obtained from persons under arrest, as the result of private questioning by officers of the law. The horrors of the 'third degree' are the direct result of the rule prohibiting the prosecution from calling the accused as a witness, or basing any argument upon his failure to take the witness stand in his own behalf. Surely it is far better to question the accused in open court, where he may have the assistance of counsel and the protection of an impartial judge, than to endeavor to convict him by means of an alleged confession which may never have been made and which, if made, may have been extorted from him in ways that, if known, would throw great doubt upon its reliability."

In Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, the leading authorities upon the subject of confession are collated and discussed masterfully in the opinion of the court delivered by Mr. Justice White. In that opinion he says: "A brief consideration of the reasons which gave rise to the adoption of the fifth amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed in the text-writers and expounded by the adjudications, and hence that the statements on the subject by the text-writers and adjudications but formulate the conceptions and commands of the amendment itself." In another part of the opinion he observes that: "There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes." He also quotes with approval part of the opinion of the same court, delivered by Mr. Justice Brown in the case of Brown v. Walker, 161 U. S. 596, 16 Sup. Ct. 646, 40 L. Ed. 819. As that quotation, we think, fully illustrates the historical significance of the rule which we have been discussing, we take this opportunity of repeating it: "The maxim, 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded on no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however, adopted, it has become firmly embedded in English as well as American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

It is suggested that the evidence in this case was so complete without the confession of the defendant that the jury would have found him guilty, even if the confession had been entirely omitted. While this argument serves to emphasize the lack of excuse for the resort on the part of public officers to the methods of the "third degree," it does not abate one whit the defendant's right to all of his constitutional privileges. He was entitled to stand mute, if he chose to do so, and to have no confession save a voluntary statement—one not extorted by fear nor induced by promises—introduced against him at his trial. Of this right he was deprived. Without instruction as to the law applicable to his case, without advice of counsel, without knowing that his utterances might be used against him, he was cajoled, browbeaten, and persuaded; was called "a monumental liar"; was told that Vernet's friends would have hanged him "to the first tree," if the sheriff had taken him to the place where the dead body was found; and, in short, every sort of device was employed to force a confession from him. Then, to enable these persuasions to sink deeply into his mind, he was solitarily confined for the night. To say that the confession of the following morning was not influenced by the conduct and the conversation of the officers would be to contradict all human experience. And it is equally untenable to say that, because the prosecution had a perfect case without the confession, the jury would have imposed the ultimate penalty of the law upon the defendant, whether that confession had been excluded or admitted. No one could say (not even the jurors themselves) just what weight the confession had in fixing the belief of the jury in Loper's guilt, and especially in shaping a verdict involving capital punishment. But every one must conclude that the introduction of the defendant's own statement of his guilt under the circumstances here shown must have been most highly prejudicial to him. It follows that for this reason a new trial must be ordered.

Objection is made that a printed copy of a notice published in a Fresno paper, purporting to be signed by Joe Vernet and authorizing Loper to settle Vernet's business affairs, was introduced in connection with the testimony of Rufus Morrell. It is admitted by appellant's counsel that the original of this notice which the district attorney promised, when examining Morrell, to produce later would be competent. With this we agree, and we think it follows that evidence was admissible, showing actual publication of the notice after its preparation and its filing in the office of the newspaper.

Objection is also made to the ruling of the court admitting certain photographs in evidence. These pictures illustrated the country between Vernet's cabin and the place where the dead body was discovered. They were clearly admissible for the purpose of showing the jury the nature of the ground necessarily or probably traversed by the murderer, and especially for exhibiting the necessity (or lack of it) for dismemberment of the body. Photographs are admissible, when, properly authenticated, just as are other illustrative charts. People v. Durrant, 116 Cal. 213, 48 Pac. 75; People v. Crandall, 125 Cal. 133, 57 Pac. 785; People v. Mahatch, 148 Cal. 203, 82 Pac. 779.

We find no material errors in the matter of giving or refusing instructions. Most of appellant's criticisms are directed at instructions upon the subject of insanity. The jury was fully and fairly instructed upon this phase of the case.

It follows from the above discussion that the judgment and order must be reversed, and it is so ordered.

We concur: BEATTY, C. J., HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, J. I am unable to concur in the reversal of the judgment and order in this case. The reversal is ordered solely because of the admission in evidence of the so-called confession of defendant, wherein, while admitting the actual killing, he described how it was compelled by an absolutely irresistible influence, commanding him to kill, that had been threatening him for days and that had finally dominated him. This statement is held to have been improperly admitted, on the ground, as we understand the opinion, that it is a confession obtained by threats, intimidation, coercion, and duress. There is no other possible ground of exclusion shown by the record. The law does not require that an accused should be affirmatively instructed as to his right to remain silent, and of the fact that statements made by him will be used against him, to render admissible a voluntary statement subsequently made. While it is better that such warning be expressly given to avoid all suspicion of improper inducement, it is not essential. The evidence of the long interview between the officers and the defendant shows beyond question that no improper inducement was held out to defendant to make the statement; no promise or intimation that it would be in any way better for him, so far as his treatment by the officers or by the court, or by any other person or persons was concerned; no statement, even, that it would be "better" for him, except in the event that some one else was implicated; and that the only thing in the way of an expression of opinion by any officer that it would be beneficial to defendant to confess the truth was expressly limited to the effect on defendant's mind—the relief from the strain of knowledge of unconfessed guilt of an atrocious crime. So that we are left, in excluding this statement, to the objection that it was obtained by threats, coercion, intimidation, and duress. While I do not desire to be understood as approving all that was said and done by the officers with relation to defendant, I do not think that it should be held that the trial court erred in its conclusion that the statement was voluntary. No threats were shown. The question of fact, whether the statement was the result of coercion, intimidation, or duress exerted by the officers, was one for the trial judge in the first instance, and we should not interfere with his conclusion thereon, unless the same be without substantial support in the evidence.

In my opinion the conclusion of the trial judge was sufficiently supported by the evidence.

We concur: SHAW, J.; SLOSS, J.

159 Cal. 23

CARTER v. WASTE, Judge.

(S. F. No. 5,662.)

(Supreme Court of California. Dec. 22, 1910.)

EXECUTORS AND ADMINISTRATORS (§ 314*) — PROCEEDINGS FOR DISTRIBUTION — MOTION FOR NEW TRIAL.

Code Civ. Proc. § 1351, provides that any person interested in the estate of a decedent may file objections to granting letters testamentary to persons named. Section 1666 provides that a decree of distribution is conclusive as to the rights of the parties, subject only to be reversed on appeal; and section 1668 provides that at a hearing in a proceeding for distribution, any person interested may contest the petition by written objections. Sections 1714, 1716, 1717 make applicable to all proceedings for distribution the provision of the Code relative to new trials, "except in so far as they are inconsistent with the provisions of this title," and that all issues of fact in probate proceedings must be tried as contests of wills, and that either party may move for a new trial as provided for civil actions. A petitioner for final distribution alleged that the only heirs of deceased were herself and certain children of a deceased half-brother of deceased, and subsequently two other petitions were filed in which the petitioners alleged that they were entitled to the estate, but not denying in terms any allegation of the first petitioner, and the court held against the original petitioner. *Held*, that an issue of fact was made and determined under the petitions in this case authorizing a motion for new trial.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

In Bank. Application by Ella Fleming Carter for a writ of mandate to be directed against William H. Waste, Judge of the Superior Court of Alameda County. Application granted.

F. A. Berlin, for petitioner. A. L. Frick, and A. F. St. Sure, for respondent.

ANGELLOTTI, J. This is an application for a writ of mandate to compel respondent to settle, allow, and sign petitioner's proposed statement on motion for a new trial in the matter of the final distribution of the estate of John J. Fleming, deceased, who died intestate. The matter was submitted to us upon a demurrer to the petition.

The facts, so far as they may be considered material, are as follows: On February 8, 1908, subsequent to the settlement of the final account of the administrator of said estate, petitioner filed her petition for final distribution, alleging, among other things, that the true name of deceased was Richard Fleming, Jr., and that he was a son of one Richard Fleming, that the only heirs at law of deceased were herself (an alleged half-sister) and certain children of a deceased half-brother of deceased, and that she was entitled to an undivided half of the estate and said children to the other half. On March 20, 1908, Ella Woodbury and three others filed their petitions, alleging therein that they were nephews and nieces of deceased, that he left him surviving no other person who was so nearly related as they, and that they were entitled to the whole estate in the proportion of one-fourth to each. On June 1, 1908, A. F. St. Sure, as assignee of George A. Myles and Ann Myles, filed his petition for distribution, alleging that deceased left no heirs at law other than the said Myles. Due notice was given of the time and place of hearing these petitions. The three petitions were finally heard together, much evidence being submitted in support of the same, and the court made its decree, finding therein that none of the alleged heirs other than George A. Myles and Ann Myles is an heir at law or relative of deceased, and that the said Myles are the sole next of kin and heirs at law of deceased, and distributing all of the property of the estate to the assignee of the latter. It is to be observed that there was in the petitions of Ella Woodbury et al. and A. F. St. Sure no denial in terms of any allegation of the petition of petitioner here; the only denial being such as must necessarily be implied from affirmative allegations that are in conflict with allegations of said petition.

The sole reason advanced for respondent's refusal to settle the statement is that the remedy by motion for new trial does not exist under the circumstances above set forth, and that the only remedy of an aggrieved party under such circumstances is to appeal from the decree of distribution. Respondent's main contention in this behalf is that the law does not authorize a motion for a new trial in proceedings on distribution.

It is true that certain provisions of the title of the Code of Civil Procedure relating to probate proceedings expressly make applicable to all such proceedings, "except in so far as they are inconsistent with the provisions of this title," the provision of part two of the Code relative to new trials. It is equally true that these Code sections declare that all issues of fact joined in probate proceedings must be tried in conformity with the provisions relating to contests of wills, that if no jury is demanded the court must try the issues joined, and that either party may move for a new trial upon the same grounds and errors and in like manner as provided in this Code for civil actions. Code Civ. Proc. §§ 1714, 1716, 1717. But nevertheless, as to certain proceedings under this title, it is well settled that these sections do not apply and that the remedy of motion for new trial is not available; the basis of such ruling being, of course, that it is inconsistent with the provisions of such title. Thus it is held that a motion for a new trial will not lie where the court has made an order granting or refusing a family allowance, or setting apart or refusing to set apart property as exempt, or as a homestead. Leach v. Pierce, 93 Cal. 614, 29 Pac. 235; Shipman v. Unangst, 150 Cal. 425, 88 Pac. 1090; Estate of Heywood, 154 Cal. 312, 97 Pac. 825. The same ruling has been made as to an order settling the annual account of an executor or administrator (Estate of Franklin, 133 Cal. 584, 65 Pac. 1081), and also as to an order appointing an administrator where there were petitions on behalf of two several applicants, but, according to the views of this court, "no issue joined as to any fact alleged in either petition or any objection made as to the competency of either of the parties." Estate of Heldt, 98 Cal. 553, 33 Pac. 549. On the other hand, it is held that the remedy by motion for new trial exists in the case of a contest of a will, and also in case of a contest based on written objections to an applicant for letters testamentary on the ground of his incompetency (In re Bauquier, 88 Cal. 302, 26 Pac. 178, 532), and an order authorizing the sale of real estate of a decedent (Leach v. Pierce, 93 Cal. 624, 29 Pac. 238). It has been assumed without question that a motion will lie in proceedings for partial distribution (Estate of Ryer, 110 Cal. 556, 42 Pac. 1082) and in proceedings on final distribution (Estate of Walker, 148 Cal. 162, 82 Pac. 770), and it has been so held as to the latter proceeding by the Supreme Court of Montana, upon statutes practically identical with ours. In re Davis' Estate, 27 Mont. 243, 244, 70 Pac. 721.

A careful consideration of the California cases we have cited leads to the conclusion that the true test to be applied in determining whether the motion will lie in the particular probate proceeding, where an issue of fact has been actually made and determined, is this, viz., Does the law expressly authorize issues of fact to be framed in such proceeding? If the answer be "Yes," the issues must be tried in the manner provided by the sections to which we have referred, and the motion for new trial is expressly authorized. This was the test suggested by the court, through Mr. Justice Temple, in Estate of Moore, 72 Cal. 340, 13 Pac. 880, and in Estate of Herteman, 73 Cal. 545, 15 Pac. 121. It was the test declared to be applied in Estate of Franklin, supra, in determining that the motion would not lie in the matter of the settlement of the annual account of an executor, the court having previously held in Estate of Sanderson, 74 Cal. 199, 209, 15 Pac. 753, 758, that "exceptions to an account do not create 'issues of fact joined,' such as must be submitted to a jury." The same distinction was observed in Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, and Leach v. Pierce, 93 Cal. 624, 29 Pac. 238. It was held in the first of these cases that a motion for a new trial was not authorized in a proceeding for family allowance, even though written objections had been filed and the issues thereby made determined, because there was no provision in the statutes for objections and the framing of issues, and the order was one that might be made by the court ex parte. The court distinguished the case before it from another case previously decided (Estate of Bauquier) solely on the ground that as to the proceeding involved in such case, the Code provided for notice and the framing of issues of fact. In the second Leach v. Pierce Case it was held that a motion for new trial would lie when an order authorizing the sale by the administrator of real estate of a deceased was made, because in such proceeding the Code required a written petition setting forth the necessary facts, and provided that any person interested may file his written objections which must be heard and determined. The court said: "Issues of fact, therefore, are expressly authorized by the Code, and a motion for a new trial is proper to review the decision of the court." In support of this ruling, the court cited In re Bauquier, 88 Cal. 302, 26 Pac. 178, 532, in which there was written opposition to the appointment of a person as executrix on the ground of her incompetency. It was held that a motion for a new trial would lie because issues of fact had been framed and tried, and the statute expressly authorized such issues. Section 1351, Code Civ. Proc., provided that any person interested may file objections in writing, and that the objections must be heard and determined by the court. In Estate of Heldt, 98 Cal. 553, 33 Pac. 549, a department case, the ruling that a motion for a new trial would not lie in a contest between two persons for letters of administration was avowedly put upon the ground that "no issue was joined as to any fact alleged in either petition," and it was said that in such a proceeding, "when no issues of fact are made by the pleadings, a motion for a new trial is not authorized." It may be that the court was in error in concluding that no issue was joined, for each petitioner alleged that he was the person requested by the widow to act as administrator. But the material thing here is that the court did impliedly recognize that, if issues of fact had been made by the pleadings, the motion would lie, and expressly approved Estate of Bauquier, supra, saying, also, in effect, that a new trial was only proper "where there are issues of fact arising upon pleadings authorized by the Code." In Shipman v. Unangst, 150 Cal. 425, 88 Pac. 1090, the remedy by motion for new trial was refused in proceedings for the setting apart of a homestead, exempt property, and a family allowance, on the authority of Leach v. Pierce, 93 Cal. 614, 29 Pac. 235, and the same is true of Estate of Heywood, 154 Cal. 312, 97 Pac. 825, a similar case. We are satisfied that it must be taken as established in this state that, under our law as it now exists, a motion for a new trial of any issue of fact actually made and determined in any proceeding in probate will lie when the law expressly authorizes issues of fact to be framed in such proceeding, and that provisions authorizing written objections on the part of persons interested in the estate and providing for the hearing and determination of those objections do expressly authorize issues of fact to be framed.

Coming to a consideration of the statutory provisions concerning final distribution, we find what, in view of what we have already said, must be held to be express authorization for the framing of issues of fact. The order or decree may be made only on petition, and notice must be given of the time and place of hearing the same. Section 1668, Code Civ. Proc. provides in part: "At the time fixed for the hearing, or to which the hearing may be postponed, any person interested in the estate may appear and contest the petition by filing written objections thereto." This was added to the section by amendment in 1907, and clearly brings proceedings for distribution within those classes of probate proceedings as to which the framing of issues of fact is expressly authorized by the Code.

Respondent relies somewhat upon the provision of section 1666, Code Civ. Proc., that "such order or decree (of distribution) is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal," as expressly excluding any remedy except direct appeal from the order or decree. This section is the one providing that in the decree the court must name the persons entitled to share in the estate, and the proportion or part to which each is entitled. It appears clear to us that the provision relied on should not be construed as intended to affect the general provisions of the title which authorize a motion for a new trial in probate proceedings whereever the framing of issues is authorized by the statute, and that its sole object was to make the determination of the court, as evidenced by the decree, final and conclusive as against collateral attack. The provision is reasonably susceptible of such a construction, and any other construction would create an exception to the general rule declared for probate proceedings, for which no reasonable ground could be found. It would certainly be difficult to give any reason whatever why a motion for a new trial should lie as to the proceeding to determine heirship provided for by section 1664, Code Civ. Proc., and at the same time should not lie as to the proceeding for final distribution, a proceeding always involving the questions that are involved in the heirship proceeding.

The only remaining question is whether issues of fact were actually made in this proceeding for distribution. That issues of fact were determined by the lower court upon evidence actually introduced by the respective parties is apparent. If the petitions for distribution presented by Ella Woodbury et al. and A. F. St. Sure constituted such "written objections" to the petition of petitioner here as are contemplated by section 1668, Code Civ. Proc., it would seem to follow that they sufficiently made issues of fact which were determined by the decree. If the papers so filed had been designated "answer" or "objections" to the petition of petitioner here, and had in terms denied the allegations of facts showing petitioner to be an heir of deceased and the other petitioners not to be heirs, it would have to be admitted, in view of what we have said, that issues of fact had been made under express authorization of law. If we wished to be exceedingly strict, we might be able to hold that to sufficiently raise an issue of fact as to any allegation of the original petition, an answer denying the same should have been presented, but to so hold, especially after judgment, it appears to us, would be to unnecessarily sacrifice substance to form. The three petitions were treated by the parties and the court below as creating issues of fact, and the hearing and determination in that court necessarily proceeded upon that theory. In substance they did create issues of fact on the question, who are the heirs of deceased, just as clearly as a formal answer containing express denials would have done. The matters set up in the subsequent petitions in support of the several claims, that the petitioners therein are respectively entitled to the whole estate of deceased, were necessarily in conflict with the allegations of the original petition.

We are of the opinion that petitioner is entitled to the relief sought.

Let a peremptory writ of mandate issue as asked in the petition.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

14 Cal. App. 662

THOMAS v. JOPLIN, County Treasurer, et al.

(Civ. 928.)

(Court of Appeal, Second District, California. Nov. 23, 1910.)

1. COUNTIES (§ 196*)—PAYMENT OF PUBLIC MONEY—TAXPAYERS' SUIT.

Code Civ. Proc. § 526a, providing that an action to restrain any illegal expenditure of public funds may be maintained, either by a citizen resident therein or by a corporation which is assessed, or within one year has paid, a tax therein, enacted after the court had decided that any taxpayer might sue to restrain the illegal payment of public money, restricts the right to sue to resident citizens, or corporations who are liable to a tax or who have paid a tax within a year.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

2. STATUTES (§§ 174, 175*) — CONSTRUCTION — EFFECT OF STATUTE.

Effect must be given to an act of the Legislature, whenever such effect is permitted on a reasonable interpretation of its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 254; Dec. Dig. §§ 174, 175.*]

3. COUNTIES (§ 196*)—RESTRAINING PAYMENT OF PUBLIC MONEY—RIGHT TO SUE—"RESIDENT"—"CITIZEN."

Under Pol. Code, § 51, defining citizens as persons born in the state and residing within it, and all persons born out of the state who are citizens of the United States and residing within the state, one suing to restrain an illegal payment of county funds, who describes himself as a "resident" of the county, does not show that he is entitled to sue, within Code Civ. Proc. § 526a, authorizing actions to restrain illegal expenditures of public funds, by a "citizen resident" therein; the words "resident" and "citizen" not being synonymous.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*

For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, p. 7602; vol. 7, pp. 6161–6166; vol. 8, p. 7788.]

4. CONSTITUTIONAL LAW (§ 42*)—VALIDITY OF STATUTES—PARTY ENTITLED TO QUESTION.

The constitutionality of Code Civ. Proc. § 526a, providing that an action to restrain an illegal expenditure of public funds must be brought, either by a citizen resident therein or by a corporation, on the ground that it deprives nonresident citizens of other states of privileges equal with those of citizens of the state, cannot be raised by one who merely shows that he is a resident, but who does not show that he is not an alien, or that he belongs to the class of persons entitled to sue.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

Appeal from Superior Court, Orange County; Frank R. Willis, Judge.

Action by J. C. Thomas against J. C. Joplin, as Treasurer of the County of Orange, and others. From a judgment for defendants, rendered on sustaining a demurrer to the complaint, without leave to amend, plaintiff appeals. Affirmed.

S. M. Davis (E. E. Keech, of counsel), for appellant. Williams & Rutan and Montgomery & Tarver, for respondents.

JAMES, J. Plaintiff brought this action to secure an injunction restraining defendant Joplin, as treasurer of the county of Orange, from paying certain warrants threatened to be issued and presented on account of salaries for deputies appointed by several of the officers of that county. A demurrer was interposed in which general and special grounds of objection to the sufficiency of the complaint were stated. This demurrer was sustained without leave to amend, and judgment followed in favor of defendants, from which judgment an appeal has been taken.

The several county officers of Orange county were elected at the general election held in 1906, and their terms of office were for four years, commencing in January, 1907. In 1909 the Legislature amended the county government act as it affected that county, and provided for deputies for several county offices, to be paid by the county. In the act as it existed theretofore, no allowance for deputies for these officers had been made. Under the provisions of the amendment, deputies were appointed by the county clerk, sheriff, auditor, treasurer, tax collector, and superintendent of schools, and these deputies have since their appointment regularly drawn their salaries from the county treasury.

Plaintiff bases his suit for an injunction to prevent a further payment of salaries to these deputies on the claim that the amendment of 1909 could not be made operative during the terms of office of the then county officials who had theretofore been allowed no paid deputies, because the effect in that case would be to increase the compensation of such officers during their term of office in violation of section 9, article 11, of the state Constitution.

One of the grounds of demurrer was that plaintiff had no legal capacity to sue. In the complaint it is alleged, first: "That the plaintiff, at all the times herein mentioned, has been and still is a resident, owner of property, and a taxpayer of the county of Orange, state of California." Defendants insist that this statement is insufficient to show that plaintiff is such a person as is entitled to prosecute an action to restrain the payment of the demands of the deputies affected, and cite section 526a, Code of Civil Procedure. This section provides as follows: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer."

Section 526a above quoted was adopted in 1909 and placed in the chapter of the Code relating to injunctions. Prior to its adoption it had been plainly established by the decisions that any taxpayer might bring an action to restrain the payment of public money under a claim that such payment, if made, would be illegal. Winn v. Shaw, 87 Cal. 631, 25 Pac. 968. Section 526a declares what persons or corporations shall be entitled to maintain that kind of an action. The effect of the legislative act must be regarded as one intending to limit the right to prosecute such an action, to suitors of the kind mentioned therein, or it can be given no effect at all. The Legislature must be presumed to have acted with knowledge of the law as established by the decisions, which gave any taxpayer the right to maintain an action for injunction in a case like this, irrespective of his residence or citizenship; and with this knowledge present in the minds of the legislators, it must be further presumed that section 526a was enacted with a view of limiting this right and restricting it to citizens who are residents, or corporations who are liable to pay a tax within the county, or who have paid such a tax within one year prior to the bringing of the action. Otherwise, the section neither confers nor limits any right not existing prior to its adoption. The elementary rule of statutory construction, that effect must be given to an act of the Legislature whenever such effect is permitted upon a reasonable interpretation of its terms, requires neither argument nor authorities to illustrate its application here. It seems clear, therefore, that by section 526a, Code of Civil Procedure, the right to bring an action like the one plaintiff has here brought for an injunction is limited, in so far as it is conferred upon individuals, to citizens resident within the county. Plaintiff nowhere alleges in his complaint that he is a citizen. On his behalf it is argued that the terms "citizen" and "resident" are sometimes considered as synonymous, and refer merely, where not otherwise defined, to persons having an actual, permanent abode at a definite place. General definitions of the word "citizen" might be looked to to determine the sense in which the term is used in the statute, were it not for the fact that in the Political Code, at section 51, a complete definition is given. Citizens of the state are there defined to be: "(1) All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls; (2) all persons born out of this state who are citizens of the United States and residing within this state." It might be argued that a statute depriving nonresident citizens of other states of privileges equal with those of citizens of our own state would be obnoxious to the federal Constitution; but even though some force should be conceded to this contention, the provisions of the statute considered here would not be wholly inoperative. Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. For aught that appears from plaintiff's complaint, he maye be an alien, and unless he shows that he belongs to the class of persons entitled to prosecute this kind of an action, he cannot be heard at all, especially when he seeks to nullify the effect of an act of the Legislature by raising constitutional questions. He is not, then, a "party interested" in a legal sense. Davidson v. Von Detten, 139 Cal 469, 73 Pac. 189.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Having determined that it does not appear from his complaint that plaintiff has the legal capacity to sue, it follows that the order sustaining the demurrer of defendants was rightly made. If it were profitable so to do, the merits of the constitutional question presented might also be considered, but any conclusion that might be announced upon that matter would have no binding effect upon the parties.

The judgment is therefore affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 564

CITIZENS' SECURITIES CO. v. HAMMEL et al. (Civ. 857.)

(Court of Appeal, Second District, California. Nov. 21, 1910. Rehearing Denied Dec. 21, 1910; denied by Supreme Court Jan. 16, 1911.)

1. SHERIFFS AND CONSTABLES (§ 128*) — WRONGFUL ATTACHMENT — NECESSITY OF POSSESSION BY PLAINTIFF.

In an action against a sheriff for damages for wrongfully levying upon property claimed to be in plaintiff's possession under a writ of attachment, plaintiff must show right of possession of the property, as well as possession.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 260–263; Dec. Dig. § 128.*]

2. CORPORATIONS (§ 404*) — OFFICERS — AUTHORITY—PLEDGE OF CORPORATE PROPERTY.

The managing officers of a corporation have not authority without instructions from the board of directors to pledge corporate property for antecedent corporate debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1626–1628; Dec. Dig. § 404.*]

3. CORPORATIONS (§ 477*)—ACTION BY DIRECTORS—NECESSITY OF MEETING.

While a corporate board of directors has power to mortgage corporate property for antecedent debts, it can only do so at a lawfully assembled meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1857; Dec. Dig. § 477.*]

4. CORPORATIONS (§ 477*) — OFFICERS—BOARD OF DIRECTORS—RESOLUTIONS—NECESSITY.

In mortgaging corporate property for antecedent corporate debts, the board of directors must act in a manner equivalent to a resolution, though such resolution need not be spread upon the minutes of the meeting if actually passed, and a conversation between four of the eleven members of the board, wherein such four decided to pledge the property, is not sufficient to bind the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1857; Dec. Dig. § 477.*]

5. LANDLORD AND TENANT (§ 275*)—RIGHTS OF LANDLORD — POSSESSION OF TENANT'S PROPERTY.

A landlord having no reserved lien for rent or the value of the use and occupation of the property cannot, by forcibly taking it, acquire a right of possession thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1167; Dec. Dig. § 275.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. SHERIFFS AND CONSTABLES (§ 98*) — LIABILITY—WRONGFUL LEVY—JUSTIFICATION — NECESSITY.

Where the judgment debtor could have legally taken possession of the goods attached while in plaintiff's alleged possession, the writ of attachment under which the sheriff took possession of the goods was of itself sufficient justification in an action against him for wrongful levy, without proving that the writ was issued upon proper affidavit.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 143–157; Dec. Dig. § 98.*]

7. SHERIFFS AND CONSTABLES (§ 137*)—LIABILITY—WRONGFUL LEVY—ACTIONS—ALLEGATIONS OF COMPLAINT—"DULY ISSUED."

An allegation of the complaint, in an action against a sheriff for wrongfully levying upon goods under a writ of attachment, that the writ of attachment was "duly issued" means that it was based upon a debt, and upon the affidavit required by statute.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 280–289; Dec. Dig. § 137.*

For other definitions, see Words and Phrases, vol. 3, p. 2263.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Citizens' Securities Company against W. A. Hammel and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Reversed and remanded for further proceedings.

John C. Stick, for appellants. Frank W. Burnett, for respondent.

ALLEN, P. J. It is alleged in the complaint that plaintiff, the owner of a building in Los Angeles, leased the same to a corporation known as the Ocean View Cemetery Co.; that prior to the 21st of October, 1908, the cemetery company was indebted to plaintiff in the sum of $395.50 on account of rent of said premises; that before said 21st day of October, as security for such unpaid rent, the cemetery company delivered to plaintiff possession of the office furniture contained in said rooms so leased, and vacated the same; that on the 21st of October the defendant sheriff, by virtue of a writ of attachment duly issued to said sheriff in an action begun in the superior court of Los Angeles county against said cemetery company, levied the same upon the property so in the hands of plaintiff, removed said property from said premises, and converted the same to his own use. The defendants deny that said cemetery company ever or at all delivered said property into plaintiff's possession, denied that any delivery of possession was for the purpose of securing to plaintiff the payment of said unpaid rent, and denied that plaintiff on the date of the levy was in the actual or peaceable possession of said property. Upon the trial of the action, the court found in favor of plaintiff, that the cemetery company was indebted to plaintiff in the sum claimed, and that the cemetery company, in consideration thereof, delivered to plaintiff possession of the office furniture contained in said rooms and vacated the same, found the property of the value claimed, and rendered judgment accordingly.

Appellants' primary and principal contention is that there is no evidence in the record warranting the finding of the court that the cemetery company ever delivered to plaintiff possession of the office furniture as security for the debt. A careful examination of the record satisfies us that appellants' contention in this regard must be sustained. It was incumbent upon plaintiff to show, in order to maintain this action, not only possession, but some right to the possession. It does show actual possession of the property at the time of the levy, but introduces no evidence from which it can be said that the right to such possession was established. The only evidence tending to show such right of possession is to the effect that, shortly before the levy by defendants and when the indebtedness existed, the plaintiff, as the landlord of the cemetery association, upon failure and refusal to pay the rent, changed the lock upon the door, thus acquiring possession of the furniture contained in the rooms; that within a day or two thereafter, upon the application of the secretary of the cemetery association and upon representations that the association desired to hold a directors' meeting for the purpose of levying an assessment, the plaintiff unlocked the doors of the rooms in which such furniture was contained and permitted certain directors of the cemetery association to hold their meeting therein. It appears from the record that the cemetery association is a corporation governed by a board of eleven directors, seven of whom were present at this meeting. It is not shown that this meeting was a regular meeting of the association, or that it was a special meeting, notice of which had been given as required by law. It does appear, however, that after the seven members of the board had assembled a conversation took place between four of the members, during which "it seemed the sense of the three or four talking about it was that the company (meaning plaintiff) should have the furniture as security for the rent," in which conversation one Nolan, manager of the corporation, took part and acquiesced. After adjournment of the meeting one of the directors notified the plaintiff that it was the sense of the meeting to have the furniture turned over to plaintiff to apply upon the rent of said office past due, and such director further said: "You will please take possession at my suggestion in order to protect myself on the note signed jointly by myself and others, and to verify my verbal instructions made Monday last." Upon the strength of this statement, and after adjournment of the board, plaintiff again took possession of the furniture by changing the lock on the door again, and excluded the cemetery association therefrom. It must be conceded that the executive or managing officers of a corporation have not the authority, without instructions from the board of directors, to pledge or mortgage the property of the corporation for antecedent debts. Especially would this be true of one simply a director of such corporation. The right of the board of directors to pledge or mortgage the property, even for antecedent debts, must be admitted; but that such board may authorize such act, it is necessary that they be in session at a meeting lawfully assembled. Plaintiff, relying as it must, upon the right to possession, as conferred upon it by the board of directors, must affirmatively show facts from which such authority may be reasonably inferred. Seven members of the board out of a total membership of eleven, notwithstanding they constitute a majority, would not have authority to pledge the property of the corporation for an antecedent debt, unless they were legally assembled for the purpose of transacting corporate business. There is nothing in the record to indicate that this board was so assembled at the time plaintiff claims the authority was given. In addition to this, we are of opinion that some action in the nature of a resolution would be necessary in order to warrant an officer of the corporation in thus pledging corporate property. The resolution need not necessarily be spread upon the minutes, if actually passed, but a conversation simply between four members—the other three present not being shown to have participated therein, nor in fact to have been aware of such conversation—is far from showing any resolution or authority upon the part of the board. It goes without saying that a landlord having no lien for rent reserved, or for the value of the use and occupation of property (Hitchcock v. Hassett, 71 Cal. 334, 12 Pac. 228), cannot acquire right of possession or an interest in the tenant's personal property by forcibly taking possession thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Respondent, however, insists that, waiving all of these matters hereinbefore discussed, the judgment should be affirmed, for the reason that the defendant sheriff did not justify, in that it was neither alleged nor proven that the writ of attachment held by him was issued upon proper affidavit, or that any indebtedness existed warranting the issuance of such writ, and this is claimed upon the authority of Darville v. Mayhall, 128 Cal. 617, 61 Pac. 276. It will be observed, however, that this case differs materially from the one just cited. The rule therein laid down applies to cases where there has been a transfer of title, or where the possession is held under such circumstances as to preclude the owner from retaking possession. In Thornburgh v. Hand, 7 Cal. 567, the rule as laid down by Starkie on Evidence is approved, which is: "If the assignment and delivery of possession were merely colorable, and the property still remained in the debtor, against whose goods the execution issued, the sheriff, it seems, would be entitled to a verdict without proof of the judgment, the plaintiff having no property in the goods." If, therefore, the owner of the property here under consideration could have retaken possession through claim and delivery, the right of possession remaining in such owner at all times, the writ of attachment would be a sufficient justification, for a writ of attachment or execution as against the debtor is a sufficient justification. In addition to all of this, however, the plaintiff in this case alleges that the writ of attachment was duly issued, which can receive no construction other than that it was based upon a debt and an affidavit required by the statute. In either view of the case, we think the justification was established.

For the reasons above stated, the judgment and order denying a new trial are reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 545

PEOPLE v. HARRISON. (Cr. 178.)

(Court of Appeal, Second District, California. Nov. 19, 1910. Rehearing Denied by Supreme Court Jan. 16, 1911.)

1. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.

Under Pen. Code, § 288, providing that any person committing lewd acts with child under 14, etc., shall be guilty of a felony, an information charging the defendant with the crime, phrased in the language of the statute, is not demurrable as charging two offenses in one count, as the commission of one or all of the acts described constituted the crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

2. CRIMINAL LAW (§ 371*)—OTHER OFFENSES.

In a prosecution for lewdness with a child, evidence of other acts of lasciviousness and their effect is admissible for the purpose of showing intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

3. CRIMINAL LAW (§ 782*)—INSTRUCTIONS.

In a prosecution for lewdness with a child, an instruction asked by defendant to the effect that charges like the one made against the defendant are easy to make and hard to disprove contains no proposition of law for a jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

4. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—ACCOMPLICES.

In a prosecution for lewdness with a boy under 14, an instruction that deals with the subject as though the claimed accomplice was an adult is not prejudicial to the defendant as it might have stated section 26 of the Penal Code, which provides that children under 14, in the absence of clear proof of knowledge of its wrongfulness, are incapable of committing crimes.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.*]

5. NAMES (§ 16*)—IDEM SONANS.

An information that a crime was committed with William Standberg, when the real name was William Elmer Strandberg, did not contain a fatal variance, as the rule of idem sonans applies.

[Ed. Note.—For other cases, see Names, Cent. Dig. §§ 12–14; Dec. Dig. § 16.*]

6. CRIMINAL LAW (§ 1163*)—TRIAL—MISCONDUCT OF JURY.

While the jury were deliberating on the verdict, a note was sent to them that "Aunt Sophia is dead." It was not shown from what source it came, or whom it was intended for. *Held*, that no prejudice can be presumed to have resulted to the defendant, though the jury shortly after receiving the note reached a verdict against him.

[Ed. Note.—For other cases. see Criminal Law, Cent. Dig. §§ 3090–3099; Dec. Dig. § 1163.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

R. B. Harrison was convicted of certain lewd and lascivious acts with a boy under the age of 14, and he appeals. Affirmed.

J. C. Cross and Grant R. Bennett (J. H. Ryckman, of counsel), for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of having committed certain lewd and lascivious acts with a boy under the age of 14 years in violation of the provisions of section 288, Pen. Code. The judgment required that he be imprisoned in the state prison for a period of 5 years. An appeal is taken from that judgment, and also from an order of the trial court denying defendant's motion for a new trial.

On January 30, 1910, defendant, a man of mature years, accompanied by a boy named William E. Standberg, entered a dressing room at the Bimini bathing establishment in the city of Los Angeles. A man occupying an apartment adjoining this dressing room shortly thereafter chanced to look through an aperture between two boards of the intervening partition, and saw the boy engaged in the act of committing sodomy with the man. He called to an attendant, and together they went to the door of the room occupied by the man and boy. Upon demand being made by the bathhouse attendant that the door be opened the door was opened, disclosing the man in a naked state and boy wearing only an undershirt. The physical condition of the boy in other respects indicated that the act observed by the first witness from the adjoining room had been completed. When called to testify at the trial, the boy Standberg, who was then 13 years of age, told of the commission of a series of acts of sodomy between him and the defendant. According to the revolting tale narrated by him, at different times prior thereto he had been the active participant in the commission of this crime, and at other times the passive subject. He testified that, upon the day when his relations with defendant were discovered at the bathhouse, defendant had first touched with lascivious hand his (the witness') person and the private parts thereof, and had excited his (the boy's) passion. He further testified that upon previous occasions when he had committed similar acts with defendant, it had been the habit of defendant to first use him in a like manner as that last referred to, with the result that his passion would become excited. His whole story was one shocking in its fullness of description of repeated unnatural and disgusting acts committed between himself and the defendant, occurring from a date several months prior to January 30, 1910, and continuing down to the time of the arrest of defendant at the bathhouse.

The information charging defendant with the crime was phrased in the language of the statute. Defendant demurred to it on the ground that two offenses were charged in one count. The demurrer was properly overruled. The commission of any or all of the acts described in, and with the intent stated, by the statute, constituted but one and the same crime or offense. That an information in such a case does not charge different offenses is thoroughly settled by the decisions. We cite People v. Gosset, 93 Cal. 641, 29 Pac. 246; People v. Thompson, 111 Cal. 242, 43 Pac. 748; People v. Gusti, 113 Cal. 177, 45 Pac. 263.

Objection was made at the trial to the admission of evidence showing that at different times prior to the commission of the offense charged acts of sodomy had been committed by the boy with the defendant. Defendant does not contend that proof of the commission of other and prior lascivious acts such as those charged to have been committed might not be competent and relevant, but he claims that the prosecution was allowed to show too much; i. e., that the proof should have stopped short of showing that a different crime than that charged, to wit, sodomy, had been committed on any of these prior occasions. The testimony of the boy Standberg was to the effect that upon each of the former occasions referred to the defendant had first done lascivious things to and with the private members of witness' person which aroused his sexual passion, and that sodomy was the resulting act. These several acts in each case were connected and inseparable. Moreover, as it was concededly competent for the prosecution to show that defendant had on prior occasions committed lascivious acts like those with which he was charged, with the complainant, it would seem also competent to permit it to be shown just what the effect of such conduct was upon the witness Standberg; that is, what he did with and to the defendant when moved by the feeling which defendant's previous acts had excited. Such proof would be very satisfactory as tending to show what the purpose and intent of defendant was on the occasion charged in the information. Mr. Wigmore in his work on Evidence, at paragraph 398, referring to a general class of cases to which this one belongs, makes an observation very pertinent here when he says: "The prior or subsequent existence of a sexual passion in A. for B. is relevant * * * to show its existence at the time in issue. The circumstance that the prior or subsequent conduct exhibiting the passion is criminal does not alter the case nor affect the admissibility of the evidence." In so far as the record shows that the boy Standberg was permitted to testify to acts of sodomy committed by the defendant upon him at times when they were unaccompanied by other lascivious acts like those described in the information, no objection appears to have been made to his so testifying. And even though there had been such objection, the evidence was merely by way of showing the complete course of depraved conduct of defendant toward the boy, as evidencing the intent with which he committed the lascivious acts charged. For this purpose the proof was competent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Instructions of the court defining who may be an accomplice, and charging the jury that the testimony of an accomplice requires corroborating proof to support it, were full and fair. The instruction asked by defendant to the effect that charges like the one made against defendant were easy to make and hard to disprove was not an instruction upon a matter of law required to be presented by the court to the jury. Instructions given on the question of an accomplice were even more favorable than the defendant was entitled to, in that they all dealt with the subject as though the claimed accomplice was an adult. The boy Standberg was a child of the age of 13 years, and the instructions might well have contained a statement of the provisions of section 26 of the Penal Code, which recite that children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew of its wrongfulness, are incapable of committing crimes.

The further point is presented that while in the information it was stated that the improper acts were committed with one William Strandberg, the proof showed the boy's name to be William Elmer Standberg, and that this variance vitiates the judgment. These names were so similar as to make the doctrine of idem sonans applicable, and the variance was not such as to affect the validity of the judgment. People v. Smith, 103 Cal. 567, 37 Pac. 516; People v. James, 110 Cal. 158, 42 Pac. 479; People v. Fick, 89 Cal. 148, 26 Pac. 759; People v. Clausen, 120 Cal. 383, 52 Pac. 658.

The jury sitting at the trial of defendant retired at the hour of 4 o'clock on June 16, 1910, to deliberate upon a verdict. At about 5 p. m. on the following day, when called into the courtroom, they announced that no agreement had been reached, and were again returned to the jury room. At 9:30 o'clock p. m. of the same day they reached an agreement and rendered their verdict. In an affidavit used at the hearing of his motion for a new trial, and in support of his claim that there had been misconduct on the part of the jury, defendant alleged that after the jury had been called into court on June 17th, according to his information and belief, "there was sent to said jury and delivered to said jury a certain writing, note, or card, stating, among other things, 'that Aunt Sophia is dead'; that within a short time after the receipt of said writing by said jury they agreed upon the verdict." It was not shown from what source the note or card came, or from whom it was intended, and in the absence of a showing that some improper effect was had upon the minds of the jury, or some of its members, which tended to induce an agreement upon the verdict, no prejudice can be presumed to have resulted to defendant. People v. Kramer, 117 Cal. 648, 49 Pac. 842.

Appellant presents no other points meriting serious consideration.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 570

WILSON v. CARSON. (Civ. 858.)

(Court of Appeal, Second District, California. Nov. 22, 1910.)

1. Landlord and Tenant (§ 291*)—Unlawful Detainer—Action—Evidence.

In an action of unlawful detainer, evidence *held* to show that defendant, who moved in after the tenant had moved out at the end of the term, was not in under the tenant and did not claim through the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

2. Landlord and Tenant (§ 64*)—Estoppel to Deny Title.

The rule that the tenant is estopped to deny the landlord's title does not bind a stranger who claims the land in his own right, and does not enter under the tenant or use the tenant's possession as a means of acquiring the possession himself.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 177–180; Dec. Dig. § 64.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action of unlawful detainer by I. L. Wilson against G. W. Carson. From a judgment for defendant, plaintiff appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Shaw & Dyke, for appellant. Conkling & Brown, for respondent.

SHAW, J. Action of unlawful detainer Judgment went for defendant, from which, and an order denying plaintiff's motion for a new trial, he prosecutes this appeal.

It appears that plaintiff, on or about January 1, 1907, leased the premises in question to one M. J. Alexander; that on September 25, 1907, and after the termination of the period for which the premises were leased to Alexander, he removed therefrom, leaving the premises vacant and unoccupied; that two days later, to wit, on September 27, 1907, and while the premises were thus vacant and unoccupied, defendant entered upon and took possession of the premises and continued to hold possession thereof down to the time of the institution of this action, more than a year thereafter. The action is based upon the theory that defendant acquired possession through collusion with Alexander. The complaint alleged: "That on said last-mentioned day defendant entered into possession of said premises by the consent and inducement of said M. J. Alexander, and with full knowledge of said lease and of the circumstances under which said Alexander entered into possession of said property, and of said tenancy, and the defendant ever since said last-mentioned date has been in possession of said premises, and said defendant continues to hold and occupy the same." This allegation was denied.

The court made findings to the effect that defendant knew that during the time that Alexander held and occupied the land such possession was under and by virtue of the lease from plaintiff, but that defendant's entry and occupancy thereof was not by reason of being induced so to do by Alexander, nor with the latter's consent, and that defendant's entry and occupancy bore no relation whatever to the lease. The only evidence offered touching the subject is that of defendant. His testimony not only fully supports the finding, but, in the absence of any contradiction thereof, the court could not have well found otherwise. The contention that the findings are unsupported by the evidence is wholly without merit.

Conceding the finding not obnoxious to the objections urged, appellant insists upon a reversal of the judgment upon the principle of estoppel which prevents a tenant and those holding under him from denying the landlord's title. Such estoppel, however, "does not bind a stranger who claims the land in his own right, and does not enter under the tenant or use the tenant's possession as a means of acquiring the possession himself." Volume 18, Am. & Eng. Ency. of Law, p. 418. From all that appears to the contrary, defendant may have owned the land by fee-simple title, and the entry have been made under an assertion of a rightful claim thereto. At all events, the findings negative any interpretation which would justify the conclusion of the existence of collusion between defendant and the tenant, whereby the latter's possession was used as a means of defendant's acquiring possession of the premises. The case of Porter v. Murray, 12 Pac. 425[1], cited by appellant, was a proceeding in forcible entry and detainer, an action which would not lie in this case, for the reason, if for no other, that it appears defendant had been in the quiet possession of the premises for a period of more than one year prior to the institution of the suit (section 1172, Code Civ. Proc.); and hence that case is not in point.

The record discloses no error, and the judgment and order appealed from are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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14 Cal. App. 666

STARKWEATHER v. DAWSON. (Civ. 893.)

(Court of Appeal, Second District, California. Nov. 23, 1910. Rehearing Denied by Supreme Court Jan. 19, 1911.)

1. Elections (§ 305*)—Objections—Admission of Evidence — Necessity — Specific Objections.

A statement by defendant's attorney in an election contest made during the recount, that they ought to consider the spoiled ballots, and that counsel thought the spoiled ballots were returned with the rejected ballots, did not amount to an objection to the introduction of such ballots as rejected ballots for noncompliance with Pol. Code, § 1257, requiring all ballots rejected for illegality to have indorsed upon the ballot the cause of their rejection and strung upon a string, and defendant cannot complain on appeal of the admission in evidence of rejected ballots.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

2. Elections (§ 291*)—Contest—Burden of Proof.

In order to rely upon ballots inclosed in an envelope marked "spoiled, cancelled and unused ballots," contestant was bound to show that such ballots were rejected ballots, and that they had been erroneously rejected.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 291.*]

3. Trial (§ 105*)—Objections to Evidence—Preliminary Proof—Waiver.

Where in an election contest plaintiff offered in evidence ballots contained in an envelope marked "spoiled, cancelled and unused ballots," stating that they were rejected ballots, and defendant did not object to the sufficiency of the evidence to show that they were rejected ballots, but received the benefit of those ballots favorable to him, he thereby waived proof of their character as rejected ballots, which was necessary to make them admissible.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 70 Cal. xx.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 105.*]

4. TRIAL (§ 92*)—RECEPTION OF EVIDENCE—STRIKING IMPROPER EVIDENCE—NECESSITY.

Where in an election contest defendant did not object to the admission in evidence of certain ballots as rejected ballots, on the ground that the evidence did not sufficiently identify them as such to make them admissible, a motion, made at the close of plaintiff's testimony, to strike out such ballots as evidence on that ground was properly overruled, since plaintiff could have made the necessary preliminary proof of the character of the ballots had timely objection to their admission been made on that ground.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 245, 252; Dec. Dig. § 92.*]

5. ELECTIONS (§ 299*) — CONTEST—RECOUNT—PROCEEDINGS—STATUTES.

Pol. Code, § 1207, requires the ballot clerk before any ballot is taken from the box to deface the unused and spoiled ballots by a cross drawn over their face in ink, and to immediately place such defaced ballots in an envelope and seal it, and that a majority of the election officers shall write their names across the sealed part of the envelope; and section 1257 requires all ballots rejected for illegality to be indorsed with the cause of such rejection, and signed by a majority of the election board, and strung upon a string. *Held*, that the statutes were merely directory, so that failure to comply therewith did not vitiate the election; and hence, if ballots were erroneously rejected, the court should count such ballots upon a recount, regardless of the failure of the election board to comply with the statutes in marking the ballots.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 299.*]

6. ELECTIONS (§ 295*)—RETURN—CONCLUSIVENESS—PRIMA FACIE CORRECTNESS.

The prima facie correctness of the returns and the canvass thereof, showing certain ballots to have been rejected ballots, cannot be overthrown upon recount, except upon satisfactory evidence that such ballots were good.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 295.*]

7. ELECTIONS (§ 305*) — CONTESTS—APPEAL—CONCLUSIVENESS OF FINDINGS.

While ballots marked as rejected ballots by the election board should only be admitted in an election contest upon clear and satisfactory evidence that they are good ballots, the appellate court will not disturb a ruling admitting them, unless it is clearly satisfied that the evidence does not warrant their admission.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

Appeal from Superior Court, Kings County; J. W. Mahon, Acting Judge.

Action by Grant Starkweather against John H. Dawson to contest an election. From a judgment for contestant, defendant appeals. Affirmed.

Dixon L. Phillips, J. L. C. Irwin, Maurice E. Power, and Robt. W. Miller, for appellant. Choynski & Humphreys and H. Scott Jacobs, for respondent.

SHAW, J. This is an election contest. At the municipal election held in the city of Hanford on April 11, 1910, Starkweather and Dawson were opposing candidates for the office of city trustee. The canvass of the returns of the election made by the city trustees resulted in Dawson being declared elected by a majority of nine votes. Thereupon, Starkweather instituted this contest in the superior court of Kings county, praying for a recount of the votes. Upon a recount thereof by the court, Starkweather was declared elected by a majority of two votes, and a judgment accordingly rendered in his favor, from which the defendant or contestee appeals.

The only point upon which appellant relies for a reversal is his contention that the trial court erred in counting certain ballots, which were claimed by plaintiff to have been wrongfully rejected by the election officers of the Fourth precinct. These ballots, 17 in number, were inclosed in a sealed envelope upon which the words "envelope for spoiled, cancelled and unused ballots" were printed. Upon the completion of the recount of the ballots returned as accepted and counted by the precinct election officers, counsel for plaintiff said: "If the court please, we now ask the court to make an order opening this envelope inclosing the spoiled, canceled, and unused ballots. I presume the rejected ballots will be contained in there, and we would like to have it opened for the purpose of ascertaining that, and then we will proceed to inspect the rejected ballots"; whereupon counsel for defendant said: "Our same objection goes to this offered evidence. By the Court: Yes, same objection." The objection referred to was one theretofore interposed, at the commencement of the recount, to the opening of the envelopes containing the voted ballots accepted by the election officers, and the recounting thereof. This objection in full is as follows: "Mr. Phillips (attorney for defendant): The defendant Dawson objects to the offered evidence and the application for an order to direct the clerk to open the Exhibit No. 8 for identification, on the ground and for the reason that the same is not the best evidence of what the votes were cast at the election; that the certificate of the board of election is the best evidence under the circumstances, as presented by the evidence here introduced in court, that the evidence shows from the city clerk, Hill, former city clerk, the present city clerk, and present and former city marshal, A. M. Fredericks, that the custody and control of the offered evidence, together with all of the other envelopes and exhibits introduced in the case, have not been under the control exclusively of either the former city clerk, James A. Hill, or the present city clerk, D. C. Williams, at any time since the 11th day of April, 1910, but, on the contrary, the evidence shows without conflict that the offered evidence, together with all the exhibits marked for identification, have been in the joint control, and in the joint possession, of the city marshal, Fredericks, who was a witness on the stand, at all the times, together with James A. Hill, the former city clerk, and the present city clerk, D. C. Williams, and that, besides, the evidence shows affirmatively that one M. B. Washburn, who was a former deputy city clerk, had knowledge of the combination of the vault in which the offered evidence was subsequently kept; and that also one Z. D. Johns was a deputy city clerk at all the times from the time that James A. Hill, the former city clerk, was in office, up to and including the 18th day of April, 1910; and in addition to that, that certain packages of these election returns were opened by the board of trustees of the city of Hanford at the canvassing of the returns, and that it is in evidence from Mr. Hill that certain of those returns were cracked; that the seals were cracked and broken when they were delivered to him and afterwards when they were delivered to the city board of trustees, and as to the certain or particular ones, the seals of which were broken, that he couldn't say which ones they were." This objection was overruled. Thereupon, the court ordered the clerk to open the envelope marked "spoiled and unused ballots," whereupon the following colloquy occurred: "Counsel for defendant: Have you counted these, Mr. Clerk? Mr. Clerk: No, sir. Counsel for defendant: Well, you had better count them. The Court: What are those? Counsel for plaintiff: Ballots that were rejected by the election board." The clerk thereupon counted the ballots and announced that there were 17. As the recount of these 17 ballots proceeded, objections were interposed by each party upon the ground of the manner of marking some of the ballots, and defendant asked that certain of the ballots be counted for him, which was done. The recount thereof resulted in Starkweather getting 10 additional votes and Dawson getting two; the other five, for reasons unnecessary to here mention, being rejected by the court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In addition to these ballots being inclosed in the envelope so marked for "spoiled, cancelled and unused ballots," none of them were indorsed as required by section 1257, Pol. Code, but defendant, at the time of counting the same, interposed no objection upon such ground, nor did he question their being rejected ballots, unless the lengthy objection heretofore quoted can be regarded as an objection raising the question.

Section 1257, Pol. Code, provides that "all ballots rejected for illegality must be endorsed upon the ballot the cause of such rejection, and signed by a majority of the election board, and thereafter strung upon a string." It is conceded the election board failed to comply with this provision. A critical examination of defendant's lengthy objection, however, discloses nothing calculated to acquaint plaintiff or the court with the fact that defendant raised any objection to the introduction of the ballots on account of such neglect of duty on the part of the election board. It is true, that at one stage during the recount defendant's attorney stated: "There is another point that should be considered. We ought to take into account the spoiled ballots. I think the spoiled ballots were returned with the rejected ballots." To which and other like suggestions the court replied: "You gentlemen may raise that point when you get to your part of the case." The suggestion made cannot be regarded as an objection to the count of the ballots, upon the ground that they were not in fact rejected ballots.

The duty devolved upon plaintiff to establish the fact that these ballots inclosed in the envelope marked and intended for "spoiled, cancelled and unused ballots" were rejected ballots, and to show to the satisfaction of the court that they had been erroneously rejected. When, however, they were offered by plaintiff, with a statment to the effect that they were rejected ballots, and defendant not only failed to question the correctness of the statement, but permitted them to be introduced without objection to the sufficiency of proof establishing their character, claiming and receiving the benefit of those appearing in his favor, it was equivalent to a stipulation of the fact, or at least a waiver of proof, which a proper objection would have otherwise rendered necessary as a condition of introducing them in evidence.

Waiving the sufficiency of the record as affording sufficient evidence that the ballots were rejected, and not unused and canceled ballots, we are of opinion that appellant, having at the time when they were offered neglected and failed to interpose any objection to the introduction of the ballots in evidence, upon the ground that they were not in fact rejected ballots or indorsed as required by section 1257, Pol. Code, he should not now be heard to complain upon such ground. "The general rule is that a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified." People v. Manning, 48 Cal. 338; Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Wise v. Wakefield, 118 Cal. 107, 50 Pac. 310; Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 Pac. 622; Bass v. Leavitt, 11 Cal. App. 582, 105 Pac. 771.

For like reason, that defendant had waived objection upon the grounds referred to, the court did not err in denying his motion made at the close of plaintiff's testimony to strike out the evidence afforded by these ballots, upon the ground that "there has been nothing shown to identify the ballots returned as spoiled and rejected ballots." Had the objection been made at the proper time, plaintiff would no doubt have been given opportunity to call the election officers to the witness stand and meet such objection by proof of the character of the ballots. Bass v. Leavitt, supra. To have granted the motion without again traversing the ground would, in effect, have deprived plaintiff of the right to make such proof.

Section 1207, Pol. Code, directs that before any ballot shall be taken from the ballot box the ballot clerk must proceed to deface the unused and spoiled ballots by drawing across the face thereof in writing ink with a pen two lines which shall cross each other, and shall immediately place all such defaced ballots within an envelope and seal such envelope, and a majority of the election officers shall write their names across the sealed portion of the envelope. The fact that none of the ballots were so defaced is unimportant and signifies little, for the reason that the provisions of this section, as well as those contained in section 1257, are merely directory. Electors of the precinct should not be disfranchised, because the election officers fail to comply with provisions which do not go to the substance of the election. "Mere irregularity on the part of election officers or their omission to observe some merely directory provisions of the law will not vitiate the poll." McCrary on Elections, § 225. Says the same author (section 228): "Those provisions of a statute which affect the time and place of the election and the legal qualifications of the election are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere details of the election are directory." Therefore, it was the duty of the court, if in fact voted ballots had been erroneously rejected, and such fact duly established or proof thereof waived, to count them for the person for whom they were voted, regardless of such acts or omissions on the part of the election board. McCarthy v. Wilson, 146 Cal. 328, 82 Pac. 243; Bourland v. Hildreth, 26 Cal. 161; Stinson v. Sweeney, 17 Nev. 309, 30 Pac. 997; Russell v. McDowell, 83 Cal. 71, 23 Pac. 183. It is true that the prima facie correctness of the returns and canvass thereof should not be overturned by a resort to a recount of the ballots, save and except upon sufficient and satisfactory evidence of the integrity of the ballots. There is nothing, however, disclosed by the record which would justify us in disturbing the conclusion of the trial court in this regard. As said in Tebbe v. Smith, 108 Cal. 108, 41 Pac. 455 (29 L. R. A. 673, 49 Am. St. Rep. 68): "While the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted, this court will not disturb the ruling, unless we in turn are as well satisfied that the evidence does not warrant it."

Defendant offered in evidence the certificate of the election officers, whereby they certified that the number of ballots voted was 134, and that the number of ballots spoiled was 17. This statement to the effect that 17 ballots were spoiled is entitled to little weight, in view of the fact that all of these ballots had the numbers torn therefrom, indicating that they had passed through the ballot box, and the further fact that in the same document the election officers certify that only 119 votes were cast for the opposing candidates, which fact tends to show that 15 of the 17 votes certified as spoiled must have been voted and passed through the ballot box, and were included in the count of 134 ballots certified as having been voted.

Upon the facts as disclosed by the record, the judgment of the lower court should be affirmed, and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

159 Cal. 34

PEOPLE v. MULCAHY et al. (Sac. 1,780.)

(Supreme Court of Calfornia. Dec. 27, 1910.)

1. Judgment (§ 279*)—Judgment Roll—Contents.

Under the express provisions of Code Civ. Proc. § 670, subd. 1, the judgment roll, where the complaint is not answered by any defendant, and where service is made by publication, embraces the affidavit for publication of summons and the order directing the publication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 551; Dec. Dig. § 279.*]

2. Judgment (§ 153*)—Vacation—Time for Proceedings.

Code Civ. Proc. § 412, provides that where defendant resides out of the state, has departed therefrom, cannot after due diligence be found there, or conceals himself to avoid service of summons, and the fact appears by affidavit, and it also appears by affidavit or by the verified complaint that a cause of action exists against defendant, or that he is a necessary or proper party to the action, or that the action relates to property in the state in which such defendant has or claims an interest, the court or judge may make an order that service be made by publication. *Held* that, in the absence of a sufficient affidavit, and where the complaint is not verified, and the affidavit is insufficient, stating merely that affiant was acquainted with the facts of the case and verily believed that plaintiff was entitled to the relief sought, and that defendant sought to be served was a necessary and proper party defendant without affirming directly or on information and belief that the facts alleged in the complaint were true, it appears in the judgment roll itself, and hence upon the face of the judgment, that it was void for want of jurisdiction on service of summons by publication, no order for such service being authorized, so that though relief against the judgment was not demanded within the time limited by Code Civ. Proc. § 473, providing that, where a summons has not been personally served, the court may allow defendant at any time within a year after judgment to answer to the merits, the court could set aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 300–304; Dec. Dig. § 153.*]

3. Process (§ 85*)—Service by Publication—Necessary Compliance with Statute.

Actions wherein service of summons is had by publication are in invitum, and strict compliance with the statute is necessary.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 99; Dec. Dig. § 85.*]

Department 2. Appeal from Superior Court, Placer County; Henry C. Gesford, Judge.

Action by the People against Patrick Mulcahy and others. There was a judgment for plaintiff, and, from an order setting it aside, plaintiff appeals. Affirmed.

Charles A. Tuttle and M. W. McIntosh, for appellant. Chauncey H. Dunn, J. D. Meredith, and J. B. Landis, for respondents.

MELVIN, J. Appeal from an order setting aside a default judgment.

In August, 1899, the district attorney of Placer county filed a complaint to foreclose the interest of Patrick Mulcahy in certain school lands and to cancel his certificate of purchase. The summons was served by publication, and upon default of the defendant a decree of foreclosure was made and entered on December 4, 1899. On June 14, 1909, James T. and Theodore F. Hill as grantees by mesne conveyances from said Patrick Mulcahy gave notice of motion to vacate the judgment, and after due hearing the motion was granted July 14, 1909. The material part of the court's finding was as follows: "That said judgment in said action is null and void on its face, and that the court never acquired jurisdiction over the person of defendant. That no service of summons, either actual or constructive, was ever made upon the defendant."

Appellant contends that the judgment is not void upon its face, and that therefore the court had no power to consider the affidavit of James T. Hill (one of the petitioners); the relief not having been demanded within the time limited by section 473 of the Code of Civil Procedure, citing People v. Davis, 143 Cal. 675, 77 Pac. 651. There can be no doubt of the correctness of the rule announced in the above-cited case, and it therefore becomes our duty to scan the judgment roll and to see whether or not invalidity of the judgment is apparent from an inspection thereof. This case differs from People v. Davis, supra, in the fact that section 670, subd. 1, of the Code of Civil Procedure, is applicable here as it has stood since the amendment of 1895, and we are permitted to consider the affidavit for the publication of summons and the order directing publication.

The only important problem in this case arises over the interpretation of section 412, Code Civ. Proc. The respondent contends that, under the requirements of this section, it must appear by affidavit or by the verified complaint on file that a cause of action exists against defendant, or that he is a necessary or proper party to the action. The complaint is not verified. The affidavit of the district attorney upon which the order for publication of summons was based stated substantially that he was acquainted with the facts of the case and verily believed that plaintiff was entitled to the relief sought and that Mulcahy was a necessary and proper party defendant. He did not affirm directly or on information and belief that the facts alleged in the complaint were true. Respondent contends that the affidavit in order to be effective must state probative facts from which the court could ultimately conclude that a cause of action against defendant exists and that he is a necessary and proper party, citing County of Yolo v. Knight, 70 Cal. 431, 11 Pac. 662, and Columbia Screw Co. v. Warner Lock Co., 138 Cal. 446, 71 Pac. 498. These cases undoubtedly sustain respondents' theory. Appellant contends that the amendment of 1895 to section 412, Code Civ. Proc. changed the pre-existing rule and dispensed with the necessity of having a verified complaint in certain classes of cases. The material portion of that section is as follows: "Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a foreign corporation having no managing or business agent, cashier or secretary within the state, and the fact appears by affidavit to the satisfaction of the court or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file therein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by the publication of summons. * * *"

The position of the appellant is that the words "the complaint on file herein," contained in that part of the section which was adopted in 1895, dispenses with the necessity of verification of the complaint in cases like the one here considered because in the preceding clause the words "the verified complaint on file" are used. We cannot agree with this. The filing of a verified complaint (in the absence of a sufficient affidavit) is contemplated in the other parts of the section, and, when the reference of the statute is to "the complaint on file herein," evidently such verified complaint was in the contemplation of the Legislature. There is no good reason why some sort of verification should be required in one class of cases and none in an equally important kind of actions. The word "herein" used in the statute, although awkwardly employed, indicates that reference was intended to the sort of complaint mentioned elsewhere in the section.

Actions of this sort are in invitum, and strict compliance with the statute is necessary. Columbia Screw Co. v. Warner Lock Co., supra. As we have seen, the statute was not closely followed in the requirement that the facts necessary to establish a cause of action should be alleged by a verified instrument—the complaint or the affidavit. This appears upon the face of the judgment; that is to say, in the judgment roll itself. It follows that the order of the court setting aside the judgment was properly made. This conclusion makes it unnecessary to discuss the other points mentioned in the briefs.

The order is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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159 Cal. 1

GRANGER et al. v. SUPERIOR COURT OF NEVADA COUNTY et al. (S. F. 5,345.)

(Supreme Court of California. Dec. 21, 1910.)

1. PROHIBITION (§ 10*) — JURISDICTION OF COURT.

The grantee of a purchaser from executors sued to quiet title and obtained judgment, which was reversed on appeal on the ground that the sale by the executors did not pass title because not confirmed by the court. A defendant in his dual capacity of coexecutor and residuary legatee filed a cross-complaint for an accounting by the purchaser and his grantee of the rents, subject to a deduction for improvements. The original complaint of the grantee was stricken out and the case proceeded on the cross-complaint. Judgment was rendered against the purchaser and the grantee, but the grantee obtained a new trial, and a decision was again rendered against him, but no judgment was entered thereon. Subsequently another executor filed an amended complaint to quiet title and for an accounting. *Held* that, while the judgment conclusively settled the account between the purchaser and the estate of testator, and while the striking out of the complaint of the grantee left only the matter of accounting at issue, the court had jurisdiction to proceed to the entry of judgment as to the grantee, and prohibition could only issue so far as to prevent further proceedings against the purchaser on behalf of the estate or the executors thereof.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37–56; Dec. Dig. § 10.*]

2. PROHIBITION (§ 10*) — JURISDICTION OF COURT.

A purchaser of real estate from executors obtained no title because the sale was not confirmed by the court, and he conveyed the property to a third person. A devisee conveyed his interest to the third person's husband, and the third person and her husband conveyed to the purchaser, who brought suit to quiet title. Pending the suit a judgment adjudging that he held possession of the property as trustee of the estate of testator, and that there was due from the estate on account of the purchase money paid to the executors, after deducting the rents received, a specified sum, was rendered. A judgment denying relief was reversed on appeal, and on remand a cross-complaint was filed by an executor. *Held*, that the court had jurisdiction of the case, so that prohibition to restrain it from proceeding in the case could not lie, though the judgment rendered pending the suit could be pleaded as an adjudication of the matters determined by it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37–56; Dec. Dig. § 10.*]

In Bank. Application for writ of prohibition by Samuel Granger and another against the Superior Court of Nevada County, and George L. Jones, judge thereof. Granted in part; denied in part.

Thos. S. Ford and Ed. V. Henley, for plaintiffs. C. W. Kitts and J. M. Walling, for defendants.

PER CURIAM. This is an application to this court for a writ of prohibition against further proceedings in the superior court of Nevada county in two certain actions in said court: (1) The action of Mary A. Benallack against William G. Richards, James Benallack, and Francis L. Richards, as executors of the estate of Phillip Richards, deceased, and William S. Richards and William G. Richards, as individuals, begun February 11, 1895, and numbered 2,343 in said court; (2) the action of Samuel Granger against the same parties, begun May 19, 1897, and numbered 2,635 in said court. The general ground upon which prohibition is asked is that a judgment has been rendered in the first-named action which disposes of all the matters at issue between the parties in both actions and that said judgment has become final. Although the cases involve the same facts, they will require separate consideration.

1. The complaint in the action of Mary A. Benallack in substance stated a cause of action to quiet title to lot 28 in block 30 in Nevada City. The complaint alleged that Phillip Richards died seised of this lot on March 27, 1887, that his will was duly probated and the above-named parties appointed the executors thereof, that they were empowered by the will to sell and convey real or personal property of the estate without any order of court, that on May 11, 1891, as such executors, they sold and conveyed said lot to Samuel Granger for $3,365, which sum was paid to the executors and by them distributed among the legatees under the will, that thereafter Granger conveyed the property to the plaintiff Mary A. Benallack, and that the defendants claimed an interest in the lot adverse to her. The answer of William G. Richards and William S. Richards alleged that the deed from the executors to Granger was never reported to the superior court or confirmed, that the purchase money therefor was in fact paid by James Benallack, and that Granger bought the same on behalf of said James Benallack. Judgment was rendered in favor of the plaintiff from which an appeal was taken to the Supreme Court, and said judgment was reversed on April 6, 1897; the opinion being reported in 116 Cal. 405, 48 Pac. 622. The ground of reversal was that a sale made by executors under a power given to them by the will of the deceased did not pass title to the grantee unless the sale was confirmed by the court.

On December 2, 1897, after the coming down of the remittitur, Francis S. Richards, one of the defendants, in the dual capacity of coexecutor and residuary legatee, filed a cross-complaint in the action. Therein he set forth the facts hereinbefore stated, including the failure to confirm the sale by the executors to Granger, and further that Granger took and held possession of the lot from May 11, 1891, until February 9, 1893; that Mary A. Benallack held possession thereafter from the latter date until May 8, 1897; that Francis S. Richards, as devisee, had conveyed his interest in the lot to James Benallack in 1894; that Mary A. Benallack and James Benallack conveyed to Granger on May 8, 1897; that Granger has ever since that time held possession thereof; that James Benallack died on November 13, 1897; that neither Mary Benallack nor Granger had ever accounted for rents received by them from said lot; that each had made valuable improvements thereon; that they were trustees of said rents for the benefit of the estate; and that as such executor he offered to make such restitution to them as the court should direct. The prayer was that Granger be made a party to the action, that an accounting be had of the purchase money paid, the taxes and insurance paid, the repairs made and the rents received, and for general relief. This cross-complaint was served on all the other parties to the action. William G. Richards, the other surviving executor, and William S. Richards, the other residuary devisee, filed a demurrer to said cross-complaint, which was overruled with their consent. They filed no answer within the time allowed, and their default thereon was duly entered. Mary A. Benallack and Granger answered denying, in part, the receipt of the rents as alleged therein, averring payments for improvements, repairs, and taxes, and denying the trust. On these issues a trial was had and on January 24, 1899, findings were filed and judgment given declaring that Granger held possession of the lot as trustee of the estate of Phillip Richards, deceased, that there was due from said estate to him on account of the purchase money paid to the executors, after deducting the rents he had received, the sum of $2,811.19, and that before the estate would be entitled to the possession of the lot it must pay him said sum. It was also declared that Mary A. Benallack was indebted to the estate on account of rents collected by her while in possession of the lot, in the sum of $2,198.19. After the filing of the cross-complaint of Richards, the original complaint of Mary A. Benallack was stricken out, and the cause thereafter seems to have proceeded on the theory that she had dismissed her action, and that the case was pending solely upon the cross-complaint of the executor aforesaid. Granger did not appeal from this judgment, nor did the cross-complaining executor, and so far as it adjudged matters at issue between them it has become final. Mary A. Benallack moved for a new trial thereof so far as the issues relating to her were concerned, and the motion was granted. Thereafter a new trial was had and a decision given again declaring her indebted to the estate. No judgment has ever been entered upon this decision. After the judgment of January 24, 1899, to wit, on March 3, 1899, William G. Richards, as executor as aforesaid, by leave of court, filed a pleading styled an amended cross-complaint in said action of Bennalack v. Richards, asking to have the title of the estate to said lot quieted, and for an accounting. To this Granger and Mary A. Benallack filed an answer setting up the judgment of January 24, 1899, as a bar to the cross-complaint and denying the jurisdiction of the court to proceed further in the action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is evident from this recital of the facts that the court has not been divested entirely of jurisdiction. While it is true that the judgment of January 24, 1899, conclusively settles the account between Granger and the estate of Richards and establishes Granger's right to hold possession of the lot until the amount due him has been paid, and while the striking out of the original complaint seems to have left no other matter at issue in the case so far as Granger and the estate is concerned, the court still has jurisdiction to proceed to the entry of judgment with respect to Mary A. Benallack. Upon the new trial which she secured, findings were filed; but it appears no judgment has yet been entered. So far as Granger and the estate of Richards is concerned, the litigation in Bennalack v. Richards appears to be at an end, and the court is without jurisdiction to proceed further. Treating this application as separable, a writ of prohibition can issue to prevent further proceedings against Granger on behalf of the estate or the executors thereof in that action. With regard to Mary A. Benallack no case of prohibition has been made.

2. After Granger received the conveyance of the lot from Mary A. Benallack and her husband on May 8, 1897, he began the action of Granger v. Richards, numbered 2,635 aforesaid. His complaint set out the same facts heretofore recited, stating them somewhat more at length than in the complaint of Mary A. Benallack in Bennalack v. Richards, and prayed for a decree quieting his title to the lot and for general relief. Answers were filed by the defendants and a trial resulted in a judgment in favor of W. G. Richards as surviving executor and residuary legatee. From this judgment Granger appealed to the Supreme Court, and the judgment was reversed. The case is reported in 154 Cal., at page 478, 98 Pac. 528. The opinion declared that Granger was entitled to be reimbursed for the amount of his purchase money and that an accounting should be had of the rents received during his possession. A cross-complaint was filed in that case by William G. Richards, as executor, and the case is still pending; no trial having been had since the reversal of the first judgment. It is obvious that the court still has jurisdiction of that case and that a writ of prohibition cannot be issued. It may be conceded that with respect to everything except the taking of a supplemental account and making of a decree requiring Granger to reconvey the property to the estate upon the payment of the money found due him upon the accounting, the whole controversy has been settled by the judgment in the action of Bennalack v. Richards. But this does not affect the jurisdiction of the court to proceed in the action. That judgment can be pleaded as an adjudication of the matters determined by it, but it cannot be given the effect of depriving the court of jurisdiction.

Let a writ issue prohibiting the superior court of Nevada county from proceeding further in the case of Bennalack v. Richards, except so far as may be necessary to determine and adjudge the issues between the estate of Richards and the estate of Mary A. Benallack, deceased, with respect to the amount due her or for rents received from said lot while she was in possession thereof. In other respects the petition is denied.

BEATTY, C. J., not participating.

159 Cal. 85

DE LA GUERRA et al. v. STRIEDEL et al.

(L. A. 2,466.)

(Supreme Court of California. Dec. 29, 1910. Rehearing Denied Jan. 28, 1911.)

1. Appeal and Error (§ 1010*)—Review—Findings of Trial Court.

In an action to restrain defendant from breaking a gate, and to quiet title to a strip of land, evidence considered, and *held* to present some proof tending to support the findings of the trial court that an easement claimed by defendant was permissive only, so that such finding would not be disturbed on appeal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

2. HIGHWAYS (§ 17*)—PRESCRIPTIVE RIGHTS—EVIDENCE.

That certain land is inclosed by a fence is strong evidence, that the use of it by the public is permissive, and based on a mere license of passage.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 24; Dec. Dig. § 17.*]

Department 2. Appeal from Superior Court, Santa Barbara County; James W. Taggart and Samuel E. Crow, Judges.

Action by Delfina de la Guerra and another, against Michael Striedel and another. From a judgment for plaintiffs, defendant named appeals. Affirmed.

Canfield & Starbuck, for appellant. B. F. Thomas, for respondents.

MELVIN, J. Plaintiffs sued to restrain defendants from breaking down a gate which had been built across a strip of land ten feet in width, and to quiet their title against defendants in the said strip of land, which was claimed by the defendants as a right of way extending from the property of defendant Streidl (named in the pleadings as Striedel) to Haley street in the city of Santa Barbara. Defendant John Doe, whose true name was found by the court to be K. Okuhara, having been regularly served and having failed to appear, judgment by default was taken against him. Defendant Streidl by his answer denied plaintiffs' right to close the strip of land in question and counterclaimed a right of way in himself in common with others and the public over the aforesaid property. Treating the counterclaim as a cross-complaint, plaintiffs entered a denial of its allegations, and the case was tried on the issues thus raised. Judgment was entered in favor of plaintiffs, and this appeal is from the judgment and from an order denying defendant Streidl's motion for a new trial.

We mention the default judgment against Okuhara because the respondents raise the point that he is an interested party within the meaning of section 940, Code of Civil Procedure, and that since he has not been served with the notice of appeal nor the bill of exceptions, this court has no jurisdiction to consider these appeals. While there is, perhaps, some force in this contention (see Niles v. Gonzales, 152 Cal. 90, 92 Pac. 74, s. c. 155 Cal. 359, 100 Pac. 1080) we have examined the case, and are prepared to sustain the judgment and order on their merits. The court, after finding that plaintiffs were the owners of a certain parcel of land, including the strip over which defendant claimed a right of way, found that neither Streidl nor the public had any easement of way across the whole or any part of said land; that "for many years, viz., since 1880, the said parcel of land has been inclosed and separated from the said Haley street by a good and substantial inclosure with a gateway to enter said parcel of land from said side of Haley street, which gate was made and maintained by the plaintiffs, their tenants and their predecessors in interest, and that said gate was across that portion of said parcel of land, described as an alley in said defendant's answer"; and that "for thirty years the said Michael Streidl, without the knowledge of the plaintiffs, occasionally walked along the said parcel of said land described in said defendant's answer as an alley, but the said defendant at no time asserted to the plaintiffs or their predecessors in interest that he claimed any right of way over said alley, but the said defendant's said occasional use of the same was permissive by the plaintiffs and their predecessors in interest." It was also found that the alley was intended by the plaintiffs and their predecessors to be used by themselves and their tenants, and that it had been so used for 30 years. It appears that in 1875 Mrs. Josefa de la Guerra owned substantially all of the west quarter of a block in the city of Santa Barbara bounded on the southwest by State street and on the northwest by Haley street. Her holding extended 200 feet on Haley street and 232 feet on State street. In that year she conveyed to Col. Hollister the west corner, 60 feet on State street by 100 feet on Haley street. Later she sold to Mr. Stearns a piece of land adjoining Col. Hollister's with a frontage of 75 feet on State street and a depth from that street of 125 feet and a strip 25 feet in width running to Haley street. It will be seen at once that this parcel surrounded the Hollister property on two sides. Later and in the year 1875 Mrs. de la Guerra sold to Streidl the property adjoining that of Stearns. This parcel had a frontage of 25 feet on State street and a depth of 125 feet. Buildings were erected on the three lots above described, and when Mr. Stearns built his back fence, he put it 115 feet from State street, leaving a strip 10 feet wide at the rear of his lot outside the fence. When Streidl built his fence he followed the example of his neighbor, Mr. Stearns, and left a similar space at the rear of his property. He also put a large gate and two doors in his back fence for convenience, he said, in going and coming between his property and Haley street. It is this strip of land over which defendant Streidl claims an easement against the plaintiffs who are the successors in interest of Stearns, the latter's title having been acquired by Mrs. de la Guerra by foreclosure about six years after the sale, and having descended with that of the rest of the property here considered to the plaintiffs. Appellant contends that the user by Streidl for 30 years of this alleyway was presumptively adverse, and that the court ignored this presumption by a finding to the contrary, unsupported by competent evidence. The only evidence offered in that behalf, according to appellant's contention, was that the tenants of Mr. Stearns and Mrs. de la Guerra used the alley as much as Mr. Streidl did. An examination of the testimony (which was conflicting) discloses the fact, however, that there was evidence offered on behalf of plaintiffs tending to show that a gate was maintained at the Haley street end of the alley as found by the court. Carlos de la Guerra testified: "We—I say 'we' because I had charge of the property at one time—we have always tried to maintain a gate there since 1874, and when I came to manage the property in 1886 or 1887 up until 1892 or 1893 we always had a gate there, especially so when they paved the street, State street, and paved Haley street, including up beyond the gate there, I had that paved with asphaltum and also paved the passageway with asphaltum through that gate—that was in 1888 or 1889 when I had the asphaltum sidewalk laid there and I had that fence put to the gate, re-established it as I had already done before. I never knew of any one else or any one other than the tenants of this property here having a passageway or using any part of this de la Guerra property that is represented here as vacant or northeast of these lines as a right of way." Mr. Maris, who occupied the property for eight or nine years following 1891 testified, in reference to the Haley street terminus: "There was a gate there all the time when I had the property—there was always a gate up there. It was kept closed most of the time. I had my horses running loose in there, and the gate was generally closed to keep them in; I always looked out for that. It was board fence from the gate down to my tract of land of three or four boards. When I first put up the fence I put up bars there, but I only kept them up a short time, and I put up a gate with hinges. That fence about which I speak as existing on the de la Guerra property along on Haley street, up to this gate, was built along in '91." The same witness said: "While I was the tenant of this property I knew of people making use of this gate going back into this property. The tenants of all the property along there used it. I had no objections to their using it as long as they didn't trespass on the land, I wanted to use there, my crop of hay there, and kept the gate closed. As long as they did that I had no objection. I refer to all the tenants along there, the tenants in the de la Guerra estate there and back of the Odd Fellows (meaning the property formerly sold to Col. Hollister)." Dr. Franceschi, who occupied property on that block for some time, commencing in 1899, testified: "There was a gate there. I think that gate has been there all the time since I went there. I don't know whether it has been there recently or whether it had been there for some time, but it was there a good many years." It will thus be seen that there is some evidence to sustain the finding that the property had been fenced and that the use of the alleyway was merely permissive. Counsel for appellant are of the opinion that Carlos de la Guerra's testimony was so discredited as to be worthless, but we cannot interfere with the peculiar function of the trial court in passing upon the weight of evidence. The showing that the land had been inclosed by a fence would strongly indicate that the use of it by the public was merely permissive and "is strong evidence in support of a mere license to the public to pass over the designated way." Quinn v. Anderson, 70 Cal. 456, 11 Pac. 746; Huffman v. Hall, 102 Cal. 30, 36 Pac. 417. We think that there is sufficient evidence to justify all of the findings of the court and to sustain the judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment and order therefore are affirmed.

I concur: **LORIGAN, J.**

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159 Cal. 49

CALIFORNIA WINE ASS'N v. COMMERCIAL UNION FIRE INS. CO. OF NEW YORK. (S. F. 5,261.)

(Supreme Court of California. Dec. 28, 1910.)

1. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—ERRONEOUS SPECIAL VERDICT.

An incorrect special verdict is harmless error when another consistent special verdict correctly found sustains the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231–4233; Dec. Dig. § 1070.*]

2. JUDGMENT (§ 279*)—JUDGMENT ROLL—SPECIAL VERDICTS.

Under Code Civ. Proc. § 670, subd. 2, making a copy of the verdict a part of the judgment roll, special verdicts controlling a general verdict are properly included.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546–551; Dec. Dig. § 279.*]

3. APPEAL AND ERROR (§ 654*) — RECORD — AMENDMENT—ESTOPPEL BY STIPULATION.

Where appellant seeks to overthrow the general verdict by showing error as to one of the issues, the judgment roll may be amended by incorporating the special verdicts to show that the judgment is sustainable regardless of the alleged error, though respondent has stipulated that the transcript is correct and that the appeal be heard thereon.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 654.*]

4. APPEAL AND ERROR (§ 656*)—RECORD—AMENDMENT—STIPULATION—EVIDENCE.

Evidence on respondent's application to incorporate special verdicts in the judgment roll *held* to show that respondent did not waive his right thereto in consideration of appellant omitting from the bill of exceptions special interrogatories refused.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 656.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—JUDICIAL DISCRETION.

Allowance of leading questions in examining witnesses is discretionary with the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 795; Dec. Dig. § 240.*]

6. WITNESSES (§ 243*)—EXAMINING WITNESSES—LEADING QUESTIONS.

Allowance of leading questions manifestly designed not to suggest answers but rather to direct witnesses of slow comprehension to the general subject of the testimony was not reversible error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 847; Dec. Dig. § 243.*]

7. TRIAL (§ 132*)—MISCONDUCT OF COUNSEL—WITHDRAWAL OF REMARKS.

Applying the term "welching" to defendant was not reversible error where counsel withdrew it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 315; Dec. Dig. § 132.*]

8. WITNESSES (§ 270*)—CROSS-EXAMINATION—SCOPE—IRRELEVANT MATTERS.

Where in an action on a fire policy, defended on the ground that the loss was caused by earthquake, plaintiff's witness testified respecting a fire, a question on cross-examination as to whether he had conversed with certain people on the morning of the earthquake was properly excluded if intended as a foundation to show the conversation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955–957; Dec. Dig. § 270.*]

9. WITNESSES (§ 329*)—CROSS-EXAMINATION—QUESTION TESTING RECOLLECTION.

Where in an action on a fire policy a witness for plaintiff testified concerning the fire, it was not error to exclude a question on cross-examination to test witness' recollection as to whether he had had any conversation with certain people on the morning of the earthquake; allowance of the question being within the trial judge's discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1104, 1105; Dec. Dig. § 329.*]

10. TRIAL (§ 63*)—ORDER OF PROOF—JUDICIAL DISCRETION.

It was not an abuse of discretion to permit defendant to show on surrebuttal matter which was part of its case in chief.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 151–153; Dec. Dig. § 63.*]

11. APPEAL AND ERROR (§ 1033*)—ERROR FAVORABLE TO PARTY COMPLAINING—REVIEW—INSTRUCTIONS.

A fire insurance company sued on a policy cannot complain of an instruction that if fire caused by earthquake spread from building to building until it reached plaintiff's, plaintiff could not recover because the instruction omitted to require a finding that the fire burned "uninterruptedly" from one building to another, the omission being beneficial to the company.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1033.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank F. Murasky, Judge.

Action by the California Wine Association against the Commercial Union Fire Insurance Company of New York. From a judgment for plaintiff and from an order refusing a new trial, defendant appeals. Affirmed.

T. C. Van Ness and Otto Irving Wise, for appellant. Pillsbury, Madison & Sutro (Alfred Sutro, of counsel), for respondent.

HENSHAW, J. This action was to recover upon a contract of insurance. The policy was pleaded in hæc verba. It contained the following provision: "This company shall not be liable for loss caused directly or indirectly by * * * earthquake." At the trial defendant conceded plaintiff's right to recover, unless it could successfully maintain its defense under the quoted provision. It undertook to do so by showing that the fire which destroyed plaintiff's property was caused either directly or indirectly by the earthquake of April 18, 1906. The verdict of the jury was for plaintiff. Judgment was entered accordingly; and defendant appeals, insisting that several errors of law committed by the trial court were of sufficient gravity to entitle it to a reversal. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

At the trial plaintiff urged, and introduced evidence to show, that defendant was estopped from making its defense under the clause above quoted. Upon this appeal it is contended that the court erred in admitting this evidence, and in its instructions to the jury upon the subject of estoppel. It is further insisted that the evidence was entirely inadequate to establish an estoppel. Again, appellant urges that the court erred in refusing to give certain instructions which it proposed, to the effect that if the jury found that a fire or fires were started by the earthquake, that such fire or fires, spreading and burning continuously and uninterruptedly, finally reached and destroyed plaintiff's property, plaintiff could not recover. Respondent, while maintaining that the court fell into error in no one of these matters, further argues that if one and all were conceded to be errors, still its judgment is good by reason of the special verdicts which the jury returned in answer to interrogatories. To interrogatory 26 the jury answered that on the morning of the 18th of April, 1906, in the territory described by the witnesses there was a fire or there were fires not caused directly or indirectly by the earthquake; and to interrogatory 29, the jury made answer that it was one or more of these fires, not caused directly or indirectly by the earthquake, which, burning uninterruptedly from building to building and block to block, reached and destroyed the property of the plaintiff. The jury, also, in terms, found and declared that no fire caused directly or indirectly by the earthquake destroyed the property of plaintiff. The general verdict for plaintiff which followed is manifestly and admittedly supported by these special verdicts. When more than one special issue, which would sustain a judgment is submitted to a jury, and the jury's general verdict is supported by one of these special verdicts and is not supported by the others, if there be no self-destroying inconsistency between these special verdicts, that one, which is correctly found will sustain the judgment, and the incorrect special verdicts become harmless error. Upon this precise subject this court has said: "If then either (special verdict) was sustained by the evidence and was not affected by any error, the want of evidence to sustain the finding on the other defense, or any errors committed in regard to it, could not have been prejudicial." Big Three Mining & Milling Co. v. Hamilton, 107 Pac. 301; Crosett v. Whelan, 44 Cal. 200; Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, 47 Pac. 364, 778.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In the original transcript filed in this case all the special verdicts were omitted and the general verdict alone appears in the judgment roll. Respondent, under suggestion of diminution of the record, moved to complete the judgment roll by adding thereto the special verdicts. To this appellant objects, upon the ground, first, that the special verdicts form no part of the general verdict, and so no part of the judgment roll; second, that respondent is estopped by reason of the fact that it stipulated that the transcript upon appeal was correct and that the appeal could be heard on the transcript; and, third, because the insertion of the special verdicts would work an injury to appellant in that respondent waived the insertion of the special verdicts by stipulation, in consideration of appellants omitting from the bill of exceptions the special interrogatories which it had asked the court to submit to the jury, and which the court refused to submit. Upon this refusal, appellant had intended to predicate error. Under the terms of section 625 of the Code of Civil Procedure, as it existed at the time this action was tried, the jury was required, if so instructed by the court at the request of either party, to return special verdicts upon any issue made by the pleadings. The special verdicts or findings in this case were such, therefore, as the law not only contemplated, but compelled the jury to make upon request. Section 670, subdivision 2, of the Code of Civil Procedure, declares "a copy of the verdict of the jury" to be a part of the judgment roll. We entertain no doubt that this language embraces the special verdicts, which, themselves, absolutely control the general verdict. It is so expressly decided in Frank v. Grimes, 105 Ind. 346, 4 N. E. 414, and in Suydam v. Williamson, 61 U. S. 427, 15 L. Ed. 978, and such is declared to be the general rule in 2 Cyc., page 1068.

Appellant, in support of its contention that respondent is estopped by stipulation from asking that the judgment roll be amended, cites Bonds v. Hickman, 29 Cal. 460, and Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888. In Bonds v. Hickman, the stipulation was to the effect that the transcript contained a true copy of the pleadings and judgment, and that "notice of appeal admitted as duly filed and served, also the filing of appeal bond, insertion of copies waived." After entering into this stipulation respondent moved that the appeal be dismissed upon the ground that the court had no jurisdiction of the case because no notice of appeal had been in fact filed. This court declared merely that if the stipulation was entered into by the respondent under a mistake of fact, and its operation was injurious to him, doubtless it was competent for the court below, upon proper application, to relieve him from it; that this court would do the same if a stipulation were here entered into under a mistake of fact; but under the circumstances of the case this court was powerless in the premises and could not amend the documents constituting the transcript, nor indirectly accomplish the same result by accepting as true a statement not found in the transcript, which necessarily displaced a fact stated therein. It is further declared that this court may order a document to be inserted in or stricken from the transcript in order to perfect it, although it cannot vary or amend a document found therein. In Bonds v. Hickman respondent, who had certified that a judgment was entered on a given date, upon the hearing of the appeal, for the first time, undertook to show by affidavit that in fact it was entered at a later date. Respondent did not undertake to show that he had been deceived or misled in making the stipulation, and his attempt to avoid it and defeat the appeal at a time when a new appeal could not have been taken, could not, under the simplest principles of fair dealing, be permitted. He had lulled his adversary into a fancied security by his stipulation, and when the time for retrieving the error had passed, he sought to defeat the appeal by proving the fact to be to the contrary of that which he had knowingly stipulated. No such question is here involved. The appellant seeks to overthrow the general verdict and judgment based thereon by showing that the court fell into error as to one of the issues. Respondent, in turn, asks the court to perfect the judgment roll, not by changing any document therein, but by adding to it omitted matters properly belonging thereto, which omitted matters would show that the judgment is sustainable regardless of the alleged error. The court of its own motion, and to perfect the record before it, could make the order, and would in any case make it, unless a right of the adverse party was injuriously affected thereby.

The third objection of the appellant to the perfection of the judgment roll rests, as has been said, upon estoppel. The matter was heard upon affidavits supported by the proposed bill of exceptions and the proposed amendments thereto. The proposed bill of exceptions negatives the contention of appellant's counsel that he desired inserted in the bill of exceptions his proposed interrogatories which the court refused to submit to the jury. His proposed bill of exceptions contains nothing to this purport. One of respondent's proposed amendments to appellant's proposed bill of exceptions contained a demand for the insertion of all the questions of fact, findings upon which were requested by either plaintiff or defendant. The court refused to allow this amendment under the belief, that as there was no claim that the special verdicts were inconsistent with the general verdict in any particular, the special verdicts had no place in the record. It thus appears that the absence of the special verdicts was not due to any stipulation, but was due to a ruling of the court in opposition to plaintiff and respondent's motion that they be inserted. Appellant also states that it withdrew "a number of matters which were then a part of the said proposed bill of exceptions," but nowhere is any one of these matters specifically pointed out. Respondent is therefore not estopped, and his motion in this regard to complete the judgment roll by adding thereto the special interrogatories submitted to the jury and their findings thereon is granted.

With the complete record before us, since the sufficiency of the evidence to support the special verdict is not questioned, and since the judgment is sustainable under the special verdict above adverted to, that plaintiff's property was destroyed by a fire not caused directly or indirectly by the earthquake, there is left for consideration only the errors of law occurring at the trial, and, of these, such alone as bear upon this special verdict.

It is contended that the manner in which counsel for plaintiff insisted upon examining his witness throughout the trial necessitates a reversal of the judgment and order. The objections especially noted under this head are that plaintiff's attorneys insisted upon asking leading questions. But the asking of leading questions is within the control of the trial court, and is permitted or not in the court's discretion. Undoubtedly the questions were leading, but they were in their nature harmless, and manifestly were designed not to put answers in the witnesses' mouths, but rather to direct witnesses, who were slow of comprehension, to the general matter concerning which it was sought to elicit their testimony. Thus, for example, a witness is asked: "Did I ask you if you saw anything there? Did you tell me what you saw?" To this the court, in response to an objection said: "The witness apparently is a man who does not comprehend readily. That is the reason why I have allowed leading questions." Plaintiff's attorney asked one of his witnesses if he remembered "when the subject of the welching insurance companies that refused to pay the California Wine Association its insurance first came up." The question was objected to. The adjective "welching" was withdrawn. But appellant insists that the use of this epithet calls for a reversal of the case. We do not think so. Fogel v. San Francisco, etc., Ry. Co., 42 Pac. 565;[1] Allen v. McKay, 139 Cal. 94, 72 Pac. 713.

The court sustained an objection to a question propounded to one of plaintiff's witnesses on cross-examination. This witness testified with reference to a fire on the morning of the earthquake. Upon the cross-examination he was asked whether he had had any conversation with the members of the Stern family on the morning of the earthquake. The court sustained the objection upon the ground that conversation had with members of the Stern family would not be competent evidence. If the purpose of counsel was to follow this preliminary question by another seeking to elicit the conversation, the court's ruling was undoubtedly correct. It is here urged that the question was admissible, if only to test the recollection of the witness. Conceding this to be so, it was upon a most minor and immaterial matter. It does not appear that the cross-examination of the witness was unduly curtailed, and the allowance or refusal to allow a specific question such as this was a matter resting in the discretion of the court, and not one for which a cause would be reversed even if, in the view of the appellate tribunal, the question might have been permitted. In rebuttal witnesses called for plaintiff had testified that certain streets were free from fire on the morning of the earthquake. In surrebuttal the defendant called a witness to ask him the condition of these streets. An objection was offered and sustained. Evidence as to the condition of the streets had been a part of defendant's case in chief. It was to rebut this evidence that plaintiff's witnesses were called. To allow further evidence on behalf of defendant, going to the same matter as to which their witnesses testified in chief, was in effect merely to open the case of the defense in chief. The question addressed itself to the discretion of the court and its refusal to allow this to be done was not error.

Complaint is made that the court refused to give an instruction to the effect that if the earthquake caused directly or indirectly a fire at one or a number of named locations in the city of San Francisco "and such fires or any one or more of them burned uninterruptedly from building to building or from block to block until they or any one or more of them reached and burned the insured property, then the defendant was not liable." The court instructed the jury as follows: "If you should find and believe from the evidence that the fires, or any one or more of the fires mentioned by the witnesses or as to which testimony has been introduced, were caused directly or indirectly by the earthquake of April 18, 1906, and that such fire or fires thereafter spread by heat, spark, flame, embers, burning brands or cinders, to and burned from building to building, or block to block, and destroyed the property of plaintiff located on the southeast corner of Fifth and Bluxome streets, in the city and county of San Francisco, then in that case, I instruct you that your verdict should be in favor of the insurance company and against the plaintiff, California Wine Association." The absence of the word "uninterruptedly" from the instruction given, which word is contained in the instruction refused, forms the basis of appellant's complaint. But manifestly the effect of the use of the word "uninterruptedly" was to narrow the instruction proposed by defendant. The absence of the word in the instruction which the court gave made rather for the benefit of defendant than to its injury. The foregoing disposes of all objections meriting discussion. The more interesting consideration, to which no small part of the briefs of both parties is directed, namely, what in law constitutes a fire directly or indirectly caused by an earthquake, is, for the reasons already given, eliminated from this case. Whatever might be said about it would be purely dicta and the question may well be left for future consideration.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 110 Cal. xvii.

For the foregoing reasons the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(159 Cal. 113)

PEOPLE v. RIGGINS. (Cr. 1,571.)

(Supreme Court of California. Dec. 30, 1910.)

1. CRIMINAL LAW (§ 1158*) — APPEAL — REVIEW—CONFLICTING EVIDENCE.

The evidence being conflicting, denial of application for change of venue on account of a general feeling against the defendant in the county cannot be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1158.*]

2. JURY (§ 97*)—"ACTUAL BIAS."

"Actual bias," defined by Pen. Code, § 1073, as a state of mind in reference to the case, or either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of party, may consist of an opinion as to the guilt or innocence of defendant, based on some knowledge or information of the facts embraced in the charge, or of the evidence to be produced, or, the juror having no such knowledge or information, may consist of a preconceived opinion concerning defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431–437; Dec. Dig. § 97.*

For other definitions, see Words and Phrases, vol. 1, pp. 151, 152.]

3. JURY (§ 133*)—EXAMINATION ON VOIR DIRE —ACTUAL BIAS.

Whether a juror has actual bias is a fact to be determined by the trial court on the evidence before it on his examination on his voir dire.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 133.*]

4. CRIMINAL LAW (§ 1158*) — APPEAL — REVIEW—ACTUAL BIAS OF JURORS.

The evidence on a voir dire examination of a juror being conflicting as to his actual bias, as where he gives contradictory answers, the decision of the court thereon, as in other cases of conflicting evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3070; Dec. Dig. § 1158.*]

5. JURY (§ 97*)—COMPETENCY OF JUROR—ACTUAL BIAS.

To make a juror competent, notwithstanding an opinion amounting to actual bias, under Pen. Code, § 1076, declaring that one shall not be disqualified as a juror because of having formed or expressed an opinion on the matter or cause to be submitted, founded on public rumor, statements in public journals, or common notoriety, provided that it appear in his declaration that he can and will, notwithstanding such an opinion, act impartially and fairly on the matters to be submitted to him, the opinion must be on the merits of the case, "the matter or cause to be submitted," and must be founded exclusively on one or more of the sources of information enumerated in such section; so he is incompetent where this prejudice consists of an opinion that defendant was guilty of a murder, of which he was acquitted, having nothing to do with the case at bar.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 431–437; Dec. Dig. § 97.*]

6. CRIMINAL LAW (§ 1186*)—APPEAL—REVERSAL—DENIAL OF TRIAL BY FAIR AND IMPARTIAL JURY.

One who, because of exhaustion of his peremptory challenges, is obliged to accept a juror, incompetent for actual bias, his challenge for cause to him being erroneously overruled, is entitled to a reversal, without inquiry as to the sufficiency of evidence of guilt, for infringement of his right to a fair and impartial jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219; Dec. Dig. § 1186.*]

7. HOMICIDE (§ 156*)—MALICE—EVIDENCE.

Evidence that, a few hours after the alleged assault with intent to murder K., defendant called K. vile names, and cautioned B., as a friend, to have nothing to do with K., though not in the presence of K., was admissible as tending to show malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.*]

8. HOMICIDE (§ 174*)—EVIDENCE—RELEVANCY.

That, several hours after the alleged assault with intent to murder, defendant was carrying in his overcoat a pistol, was irrelevant; the prosecution having proved that this was not the pistol with which the assault was committed, and his possession of such other pistol afterwards not being shown to have any connection with or relation to the offense.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.*]

9. HOMICIDE (§ 158*)—EVIDENCE—RELEVANCY.

The statement of defendant, a week before the alleged assault with intent to murder K., that before he went to jail "somebody would go to the morgue," cannot be said to be irrelevant, being admitted on the theory that the "somebody" referred to was K., and some circumstances being proved tending in a slight degree to indicate K. was the person to whom he intended to refer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293–296; Dec. Dig. § 158.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Emmett Riggins was convicted of assault with intent to murder, and appeals. Reversed.

Henry Brickley and W. D. Foote, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of assault with intent to murder one A. L. Kreiss. His motion for a new trial was denied. He appealed from the judgment and order to the District Court of Appeal for the First district. The justices of that court being unable to agree, the case was transferred to this court for determination.

Several errors are alleged, but the principal point presented is that the court erred in overruling the defendant's challenges for cause to the jurors Simpson, Bargroth, and McKeen.

In July, 1905, the defendant shot and killed one Robert E. Dean in Fresno county. He was charged with the murder of Dean, and upon a trial he was acquitted thereof in September, 1905. The case had caused great public discussion. The local newspapers had published detailed accounts of the facts and of the trial, commenting thereon and denouncing the verdict as a miscarriage of justice, even going so far as to condemn the jurors who rendered the verdict. Great indignation was excited against the defendant on account of this, and it manifested itself to such an extent that he left Fresno county and was absent for nearly a year. The offense with which he now stands charged occurred after his return. An application for a change of venue on account of this general feeling against the defendant in Fresno county was presented to the court. Counter affidavits were filed. It appeared from the affidavits and counter affidavits that many persons in the county had expressed feelings of prejudice and bias against the defendant, but that there were also a great many persons who stood indifferent and knew nothing of the defendant or of the present or former charge. The court denied the application. This is assigned as error, but we think the affidavits presented such a conflict that this court cannot disturb the ruling. We mention the facts disclosed merely because they emphasize the necessity for care in passing upon challenges to individual jurors to see that the prevailing prejudice did not find its way into the jury box. On the trial it appeared that many persons were prejudiced against the defendant. Thirty-five of the jurors examined were excluded from the panel on the challenge of the defendant based on their testimony that their belief that the defendant was guilty of the murder of Dean was so strong, notwithstanding his acquittal, that they could not give him a fair and impartial trial upon the charge of which he stood accused.

No one of the jurors above named knew the defendant personally or had any personal feeling of ill will toward him. They had no knowledge of the facts of the previous shooting of Dean, except what they had heard or had read in the newspapers. On his voir dire Simpson said that he thought Riggins was guilty of the murder of Dean and that by his acquittal thereof he had unjustly escaped punishment, that this belief would influence him as a juror if selected to try the case in hand, that he would have a prejudice against the defendant on account of it, and that for that reason it would require less evidence for the prosecution to induce him to convict the defendant of the present charge, and more evidence of innocence to induce an acquittal, than if he were not thus prejudiced. In answer to questions by the district attorney he testified that he could and would lay aside this prejudice, if he were sworn as a juror in the case, and would give the defendant a fair and impartial trial. On re-examination, he said again that, because of this belief that the defendant had murdered Dean, he would require more evidence on behalf of the defendant and less for the prosecution than if the defendant were a person of whom he had never heard. McKeen testified to the same belief as Simpson in regard to the former charge of murder. He further said that, notwithstanding this belief, he could give the defendant a fair and impartial trial on the evidence in the case, that he would not hold any spite against the man for the past and would take the evidence introduced, but that, if there arose a reasonable doubt, his opinion that the defendant had murdered a man once before might cause him to determine the doubt against the defendant. To the district attorney he said that if there was a doubt he did not know that he could give the defendant as fair and impartial a trial as if he had never heard of him before, but that if the court so instructed he would give him the benefit of any reasonable doubt, the same as he would any other man who was being tried. Bargroth testified that he also believed the defendant to be guilty of the murder of Dean. He then said that he did not think this opinion would influence his action as a juror in the case on trial; that the fact that he had shot a man before would lead him to believe that defendant would possibly be more apt to draw a pistol, and would make him think it more likely, if defendant drew a pistol, that he intended

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to use it, than in the case of a stranger; that circumstances would change this tendency considerably; that he expected he would require the defendant to show that he did not have an intention to use the pistol to kill the man he drew it upon; that if the prosecution proved that he did pull the pistol he would think this sufficient to show an intent by the defendant to kill the man, unless he showed that he did not so intend. In answer to the district attorney, he said that after it was shown that the defendant drew a pistol he would not require less evidence of his intention in doing so than in any other case, that his belief in regard to the former case might make a little difference because it would show a difference in the character of the person, but that if the court instructed that the people must prove every element of the crime charged, beyond a reasonable doubt, to wit, that he made the assault, that he made it with a deadly weapon, and with intent to commit murder, before the defendant was required to prove anything, he could and would obey those instructions.

"Actual bias" is defined in section 1073 of the Penal Code as "a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." Such bias may consist of an opinion as to the guilt or innocence of the accused, based upon some knowledge or information of the facts embraced in the charge or of the evidence to be produced, or it may exist without such knowledge or information, and may consist of a preconceived opinion concerning the defendant or the prosecuting witness which would prevent a fair consideration by the juror of the evidence given or facts proven in the case. Upon the examination of a juror on his voir dire, the question whether or not he has actual bias is one of fact, to be determined by the trial court upon the evidence before it. If the evidence is conflicting upon that question, as where the juror gives contradictory answers, the decision of the trial court thereon, as in any other case of conflicting evidence, is conclusive upon the appellate courts. People v. Wells, 100 Cal. 229, 34 Pac. 718; People v. Ryan, 152 Cal. 371, 92 Pac. 853; People v. Fredericks, 106 Cal. 559, 39 Pac. 944; People v. Scott, 123 Cal. 435, 56 Pac. 102; People v. Owens, 123 Cal. 487, 56 Pac. 251; People v. Evans, 124 Cal. 210, 56 Pac. 1024; People v. Flannelly, 128 Cal. 86, 60 Pac. 670.

But the inquiry as to the ability of the juror to lay aside an opinion which he has, amounting to actual bias, and to act impartially and fairly in the matter, is pertinent and material, under section 1076 of the Penal Code, only where it is an opinion upon the matter to be submitted to him and is based solely upon public rumor, common notoriety, or statements in public journals. If the actual bias is of any other character, no further inquiry is authorized by law. To bring the juror within the exception of the section, the concurrence of the two conditions is necessary: First, the opinion must be upon the merits of the case, "the matter or cause to be submitted"; second, it must be founded exclusively upon one or more of the sources of information above stated. The effect of the absence of the second of these conditions has been repeatedly decided, as the following cases show:

In People v. Wells, supra, a juror had an opinion on the merits of the case, and it was founded upon what he had been told by those who seemed to know the facts they had related to him; but he stated that, notwithstanding that opinion, he could and would act fairly and impartially in the case. The court held that he was incompetent, saying: "At common law a juror who entered the box with an opinion as to the guilt or innocence of the accused was ipso facto disqualified from acting in the case, but section 1076 of the Penal Code of this state creates an innovation upon this principle and declares an exception to the common-law rule. But in order that a juror disqualified at common law, by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within the provisions of the statute, it must appear affirmatively to the court from the evidence before it that such opinion is formed from public rumors, or statements of public journals, or common notoriety; and it must further appear to the court by the juror's declarations under oath that, notwithstanding such opinion, he can and will act fairly and impartially upon the matter to be submitted to him." But the court proceeded to declare that, where the opinion is founded upon statements, from other sources than those above named, "that fact of itself is a disqualification under the law, and it is a disqualification even though the juror should declare to the court under oath that, notwithstanding such opinion, he would and could act fairly and impartially upon the matter to be submitted to him." In People v. Miller, 125 Cal. 46, 57 Pac. 771, the court says: "The juror went into the box with an opinion that the defendant was guilty. Such condition of the juror's mind was an absolute disqualification at common law. Under the Penal Code of this state a single exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section." This was said in view of the further fact that the juror had declared that he could and would act fairly and impartially and obey the instructions of the court. In People v. Helm, 152 Cal. 536, 93 Pac. 101, the court in discussing this subject says: "If it is not made to appear that the juror's opinion is based entirely upon one or all of the three sources of information above named, if it is shown that his belief has its origin in any other source than one of the three enumerated, he is at once as thoroughly disqualified under our Code as he would have been at common law."

The principle established by these decisions is that the juror's ability to disregard actual bias, shown to exist in his mind, is wholly immaterial, save in a case which comes within the exception specified in section 1076. The concurrence of both conditions being necessary to the exception, the failure to bring the juror within it is as clear where the opinion constituting the bias or prejudice is not an opinion on the matter or cause to be submitted, as where, although it is upon that matter or cause, it is not based solely upon one or more of the sources of information named in the excepting clause. If both conditions are not met, the juror is disqualified, and no declaration by the juror that he can lay aside the prejudice and act fairly and impartially will remove the disqualification. Lombardi v. Railway Co., 124 Cal. 316, 57 Pac. 66; Naylor v. Railway Co., 66 Kan. 407, 71 Pac. 835; Coughlin v. People, 144 Ill. 165, 176, 33 N. E. 1, 19 L. R. A. 57.

In the case of the juror Simpson, at least, if not of the others, actual bias was shown to exist, and it consisted of a prejudice against the defendant, growing out of a belief that he was guilty of a murder, of which he had been duly acquitted by a jury. His answers were not contradictory upon this point. It amounted to this: That upon the trial of the case in hand he would take into consideration the fact that the defendant was, as he believed, guilty of a previous murder and would give that fact some weight against the defendant in determining his guilt or innocence, although the fact was not in evidence and could not be inquired into at all. The fact that he proposed to consider a belief formed wholly upon newspaper accounts, without any knowledge of the facts of that case, a belief persisted in, notwithstanding an acquittal by a jury after hearing all the evidence from the lips of the witnesses, shows a considerable degree of prejudice, and the fact that he was still willing to say, in all sincerity, that he could and would lay aside this prejudice and act fairly and impartially in the case, shows the wisdom of the common-law rule that, where bias appears, the juror's opinion of his own fairness will not be considered. One of the striking instances of the frailty of human nature is the fact that a prejudiced person usually believes himself fair-minded and impartial. The guilt of the defendant of the murder of Dean in 1905 was no part of the matter to be submitted upon the charge of assault with intent to murder Kreiss in 1908. Upon the trial of the latter charge no evidence in regard to the former charge could be allowed. The prejudice clearly arose from facts extraneous to the case, and it was not upon the matter to be submitted. The challenge should have been allowed.

The defendant exhausted all his peremptory challenges, and by reason of the refusal of these challenges he was forced to accept McKeen upon the jury. He asked the privilege of challenging McKeen peremptorily, and was denied. Error in denying any one of those challenges would therefore be substantially injurious to the defendant. Consequently, even if it be admitted that the answers of the jurors McKeen and Bargroth, as to the existence of actual bias on their part, were merely conflicting, and that the decision of the trial court with regard to the challenge to them is conclusive, the denial of the challenge to the juror Simpson would require a reversal of the judgment. The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the Constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged, and a conviction by a jury so selected must be set aside.

There are no other assignments of error that demand elaborate discussion. The testimony of Barton that, a few hours after the alleged assault, defendant had called Kreiss vile names and cautioned Barton, as a friend, to have nothing more to do with him, although not in the presence of Kreiss, was admissible as evidence tending to show malice. People v. Shears, 133 Cal. 158, 65 Pac. 295. The testimony that defendant was carrying a pistol in his overcoat pocket while attending a performance at a theater in the evening of the day of the alleged assault, and several hours afterward, was irrelevant and should have been excluded. The prosecution had proved that this was not the pistol with which the alleged assault was committed, and his possession of another pistol afterward was not shown to have any connection with or relation to the offense charged, and it may have prejudiced defendant in the minds of the jurors. The evidence of a statement by the defendant, about a week before the difficulty, that before he went to jail "somebody would go to the morgue," was admitted on the theory that the "somebody" referred to was Kreiss, the assaulted party. Some circumstances were proven tending in a slight degree to indicate that Kreiss was the person to whom he intended to refer. We cannot say that the evidence was irrelevant. But the court might well have directed the jury that they should disregard it unless they found from the evidence that he did refer to Kreiss.

The judgment and order are reversed.

(159 Cal. 65)

PEOPLE v. BANK OF SAN LUIS OBISPO et al. (L. A. 2,384.)

(Supreme Court of California. Dec. 28, 1910. Rehearing Denied Jan. 27, 1911.)

1. JUDGMENT (§ 578*)—RES JUDICATA—EFFECT OF MOTION FOR NEW TRIAL.

Under Code Civ. Proc. § 1049, declaring that an action is deemed pending from its commencement until final determination on appeal, or until the time for appeal has passed, where a judgment has been affirmed on appeal and has thus become final, or where the time for appeal has expired, the judgment may be pleaded or given in evidence as res judicata or an estoppel, though a motion for new trial is pending, which, if successful, will overthrow the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1022; Dec. Dig. § 578.*]

2. NEW TRIAL (§ 12*)—MOTION FOR NEW TRIAL—EFFECT.

A motion for new trial does not stay or suspend the operation of a final judgment, in the absence of an order of the court to that effect.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 17; Dec. Dig. § 12.*]

3. STATUTES (§ 276*)—REPEALING ACTS—EFFECT ON PENDING ACTIONS.

The court on appeal from a judgment cannot proceed where the statute which alone supports the judgment given has been repealed, since the court can pronounce judgment only under the authority of an existing law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371–373; Dec. Dig. § 276.*]

4. STATUTES (§ 276*) — REPEALING ACTS — PENDING ACTIONS.

The decision on appeal from an order denying a new trial, where no stay has been granted, and where the judgment has become a finality, is not on the judgment, but on the order, appealed from, and the repeal of the statute supporting the judgment, pending the appeal from the order denying a new trial, does not destroy the right to be heard on the motion for new trial.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 276.*]

5. APPEAL AND ERROR (§ 460*)—APPEAL FROM ORDER DENYING NEW TRIAL—EFFECT.

An appeal from an order denying a new trial is a separate and independent appeal, which, if prosecuted in time, may be taken after the judgment has become final, and, except when ordered by supersedeas or permitted by stay bond, an appeal does not suspend the judgment or interfere with its finality.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 460.*]

6. NEW TRIAL (§ 12*)—MOTION—NATURE.

A motion for new trial under the Code differs from the common-law motion, which was always heard and determined before the entry of judgment, so that an appeal from the judgment embraced all questions; but it is in the nature of an equitable bill of review which, while countenanced in proper cases, even after affirmance of judgment on appeal, never operates in itself to suspend the decree.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 12.*]

7. STATUTES (§ 276*)—REPEAL—EFFECT ON ACTIONS.

The repeal of the banking act of 1903 (St. 1903, c. 266), authorizing an equitable action by the people by the Attorney General to obtain a decree adjudging a bank insolvent and ordering it into liquidation, leaving the proceedings governing the action those which generally obtain in the practice of the state, does not destroy the right of a bank to a hearing on appeal from an order denying a new trial after adverse judgment, which prior to the repeal became final by affirmance on appeal; the repeal taking place pending decision on the appeal.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 276.*]

8. BANKS AND BANKING (§ 76*)—INSOLVENCY—EVIDENCE.

Evidence *held* to sustain a finding that a bank was insolvent within the banking act of 1903 (St. 1903, c. 266), authorizing the people on the relation of the Attorney General to proceed in equity to have a bank declared insolvent.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 76.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by the People, by U. S. Webb, Attorney General, against the Bank of San Luis Obispo and others. From an order denying a new trial after judgment for plaintiff, defendants appeal. Affirmed, and motion to vacate the judgment and dismiss the proceedings denied.

James L. Crittenden, for appellants. U. S. Webb, Atty. Gen., and R. C. Van Fleet, Deputy Atty. Gen., for the People.

HENSHAW, J. Under the banking act of 1903 (St. 1903, c. 266), action was begun in the name of the people of the state of California by the Attorney General, as contemplated by the provisions of the act, for a decree declaring the defendant, Bank of San Luis Obispo, insolvent, ordering it into involuntary liquidation, and restraining it from the transaction of a banking business. This action proceeded to judgment in accordance with the complaint of the people, and a receiver was appointed by the court to administer its affairs in liquidation. On appeal to this court the judgment of the trial court was in all respects affirmed (People v. Bank of San Luis Obispo, 154 Cal. 194, 97 Pac. 306), and this judgment became final in September, 1908. On June 19, 1908, the trial court denied the defendant bank's motion for a new trial, and from this order an appeal was taken to this court. Pending the decision on this appeal from the trial court's order refusing to grant the motion for a new trial, the banking act of 1903 (St. 1903, c. 266), under the authority of which this action was prosecuted and these proceedings had, was repealed by the banking act of 1909 (St. 1909, c. 76), which latter act made no provision for continuing in force any pending proceedings or litigation under the repealed act.

The Bank of San Luis Obispo now moves this court to vacate and set aside the judgment given against it, and to direct the trial court to dismiss this action upon the ground that the repeal of the banking act of 1903 put an end to all litigation pending under it, and that within the meaning of the law the action of the people of the state of California against the Bank of San Luis Obispo was litigation pending and undetermined. The principle which appellant invokes has thus been stated: "When a cause of action is founded on a statute, a repeal of the statute before final judgment destroys the right, and a judgment is not final in this sense so long as the right of exception thereto remains." 1 Lewis' Sutherland, Statutory Construction (2d Ed.) p. 285. And, says Cyc. (volume 36, § 1228): "As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of statutes creating a cause of action and providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and is carried to such extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff. A suit, the continuance of which is dependent upon the statute repealed, stops where the repeal finds it." But a consideration of the leading adjudications becomes necessary to determine the precise meaning of the language thus employed—how broad may be its scope and to what extent the principle is carried.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In Surtees v. Ellison, 9 Barn. & Cress. 752, the question was whether the evidence of trading which was sufficient to have supported the judgment of bankruptcy under the act of 5th George II would support a commission in bankruptcy issued if all previous statutes had been repealed, and the controlling statute was that of 6th George IV. The Court of King's Bench held that the acts must be those contemplated by the existing statute; in this connection Lord Tenterden saying: "It has been long established that, when an act of Parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed." And to the same effect is Key v. Goodwin, 5 Moore & Payne, 341, where, the question being similar, Lord Chief Justice Tindal declared: "I take the effect of repealing a statute to be to obliterate it as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law." Rex v. Justices of London, 3 Burrow, 1456, was an application for mandamus to require the justices to proceed in a matter pending before them after the act regulating the proceeding had been repealed. The matter was regularly before them for consideration and had by them been adjourned without decision until a day after the repealing act took effect, whereupon they refused further to proceed. The court found the case to be one of great inconvenience and great hardship. "The Legislature had the whole affair under their consideration, and they have not thought fit to reserve any jurisdiction to the justices after the 19th of November, 1761. Therefore Lord Mansfield was very clear, and all the rest of the court concurred with him, that no jurisdiction now remains in the sessions."

In United States v. Schooner Peggy, 5 U. S. 103, 2 L. Ed. 49, the schooner Peggy was seized as a prize, and by decree of the Circuit Court condemned and forfeited. An appeal was taken to the Supreme Court of the United States. While the appeal was pending, a treaty was entered into between the United States and France, whereby property not definitely condemned was to be restored to the original owner. Chief Justice Marshall held that the pending appeal forbade the conclusion that the property had been definitely condemned since the judgment of condemnation had been appealed from and was undecided at the time when the treaty took effect; that, therefore, in contemplation of the treaty, the property was not definitely condemned and should be restored, the Chief Justice saying: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." In The Schooner General Pinkney v. United States, 9 U. S. 281, 3 L. Ed. 101, the schooner and its cargo had been condemned for violation of an act prohibiting intercourse with certain designated ports on the Island of St. Domingo. Judgment of condemnation was pronounced by the District Court. This condemnation was affirmed upon appeal by the Circuit Court, and from this judgment, in turn, an appeal was taken to the Supreme Court of the United States. While this appeal was pending, the time limit of the law under which the proceedings were taken expired and the law's existence ceased. Chief Justice Marshall, delivering the opinion of the court, declared that in admiralty cases an appeal suspends the sentence altogether, and that the judgment is not res adjudicata until the final sentence of the appellate court be pronounced, and that the cause in the appellate court is to be heard de novo as if no sentence had ever been passed, and, "if no sentence had been pronounced, it has long been settled, on general principles, that after the expiration or repeal of the law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." The Schooner Rachel v. United States, 10 U. S. 329, 3 L. Ed. 239, was decided upon the principle governing The Schooner General Pinkney v. United States, supra. Under the sentence of condemnation the schooner Rachel had been sold and the proceeds of the sale paid over to the United States while the act was in force. The Supreme Court made a general order for restitution of the property condemned, leaving it to the District Court to say whether that order for restitution would be complied with by order for the payment over of the proceeds of the sale as prayed for by claimants. In Maryland v. Baltimore & Ohio R. R. Co., 3 How. 534, 11 L. Ed. 714, Chief Justice Taney, in a brief sentence, expounds the reason for the rule as follows: "The repeal of the law imposing a penalty is itself a remission." In Railroad Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231, Chief Justice Waite declares: "It is equally well settled that if a law conferring jurisdiction is repealed, without any reservation as to pending cases, all such cases fall with the law." But this language was employed under the following state of facts: An act conferring jurisdiction in certain cases upon the Supreme Court of the United States on appeal from the Supreme Court of the District of Columbia had been repealed. At the time the repeal became operative, the case was pending before the Supreme Court under a writ of error. The court declared that the single question was "whether there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case," and held that the repeal of the law conferring jurisdiction deprived the court of jurisdiction. And to the argument that the appellants were deprived of a remedy secured to them by the earlier law, and of which they had availed themselves before the repeal of that law, it was answered: "But a party to a suit has no vested right to a writ of error from one court to another. Such a privilege once granted may be taken away, and, if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary." Of like import is Insurance Co. v. Ritchie, 72 U. S. 541, 18 L. Ed. 540, where Chief Justice Chase delivered the opinion of the court. The Chief Justice there says: "It is clear that, when the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction." But this was addressed to an action brought when the parties were citizens of the same state, under the act of 1833, countenancing such actions. It had been repealed before judgment pronounced, and it was held that the action must fall. In Ex parte McCardle, 74 U. S. 506, 19 L. Ed. 264, the same principle is announced by the Chief Justice. That case also was one where, when the court came to consider an appeal properly taken, it was confronted with the fact that after the appeal had been taken, the law authorizing it had been repealed. Chief Justice Chase, again delivering the opinion of the court dismissing the appeal, says: "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is no less clear upon authority than upon principle. * * * The general rule, supported by the best elementary writers, is that, 'when an act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.' And the effect of repealing acts upon suits under acts repealed has been determined by the adjudications of this court. The subject was fully considered in Norris v. Crocker, and more recently in Insurance Co. v. Ritchie. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted. * * * Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." Norris v. Crocker, 13 How. 429, 14 L. Ed. 210, was an action brought under the "Fugitive Slave Act," to recover from defendant a penalty prescribed by that act against one who aided a slave to escape. While the action was pending, and before it had passed to judgment, the provision of the act fixing the penalty was repealed. Addressing itself to this state of facts, the Supreme Court says: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And, in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law." To like effect, in Assessor v. Osbornes, 76 U. S. 567, 19 L. Ed. 748, where, upon the authority of Insurance Co. v. Ritchie, supra, it is declared that, where jurisdiction depends wholly on a statute, suits brought during the existence of the statute fall with its repeal. United States v. Tynen, 78 U. S. 88, 20 L. Ed. 153, was a criminal case. Tynen was indicted under the act of 1813. The judges of the Circuit Court divided upon the question of the sufficiency of the indictment. They certified the case to the Supreme Court. While it was there pending, Congress repealed the act of 1813, and it was held that the prosecution of Tynen fell with the repeal. In Re Hall, 167 U. S. 38, 17 Sup. Ct. 723, 42 L. Ed. 69, a judgment given in the Court of Claims was reversed by the Supreme Court of the United States because interest on the original claim had been improperly allowed. The case was remanded to the Court of Claims for further proceedings not inconsistent with the opinion of the Supreme Court. The mandate of the Supreme Court was filed in the Court of Claims, an application was made for judgment in accordance with the opinion of the Supreme Court, and pending the decision upon this application the act of Congress authorizing the original judgment was repealed, and the Court of Claims declined to enter the judgment as prayed for. The plaintiff thereupon made an application to the Supreme Court for mandamus to require the Court of Claims to enter the judgment. It was held that the effect of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in any case founded upon the repealed act. But the Supreme Court distinctly held that its decision was not to be construed as an intimation that the Court of Claims would not have jurisdiction to entertain and grant a motion on the part of the petitioner to reinstate the original judgment without interest. In Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597, the question arose as to the effect of a repeal of an ordinance construed as a revenue ordinance upon proceedings begun before the repeal and pending after it. The action had been commenced in the superior court of the county of Sierra, state of California, by Sierra county, had been removed to the United States Circuit Court, where judgment was given against Flanigan, which judgment was affirmed by the Circuit Court of Appeals. He then obtained from the Supreme Court of the United States certiorari to the Circuit Court of Appeals. The suit was brought on the 21st of June, 1900. On March 23, 1901, the ordinance was repealed. The action was at that time pending and undetermined, and the familiar principle is declared "that no proceedings can be pursued under the repeal of the statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgment, 225."

Taking up, in turn, the views embodied in the leading decisions of sister states: In Commonwealth v. Duane, 1 Bin. (Pa.) 601, 2 Am. Dec. 497, the defendant was convicted under an indictment for libel against the Governor of the state. He moved in arrest of judgment. While his motion in arrest of judgment was pending, the Legislature of Pennsylvania passed an act "that from and after the passing of this act, no person shall be subject to prosecution by indictment" for libel as at common law. It was held that the judgment should be arrested, since it had not been pronounced, and that the court cannot "pronounce judgment and inflict punishment when the law declares that the defendant shall not be subject to prosecution." In Balch v. City of Detroit, 109 Mich. 253, 67 N. W. 122, under an existing statute, the city of Detroit had proceeded to condemn land for street purposes, trial was had as to the value of the property sought to be condemned, a verdict and award of the jury given, and judgment entered, from which neither party took appeal. The act under which these proceedings were taken was then repealed, and substituted therefor was another act containing no saving clause as to pending litigation, but providing specifically that all proceedings to take private property on the part of the city of Detroit should be held and prosecuted under the provisions of the later act. The city of Detroit refusing to pay the award, mandamus was sought to compel it to do so. It defended upon the ground that the repeal of the previous act forbade it from levying an assessment and collecting the amount of the award. But it was held that as the proceedings in confirmation had gone to judgment, and that the judgment had become final, the petitioners had the right to insist that the judgment should stand and to enforce payment of the amount awarded them under it. In Speckert v. City of Louisville, 78 Ky. 288, a fine was imposed upon the appellants for violating the provisions of a penal ordinance forbidding the sale of liquor on Sunday or after half past 11 o'clock at night. The appellants "suspended the judgments in the various actions against them" by appeal. During the pendency of the appeal, the ordinance imposing the penalty was repealed. Before the appellate court this fact was made known, and it was argued that there was no law in existence under which the judgments could be enforced. It is to be noted that the appeal herein and of itself had the effect of suspending the judgments. It is said: "The right of the Legislature to repeal such laws cannot be questioned, and the mere fact that a party may be entitled to the benefits resulting from the prosecution of a penal action gives him no vested right to prosecute the action to a recovery, nor does the fact that a judgment has been rendered below vest him with such a right as cannot be divested by legislative action had before execution." Sedgwick on Statutory Law is quoted, and Cooley's Const. Limitations (4th Ed. 477), to the effect that, "if a case is appealed and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered."

In Butler v. Palmer, 1 Hill (N. Y.) 324, the statute gave a judgment creditor a year from the date of the sale under the mortgage in which to redeem. A subsequent statute, after sale and while the time for redemption was running, shortened the time. After the passage of this act the redemption was attempted within the time limited by the earlier statute, but after the time prescribed by the later act. It was held that the later statute, though operating to shorten the time for the exercise of the previously existing right of redemption, was not unconstitutional; that rights specifically conferred by a statute are lost by its repeal unless saved by express words in the repealing statute; that, where the statute conferred jurisdiction, its repeal takes away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal, which pending proceedings rest for their support upon the jurisdiction conferred by the repealed statute; but that it is otherwise in respect to such civil rights as have been perfected far enough to stand independent of the statute, or, in other words, such as have ceased to become executory and have become executed. In Denver & R. G. Ry. Co. v. Crawford, 11 Colo. 598, 19 Pac. 673, after judgment obtained, but while the judgment was upon appeal, the statute prescribing a penalty against a railroad company for failure to file with the county clerk notice of the station at which a book should be kept for entering a description of animals killed was repealed, it was held that the repeal put an end to the proceeding, that the appellee could have "no such thing as a vested interest in an unenforced penalty." It is pointed out that the judgment for the penalty does not enforce the penalty, but the penalty must be enforced by the execution of the judgment, and that the power to enforce it had been suspended by the appeal. In Church v. Rhodes et al., 6 How. Prac. (N. Y.) 281, under the law as it existed, a report of referees could be reviewed by rehearing. The provision for a rehearing was repealed, and it was held that the repeal applied to pending and inchoate proceedings; that is to say, to actions commenced before the passage of the repealing act, and in progress for rehearing at the time of the passage, and that the effect was to take away the right to a rehearing. In Vance v. Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173, the law required the trustees of a village to pass an ordinance disconnecting certain designated territory. Mandamus was sued out to compel the trustees so to do, and judgment as prayed for awarded. The trustees appealed from the judgment. While the appeal was pending, the Legislature amended the law so as to make it discretionary with the trustees, rather than compulsory upon them, so to do. It was held that the new statute controlled, and that by reason of the change in the law it would be improper to enforce mandate where the existing law did not countenance it. In Western Union Tel. Co. v. Smith, 96 Ga. 569, 23 S. E. 899, plaintiff had obtained a verdict and judgment against the defendant under an act imposing penalties upon telegraph companies. Within the time allowed by law, defendant filed its motion for a new trial. The motion was overruled, and a bill of exceptions assigning error in the overruling of the motion for a new trial was sued out by the defendant. While the cause was in this condition, the penal statute was repealed. Says the Supreme Court of Georgia: "At the time the repealing act was passed, the plaintiff was not entitled to the enforcement of his judgment, and the case must be dealt with as one which was pending when the repeal took place." And then the court declares the established rule that when such a statute is repealed it ends all pending litigation under it.

In this state it is provided by Code that any statute may be repealed at any time except when it is otherwise provided therein, and persons acting under any statute are deemed to have acted in contemplation of this power of repeal. Section 327, Pol. Code. It is further provided that: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." Pol. Code, § 329. In Thorn v. San Francisco, 4 Cal. 127, the language of Lord Tenterden to the effect that, "when an act of Parliament is repealed, it must be considered the same as if it had never existed," is quoted, with the comment that "no one will question the right of Parliament or the Legislature to repeal statutes where subsisting rights are not disturbed or the obligation of contracts impaired." In McMinn v. Bliss, 31 Cal. 122, appeal from a judgment in an action of forcible detention and detainer had been taken. When the case came to be heard on appeal, a motion was made to dismiss upon the ground that the statute under which the action was brought had been repealed. The principle is recognized that the repeal of a statute under which alone a right of action exist operates as an extinguishment of all actions pending when the repeal takes effect, but it was held, for reasons stated, that the statute had not been repealed. In Lamb v. Schottler, 54 Cal. 319, proceedings were taken under an act which contemplated the creation of a board of water commissioners for the purpose of acquiring by condemnation the Spring Valley Waterworks of San Francisco. The supervisors and the board of water commissioners had taken certain steps under the act when the act was repealed. It was declared by this court that the repeal of the statute effectually annulled all proceedings had under it, unless the obligation of a contract would thereby be impaired, or a vested right destroyed, and that by reason of the repeal it was impossible for the supervisors and the water commissioners to proceed further. In Spears v. County of Modoc, 101 Cal. 303, 35 Pac. 869, a fine had been imposed for violation of a municipal ordinance. Pending an appeal from the judgment, the municipal ordinance was repealed. It was held that such repeal operated as a remission of the penalty for the offense and the fine imposed for its violation, and that, notwithstanding a mistaken affirmance of the judgment by the superior court after the repeal of the ordinance, the enforcement of such a mistaken judgment would be restrained by injunction. It is said in this case: "By the appeal to the superior court the enforcement of the judgment appealed from was stayed until after the determination of the appeal. Pen. Code, § 1470. As no undertaking on appeal was required, the appeal operated as a supersedeas. McGarrahan v. Maxwell, 28 Cal. 75. The effect of the appeal was therefore to preserve the rights of the parties in the same condition as they were prior to the entry of the judgment (Dulin v. Pacific Wood & Coal Co., 98 Cal. 304 [33 Pac. 123]); and until the determination of the appeal the proceeding was a pending action in which the rights of neither party had been conclusively determined." In First Nat. Bank of San Luis Obispo v. Henderson, 101 Cal. 307, 35 Pac. 899, an action by the bank against the defendant upon an account stated, judgment was given in favor of the bank. One of the defenses was the failure of the bank to comply with the provisions of the act of April 1, 1876, requiring the bank to file with the county recorder or to publish the statements required by the act. The defense was established at the trial. Pending the appeal the Legislature repealed this statute without a saving clause. It was by this court held that, while ordinarily it is the province of an appellate court to review the judgment of an inferior court as of the time when it was rendered, since ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action, the rule was subject to exception, and such an exception was presented in this case, and that the modification of the rule is that if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. Cooley, Const. Lim. p. 469. It was held that the statute requiring banks to file or publish their statements, under the penalty that a bank so failing could not maintain or prosecute any action, was in its nature penal; that when the Legislature had remitted the penalty by repeal of the statute the appellant was no longer able to avail himself of the privilege and defense which it conferred upon him. In Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821, an act authorizing a stockholder of a domestic mining corporation to recover from its directors a penalty for failure to comply with the provisions of the act was repealed while an appeal was pending in this court from a judgment given under the act. It was held that the repeal absolutely prevented any further prosecution of the litigation, and that, as no person has a vested right in an unenforced penalty, the proceedings must cease. In Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322, the action was brought by the State Hospital to secure from defendant provision for the support of his son—an inmate of the asylum. The law countenancing this action had been repealed, and it was by this court held that, if the remedy for a right accorded solely by statute is repealed while the right is still inchoate and not reduced to possession or judgment, the right is thereby lost if the repealing statute contains no saving clause. In Ball v. Tolman, 135 Cal. 377, 67 Pac. 339, 87 Am. St. Rep. 110, the action was to recover a penalty under the provisions of an act for the better protection of stockholders. Judgment for plaintiff was entered in the trial court on January 9, 1897. Pending a motion for a new trial, the penal provisions of the act were repealed. The motion for a new trial was denied, and defendant then appealed from the judgment and from the order denying his motion for a new trial. This court affirmed the judgment and order. Ball v. Tolman, 119 Cal. 358, 51 Pac. 546. The remittitur issued on January 18, 1908. Neither this court nor counsel at the time of the affirmance in this court had actual knowledge of the existence of the repealing statute. Upon subsequent appeal to this court the judgment was vacated and annulled; this court holding: "By reason of the repeal, it was without jurisdiction to proceed, and that, in all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction." In City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674, plaintiff had recovered a judgment in a civil action under one of its ordinances prescribing a license fee to be paid by every attorney at law. By general statute the power to pass such an ordinance was taken away from municipalities. It was held: "The right given the plaintiff in this case being penal in its nature and the remedy created solely by statute, its enforcement is dependent upon the statute alone. It is still inchoate and not reduced to possession nor perfected by final judgment. In such case the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

These cases have been cited as fairly typifying the extremes of judicial determination, and as expressing the reasons upon which their rules of decision are based. In the case of penalties and crimes, the repeal operates to defeat all actions pending. In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unexercised. In the case of statutes conferring jurisdiction, the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative. In cases of judgment pending upon appeal, the rule of decision is that the proceedings abate and the judgment falls. But the general expressions to this effect employed in the decisions are to be read in each case in the light of the facts which are there disclosed. Here the wise admonition of Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 399, 5 L. Ed. 257, applies with peculiar force: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question before the court is investigated with care and considered in its full extent, and other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." In every case where, after judgment, the proceeding has been declared to be "pending," there will be found a direct appeal from the judgment, which direct appeal either suspended the judgment so that it was not final and enforceable, or, as in The Schooner General Pinkney v. The United States, 9 U. S. 281, 3 L. Ed. 101, worked a removal of the cause to the appellate court, where it was to be tried de novo. The reason given why the proceeding must abate under these circumstances is that, because of the suspension of the judgment by appeal, it is without finality; that to give it finality the Court of Appeals must itself pronounce its judgment; and that in pronouncing its judgment it must be governed by the existing law. Therefore, when it finds that by the existing law the previous law, under which alone validity could be given to the judgment, has been repealed, the sole prop and foundation for support of the judgment has been removed, and of necessity it must be declared null and void. No case, however, has been found, and we venture to say none can be found, where a judgment which has been affirmed after direct appeal, and has by such affirmance become final during the existence of the statute supporting it, where the judgment itself has been in the process of execution within the law, and where rights have arisen by virtue of this legal execution of the judgment, has ever been held to be destroyed by a repeal of the statute supporting it because the collateral proceeding of an appeal from an order denying a new trial is pending without supersedeas or stay bond. And to this consideration we now come.

Western Union Telegraph Co. v. Smith, 96 Ga. 569, 23 S. E. 899, would seem, at first glance, to be in opposition to the declaration just made. There a judgment under a statute imposing a penalty had been recovered. The defendant had moved for a new trial and had secured its bill of exceptions, assigning error in the overruling of its motion for a new trial. The Supreme Court of Georgia held that the situation disclosed was one which brought the case within the accepted rule that the effect of the repeal is to abate actions for the statutory penalty then pending. But this is based, not alone upon the proposition that the repeal of a statute exacting a penalty is a remission of the penalty unless at the time the appeal operates the penalty has actually been enforced, but still further the court points out that at the time of the repeal the judgment was in suspension and could not have been enforced. Here, not only had the judgment itself been affirmed upon direct appeal, but it was not stayed in law or in fact by virtue of the pending proceedings under the motion for a new trial. The Code of Civil Procedure declares (section 1049) that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal is past, unless the judgment is sooner satisfied." In Gilmore v. American C. I. Co., 65 Cal. 63, 2 Pac. 882, it is said: "While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and, until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it." This language is quite appropriate to the consideration then before the court. This court there did not have before it the question of the effect of a repeal of a statute upon a judgment which had become final by affirmance after direct appeal, but it was merely considering and interpreting a stipulation between parties, to the effect that judgment should be entered for plaintiff provided such judgment was given for plaintiff in another action between the parties, the same "to be entered when the judgment had become final." Its language was used solely with reference to the stipulation, holding that, within its terms, the judgment had not become final, by reason of the pendency of a motion for a new trial. In Sharon v. Hill (C. C.) 26 Fed. 337, 392, the case of Gilmore v. American C. I. Co. is quoted from and commented upon; the discussion in the federal case being addressed to the proposition whether a judgment in a state court could be pleaded as res adjudicata while an appeal was pending both from the judgment and from the order denying the motion for a new trial. Upon the authority of Gilmore v. American C. I. Co., it is intimated, though not necessary to the decision, that the pendency of a motion for a new trial would be sufficient to forbid the reception of the judgment in evidence by way of res adjudicata or estoppel. But, upon the other hand, it is now well settled that where a judgment has been affirmed upon appeal and has thus become final, or where the time for appeal has expired, the judgment may be pleaded as res adjudicata or in estoppel, notwithstanding the fact that proceedings upon a motion for a new trial are pending, which, if successful, would result in the overthrow of the judgment. In Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589, the matter is discussed, and the conclusions of the court may be summarized as follows: A motion for a new trial, in the absence of an order of the court to that effect, does not stay or suspend the operation of a final judgment. An action under section 1049 of the Code of Civil Procedure is to be deemed pending while an appeal from the judgment is pending, or until the time for such an appeal has expired, but when the judgment upon appeal has been determined by an affirmance of the judgment, or when the time for appeal has expired, the judgment is admissible in evidence as res adjudicata and to raise an estoppel in bar of the action. The same ruling as to the effect of a pending motion for a new trial upon the finality of a judgment is declared in Young v. Brehe, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892, and the soundness of the rule is intimated by the Supreme Court of the United States in Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136, where it is said: "Indeed, it may well be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel."

In Spanagel v. Dellinger, 38 Cal. 284, it is said: "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or, in a certain sense, a collateral proceeding—a proceeding not in the direct line of the judgment—for the judgment may be at once entered and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." And this language is quoted with approval by this court in the later case of Brison v. Brison, 90 Cal. 323, 27 Pac. 186; while to the same effect is Houser & Haines Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660, and Knowles v. Thompson, 133 Cal. 247, 65 Pac. 468. A broad difference exists between the operation and legal effect of a direct appeal from a judgment (which, while the appeal is pending, in the generality of cases operates to stay the judgment absolutely, and in all cases operates to destroy for it any claim of finality), and the "collateral proceeding" of an appeal from an order denying a motion for a new trial taken after the judgment itself has become an enforceable finality by reason of its affirmance upon direct appeal. In the former case the courts, when the law which alone will support the judgment given has been withdrawn, have felt and expressed themselves as unable to proceed further with the litigation, since they themselves must pronounce a judgment, and can pronounce it only under the authority of existing law. In the case of appeal from an order refusing a new trial where no stay has been granted and where, as here, the judgment has become a finality, the decision which the court renders is not upon the judgment appealed from, but upon the order appealed from, and while the effect of its reversal of the order will, of course, be necessarily the setting aside of the judgment, this, after all, is but an incident to the ruling which it makes, which ruling goes not at all to the sufficiency or finality of the judgment, but only as to whether, within familiar rules and limitations, the judgment was fairly given. Herein our motion for a new trial differs essentially from the common-law motion which was always heard and determined before entry of judgment, so that the appeal from the judgment embraced all questions. Under our system, the appeal from an order denying a new trial is a separate and independent appeal, which, if prosecuted in time, may be taken after the judgment has become final. Excepting when ordered by supersedeas or permitted by stay bond, it in no way suspends the judgment nor interferes with its finality. It is in this respect more in the nature of an equitable bill of review which, while countenanced in proper cases, even after a judgment of affirmance upon appeal, never operated in and of itself to suspend the decree. Indeed, it has been so expressly declared by this court in Fowden, Adm'r, v. Pac. Coast S. S. Co., 149 Cal. 151, 154, 86 Pac. 178.

We conclude, therefore, that, as the judgment had become final while the statute authorizing the action was in force, its finality is not disturbed by a pending motion for a new trial which does not operate in any way to stay the execution of the judgment; that as the statute authorizes the people upon the relation of the Attorney General to proceed in equity to have the bank declared insolvent, leaving the proceedings governing the action those which generally obtain in the practice of this state, the repeal of the statute did not destroy the right of the appellant to be heard upon this motion for a new trial; that, if the appeal from the motion for a new trial should be granted, it would necessarily have the effect of vacating the judgment; that by virtue of the repeal the action could then no longer be prosecuted; that if, however, the appeal from the order denying the motion for a new trial should be denied and the order affirmed, the repeal of the statute would not affect any proceeding taken under it and under the judgment heretofore affirmed.

2. To the consideration of the appeal from the order refusing appellant's motion for a new trial we now proceed. Many of the propositions advanced go to the alleged errors of the court in admitting evidence of the action and reports of the bank commissioners in the sequestration of the bank's property, and of their report that it was unsafe to permit the bank longer to continue business. They are based upon appellant's contention that, for specified reasons, the act itself is unconstitutional. The objections thus advanced have been completely answered in the opinion upon the appeal from the judgment and do not require further discussion. People v. Bank of San Luis Obispo, 154 Cal. 194, 97 Pac. 306. See, also, State ex rel. Sparks v. State Bank & Trust Co., 31 Nev. 456, 103 Pac. 407. The evidence was sufficient to justify the finding of the insolvency of the bank. That evidence disclosed that the assets of the bank amounted to $158,903.70; that the principal items of assets were inventoried as "bills receivable $133,332.56; profit and loss account of $5,022.69; and real estate and bank building at $19,000." The cash on hand was $367.35. The bills receivable consisted in large part of 15 notes signed by the San Luis Land & Improvement Company, a note of the Breeze Publishing Company for $4,000 and $645.75 accrued interest, a note of James L. Crittenden for $22,268.13 principal and $7,779.64 accrued interest, and sundry other notes. The notes of the San Luis Land & Improvement Company were secured by mortgages upon real estate, and there was conflicting evidence as to the value of that real estate. The officers of the Bank of San Luis Obispo likewise constituted the officers of the San Luis Land & Improvement Company. On the debit side of the statement there were certificates of deposit amounting to $54,433.49. Some of these, with accumulated interest, were due and others coming due. Thus, upon July 24, 1906, there was due $400 with accumulated interest upon a certificate of deposit of January 17, 1905, payable six months after date; also $473 upon a like certificate of July 18, 1905; $3,040, with accumulated interest upon like certificate of February 6, 1905; and $20,000 upon a certificate of September 27, 1902, due and payable 12 months after date. Manifestly, these overdue demands could not be met from cash on hand of $367.35, and it appears that the answer which the bank officials made to the inquiries of the bank commissioners was that Mr. Crittenden, the president, was in San Francisco endeavoring to borrow money to meet the demands against the bank. Without further elaboration of the evidence, it is apparent that it sustained the finding of the court as to the insolvency of the institution.

Wherefore the motion to vacate and annul the judgment and dismiss the proceedings is denied, and the order denying defendants' motion for a new trial is affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

159 Cal. 89

BROWN v. SHARPHOUSER CONTRACTING CO. (L. A. 2,554.)

(Supreme Court of California. Dec. 29, 1910.)

1. Master and Servant (§ 150*)—Injuries to Servant—Negligence—Warning.

Where the foreman in charge of the work of excavating at the foot of a bank of earth 65 or 75 feet high knew that there was a large crack at the top of the bank, but plaintiff, a laborer working at the bottom of the bank, did not know of such crack, and received no warning thereof, the master was liable for injuries to plaintiff caused by the caving in of the bank owing to such crack.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299; Dec. Dig. § 150.*]

2. Master and Servant (§§ 101, 102*)—Injuries to Servant—Negligence.

It is the duty of an employer to furnish a reasonably safe place in which the employé may perform the work in which he is engaged and use ordinary care to keep the place reasonably safe so that the employé may not be exposed to danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. §§ 101, 102.*]

3. Master and Servant (§§ 101, 102*)—Injuries to Servant—Negligence.

An employer is not an insurer of the safety of the employé, and no liability is cast upon him to indemnify an employé for injuries which are the ordinary risks of the business in which he is employed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 172; Dec. Dig. §§ 101, 102.*]

4. Master and Servant (§ 217*)—Injuries to Servant—Assumption of Risk.

Where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work, and where he has knowledge of such dangers, or his faculties for seeing or discovering them are just as good as those of his employer, and he undertakes the employment with the knowledge or opportunity for ascertaining those dangers, he is in law deemed to assume the perils incident to the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

5. Master and Servant (§ 219*)—Injuries to Servant—Assumption of Risk.

The rule of assumption of risk has no application where the dangers are not obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. § 219.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. Master and Servant (§ 226*)—Injuries to Servant—Assumption of Risk.

A servant does not assume the risk of injury from perils which might have been discovered and removed by the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. § 226.*]

7. Master and Servant (§ 124*)—Injuries to Servant—Negligence—Cave-In.

Where a dangerous condition exists at the top of a bank of earth from blasting which would not be observed by the workmen at the base and which could only be discovered by inspection at the top, it is the duty of the employer to have proper inspection made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235–242; Dec. Dig. § 124.*]

8. Master and Servant (§ 90*)—Injuries to Servant—Negligence.

The law does not permit an employer to take any chances as to the safety of his employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.*]

9. Master and Servant (§ 118*)—Injuries to Servant—Negligence—Cave-In.

In an action against an employer for negligence in permitting a cave-in of earth, it was gross negligence for the defendant to take the chance of the earth not caving in, when it could have been prevented by prying the mass down the bank.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

10. Appeal and Error (§ 1064*)—Instructions—Harmless Error.

Under Code Civ. Proc. § 2061, which provides that the section shall be given to the jury upon proper occasions, an instruction that, if weaker or less satisfactory evidence is offered, when it appears that stronger or more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, was not prejudicial to defendant, in an action of negligence caused by falling earth, where it was shown by defendant, on the matter of warning plaintiff and four others, that defendant had endeavored to obtain the presence of these four men as witnesses but could not find them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

11. Appeal and Error (§ 1066*)—Instructions—Harmless Error.

An instruction that it was the duty of the master to give warning to an inexperienced servant of unusual and hidden dangers of which the master is aware and of which the servant, to the master's knowledge, is ignorant, in an action against an employer for negligence in permitting a cave-in, in which there was no evidence that plaintiff was inexperienced, was not prejudicial where the evidence showed that it was the duty of the employer, whether the servant was experienced or inexperienced, to keep the place of employment in a safe condition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

12. Master and Servant (§§ 90, 91*)—Injuries to Servant—Negligence—Cave-In.

The fact that a servant is experienced, or that an inexperienced servant has notice of perils ordinarily incident to the employment, does not relieve the master from the duty to protect both from risks which are not natural and ordinary incidents to the conduct of the business, and which could have been removed by the exercise of due diligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 139, 141; Dec. Dig. §§ 90, 91.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Boh H. Brown against the Sharphouser Contracting Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. E. C. Munday, for appellant. Gavin W. Craig and C. H. Slease, for respondent.

LORIGAN, J. This is an action for damages for personal injuries, and from a judgment in favor of the plaintiff, entered upon the verdict of the jury, and from an order denying its motion for a new trial, defendant appeals.

Under contract with the Santa Fé Railroad Company, the defendant was engaged in cutting down a hill along the railroad line near Orange in Los Angeles county. The work of removing the hill was done by blasting down the bank and using a steam shovel to load the loosened earth upon cars which conveyed it away. The steam shovel was propelled by a traction engine operating over a bed of ties laid along the base of the hill. When the earth loosened by one blast was removed, the steam shovel was moved back and another blast put in the hill to loosen the rock and earth, which being done, the traction engine was again moved forward, the dirt at the base of the hill cleared away, and the ground leveled so that additional ties might be laid ahead upon which to operate the engine and shovel, in removing the rock and earth loosened by the last blast. The plaintiff was, with others, employed by the defendant to level the earth and lay down the ties as occasion required ahead of the traction engine and shovel, such employés being known as "pitmen," and plaintiff had been in the employ of the defendant in such capacity some 10 days prior to the accident. He had never worked as a pitman, although he had done shovel work theretofore on the Santa Fé and other railroads.

On December 21, 1908, the bank of the hill had been blasted down, leaving a steep bank, nearly perpendicular, and from 65 to 75 feet high. In the morning, two days afterwards, plaintiff, with others, was engaged in their regular occupation of leveling the ground and laying the ties at the base of the hill for the operation of the steam shovel. While so engaged the assistant foreman of defendant took the general foreman to the top of the steep bank below which the plaintiff and the others were working in order that he might examine it. Before doing so, the assistant had himself gone up and inspected the top of the cut and had found cracks, from a foot to 18 inches wide in the bank, about 10 feet back from the face of the cut, and running parallel with the face of the bank and pretty deep down, but not noticeable from the bottom of the hill where the plaintiff and the others were working. The assistant foreman considered the conditions on top pretty bad, and did not deem the bank safe as against a cave, and so called the general foreman, Sullivan, to inspect it. The latter did so and said, "She looks pretty bad," but, "We will take a chance at her." He instructed the assistant to remain on top to watch the bank and warn the men below should a slide commence, while he went below to move the shovel through. The condition of the bank at the top of the cut was not noticeable from the bottom of the hill where plaintiff and the others were working; from that point the face of the cut seemed to be safe. The condition at the top was not known or observable to plaintiff, or, as far as the evidence discloses, to any one save the general foreman and the assistant foreman of defendant who inspected it. When the general foreman came down from the top, and reached the place where plaintiff and the other pitmen were working, he testified that he told them to be careful and look out for the bank. No warning of any particular danger was given them; they were not informed of the condition of the bank as he had discovered it. Plaintiff testified that the foreman gave them no warning whatever, but that as the latter came down from the top, and approached near where the men were working, plaintiff asked him if the bank was dangerous, to which he made no reply, but walked over to where a work train was stationed. Just about this time a vast body of rock and earth from near the top of the bank where the ground was crevassed was suddenly precipitated, a sheer fall of about 50 feet, upon the pitmen below, grievously and permanently injuring the plaintiff. It was in evidence further that in blasting banks crevassed conditions such as were found on the top of the hill would sometimes occur; that after a blast the usual and proper course before moving up the steam shovel was to examine the bank and see if it was safe to work under; that when there is any apparent danger of caving these conditions of danger are removed; men with bars are directed to loosen any dangerous mass of earth, either on the face or top of the hill, and cave them down the bank; sometimes small blasts are put in to effect the purpose.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Various grounds are urged for a reversal. It is first insisted that the evidence is not sufficient to sustain the verdict; the claim being that the injury sustained by the plaintiff from the fall of the mass of earth was one of the risks ordinarily incident to the business in which he was engaged, and which he assumed when he took the employment. This is the only point made in regard to the evidence.

The rule as to the assumption of risk by an employé has, however, no application under the evidence in this case. It is the duty of an employer to furnish a reasonably safe place in which the employé may perform the work in which he is engaged, and to use ordinary care to keep the place reasonably safe so that the employé may not be exposed to danger. It is true that the employer is not an insurer of the safety of the employé. The measure of his obligation is to use ordinary care in seeing that the place where the work is being done is safe in the first instance, and to employ the same degree of care in continuing to keep it safe. No liability is cast upon the employer to indemnify an employé for injuries which are the ordinary risks of the business in which he is employed. Where a person undertakes to work in a place where conditions of danger are liable to occur in the ordinary prosecution of the work, where he has knowledge of such dangers, or his facilities for seeing or discovering them are just as good as those of his employer, and he undertakes the employment, or continues in the work with the knowledge or opportunity for ascertaining those dangers, he is in law deemed to assume the perils incident to the employment, and cannot look to the employer for indemnification for injuries resulting therefrom. But this rule of assumption of risk has no application where the dangers are not obvious, where they are known to the employer and not to the employé, or where, in the exercise of ordinary care, the conditions of peril might have been discovered and removed by the employer.

In the case under consideration, while in the ordinary transaction of the work a dangerous condition at the top of the slope might sometimes occur, after the face of the hill was blasted, this was not obvious to the men working at the base. No inspection or observance from that point could have disclosed it. It was not the duty of the plaintiff to go to the top of the hill and discover this condition. A dangerous condition being liable to arise there from the blasting, which would not be observable by the workmen at the base, and which could only be disclosed by inspection at the top of the hill, it was the duty of the defendant, in the exercise of ordinary care towards the safety of its employés, to have made such inspection. This duty was recognized by it, and, for the purpose of discharging it and determine whether the top of the hill was safe or not, its general and assistant foreman both made an inspection of it, and both discovered that its condition was such as to be an impending danger to the men below. The plain legal duty of the general foreman, as representing the defendant in the discharge of his duty to its employés, was to have removed the danger. This could have been readily accomplished by prying the mass down the bank with bars. Instead of doing this, the foreman concluded "to take a chance." The law does not permit an employer to take any chances as to the safety of his employés. As disclosed here, the defendant neglected to take the ordinary care which the law requires shall be exercised in providing a safe place for employés to work. It was gross negligence for defendant to take the chances, and, they having gone against it, the defendant was clearly liable to plaintiff for the result of the injuries suffered by him thereby.

There is nothing in Thompson v. California Const. Co., 148 Cal. 35, 82 Pac. 367, cited by appellant, sustaining its claim that the evidence in this case showed an assumption by plaintiff of the danger of injury by a fall of the bank. In the case cited the danger of a fall of rock from the face of the quarry was as obvious to the employé as to the employer, and it was not claimed there that the defendant had not taken proper precaution to prevent the rock from falling. In the case here, danger from the fall of the bank was not only not known or obvious to the plaintiff, but its dangerous condition was known to the defendant, and no precautions were taken by it to prevent its fall after discovery of the conditions. In the case cited, under the evidence, the rule of assumption of risk was properly applied. It is inapplicable here as the facts show that the dangerous condition was solely known to the defendant, and, this being true, it was its absolute duty to have protected the plaintiff against the danger by removing it.

Complaint is made of various instructions to the jury. The court read to the jury some of the subdivisions of section 2061 of the Code of Civil Procedure, which that section provides are to be given to a jury "on all proper occasions." Appellant complains particularly of the giving of that subdivision which declares "that, if weaker or less satisfactory evidence is offered when it appears that stronger or more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." This instruction, like some others contained in the Code section referred to, has been criticised by this court as being an intrusion on the province of the jury to exclusively determine the weight and effect to be given to the evidence in any case presented to them, and the giving of it is particularly deprecated in criminal cases. People v. Cuff, 122 Cal. 589, 55 Pac. 407. In that case the advisability of not giving it at all in criminal cases is suggested. A similar suggestion is applicable to civil cases. As formulated in the Code subdivision, the instruction is but a mere commonplace rule which an intelligent jury will recognize, and apply when the evidence in the case calls for its application, without any suggestion by the court on the subject. This, however, furnishes no reason why the giving of it should be held harmless whenever the existence of a proper occasion for giving it is questioned, any more than it should be held error always to give it because it may be an invasion of the province of the jury. Like other instructions in a case, error in giving it cannot be insisted on unless it appears to have been prejudicial to the party complaining of it. Nothing of the kind appears here. The jury were told that they were to view with distrust the offer of weaker or less satisfactory evidence when it appeared that stronger or more satisfactory evidence was "within the power of the party" to produce. It was shown in evidence by the defendant, in connection with the testimony of the foreman on the matter of warning the plaintiff and the four others, that defendant had endeavored to obtain the presence of these four men as witnesses but could not find them. Hence the evidence showed that the conditions under which the jury, on the theory of the appellant, might have applied the instruction so as to distrust the testimony of the foreman about the warning, did not arise in the case. It did not appear that it was within the power of the defendant to produce these other witnesses; but, on the contrary, it actually appeared that it was not in defendant's power to do so.

The court instructed the jury that: "It is the duty of the master to give warning to an inexperienced servant of unusual and hidden dangers of which the master is aware, and of which the servant to the master's knowledge is ignorant. Therefore, if you find from the evidence that the plaintiff herein was inexperienced as a pitman, and the defendant was aware of the dangerous condition of the bank, and knew of plaintiff's inexperience, it was defendant's duty to warn plaintiff of such dangerous bank." There is no question but that the general principle of law was correctly given in this instruction; but it is claimed that it was inapplicable because there was no evidence that plaintiff was inexperienced about the dangers to be apprehended in the work to which he was assigned, or, if he was, that the defendant had any knowledge of it. Whether this is true or not we do not consider of any importance. Under the unquestioned evidence in the case, the instruction was more favorable to the defendant than it was to the plaintiff, as the right of the plaintiff to recover should not have been limited, under the evidence in the case, upon the fact whether he was experienced or inexperienced in the work. While it is the duty of the master to inform an inexperienced servant of any danger to be apprehended in conducting a particular employment in which he is engaged, and of which the master has knowledge, but which may not be known or understood by the servant, his paramount duty to his servant, whether inexperienced or experienced, is to use due care and diligence to keep the place of employment in safe condition so that such servants may not be exposed to unusual and unreasonable risks. A servant who has had experience in an employment, and has notice and knowledge of the dangers incident to the ordinary course of the work, and who undertakes the employment or continues to perform it with the knowledge, assumes the risk of injury. But the fact that a servant is experienced, or that an inexperienced servant has notice of perils ordinarily incident to the employment, does not relieve the master of the duty to protect both from risks which are not natural and ordinary incidents to the conduct of the business, and which could have been removed by the exercise of due diligence. The evidence in the case at bar shows that danger of the fall of the bluff was not an ordinary peril of the employment, nor as obvious to the employé as to his employer. On the contrary, it was one unknown to the plaintiff and known as a fact to the defendant. It was an imminent danger when discovered and could readily have been removed, and it was the affirmative duty of the defendant to have done so and not leave it to imperil the men below, and it owed this absolute duty to the plaintiff whether he was an experienced or inexperienced employé. So that the plaintiff having a right to recover under the evidence, whether an experienced or an inexperienced employé, the limitation on his right to do so under this particular instruction, only if the jury found that he was inexperienced, and had not been warned of the danger, cannot be complained of by defendant, as the instruction was not prejudicial to it, but, on the contrary, to the plaintiff.

The appellant attacks several other instructions given by the court; but we do not feel called upon to review them particularly. While parts of some of them may be subject to criticism, when taken separately, still, taking the instructions as a whole, as the jury necessarily did, they correctly stated the law applicable to the evidence in the case.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(159 Cal. 37)

LOS ANGELES COUNTY v. HANNON et al.

(L. A. 2,497.)

(Supreme Court of California. Dec. 27, 1910. Rehearing Denied Jan. 26, 1911.)

1. DEEDS (§ 38*)—VALIDITY—SUFFICIENCY OF DESCRIPTION.

A deed is not to be held void for uncertainty, if by any reasonable construction it can be made available, and unless it is apparent from its face that the intent of the grantor as to the property conveyed is so uncertain that it is incapable of being made certain by resort to extraneous facts.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 65; Dec. Dig. § 38.*]

2. DEEDS (§ 100*)—VALIDITY—SUFFICIENCY OF DESCRIPTION.

Where there is no patent ambiguity appearing on the face of a deed, but the description of the land as lying between two lines of railroad and from their junction at a certain depot to a specified avenue tends to create an uncertainty because of the existence of two junctions of the railroad and because there is no junction at the immediate point stated, the grantor's intent may be sought for by consideration of the facts surrounding the parties when the instrument was made.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.*]

3. DEEDS (§ 192*)—PRESUMPTIONS—INTENT OF GRANTOR IN DEED.

It is to be presumed from the making of a deed that the grantor intended to convey some property by it.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 192.*]

4. DEEDS (§ 114*)—CONSTRUCTION—PREMISES CONVEYED—"AT."

A deed conveyed a strip of land on either side of the center line of a railroad commencing at a specified point and running in an easterly direction to a point where the G. cut-off line diverges from the old railroad, running thence easterly along the center line of both lines of railroad to their intersection with the easterly line of the Rancho San Pascuals, and also all the land lying between the two lines of railway from their junction at Garvanza depot to Pasadena avenue, where such avenue lies between such railway lines. There were two junctions of the cut-off and the main line; the easterly one being at the intersection of the easterly line of the Rancho San Pascuals, and the other being a considerable distance west of the depot mentioned, but much nearer to it than the easterly junction, and situated in the territory known as Garvanza, while the easterly junction was situated in another territory. *Held*, that in view of the fact that the westerly junction was in the same territory as the Garvanza depot and nearer to it, and that the easterly junction was referred to, in the deed immediately previous to the reference to the junction as "Garvanza depot," as the "intersection near the easterly line of the Rancho San Pascuals," and the fact that the word "at," when applied to a place, is not definitely locative, but primarily expresses the relation of presence, nearness in place, or time or direction toward, the description of the land lying between the two lines of railway from their junction at "Garvanza depot," etc., will be deemed to refer to the westerly junction of the railway line and to convey the land bounded by the triangle formed by the two lines of railway west of Pasadena avenue.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 114.*

For other definitions, see Words and Phrases, vol. 1, pp. 593-599; vol. 8, p. 7585.]

5. QUIETING TITLE (§ 10*)—PERSONS ENTITLED TO RELIEF—OWNER OF EQUITABLE TITLE.

An action to quiet title cannot be maintained by the holder of an equitable title against one holding the legal title.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 10.*]

6. DEEDS (§ 111*) — CONSTRUCTION — ESTATES CONVEYED—EQUITABLE ESTATES.

G. contracted with R. and another to sell them certain property and to convey it to them or to such persons as they might request, and that on receipt of the price specified that he would convey to R. and the other whatever balance might remain after deducting lots conveyed by G. under the contract. R. deeded to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

C. numerous lots, including four lots in question in trust for persons to whom R. had sold or agreed to convey such property. Subsequently G. and R. deeded land including the four lots to M. Afterwards G. made a deed to R. of all the land which was agreed to be conveyed by the original agreement except the lands expressly exempted by the terms thereof. Subsequently C. deeded the lots in question to H. *Held*, that the deed from R. to C. only transferred the equitable right which R. had under his contract with G., the legal title then being in G., and, G. joined by R. having conveyed the legal title to M., C.'s deed to H. transferred merely the equitable title in the lots conveyed which he had received from R., such deed not being affected by the last deed of G. to R., G. having already conveyed the legal title to M., and such last deed to R. expressly exempting portions of the property which had been previously conveyed at the request of R. under the contract.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 111.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

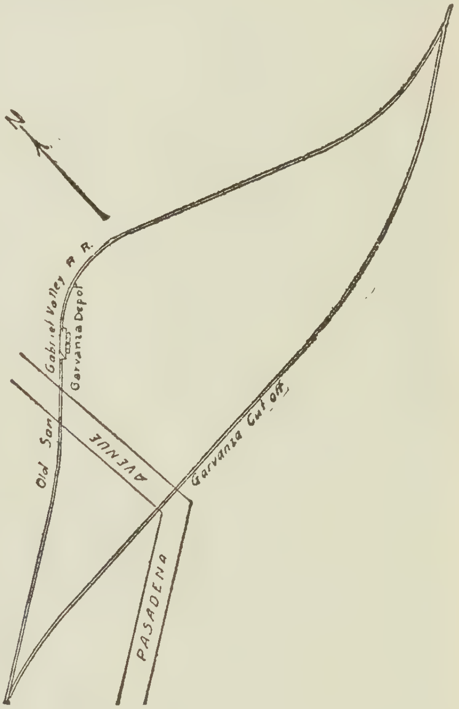
Action by the County of Los Angeles against Joseph E. Hannon and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Hass, Garrett & Dunnigan and McNutt, McNutt & Hannon, for appellants. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent.

LORIGAN, J. This action was brought to quiet title to a tract of land in Los Angeles county. Plaintiff had judgment, and defendants appeal therefrom and from an order denying their motion for a new trial.

All parties asserted title to the property from a common grantor, Andrew Glassell; the plaintiff claiming under a deed made by said Glassell and one Ralph Rogers to D. McCool. This deed to McCool described some property not involved in this action; but, as the whole description must to some extent be examined in determining the meaning of the description of the particular property involved here, the entire description is set forth and is as follows: "Being a strip of land thirty (30) feet in width on either side of a center line of what is now known as the California Central Railway, commencing at a point in the center of San Rafael avenue, where said railway crosses said street, according to a map of the town of Garvanza, now on file in the office of the county recorder of Los Angeles county, state of California, in book 9, of miscellaneous records, pages 45 and 46, and running thence in an easterly direction along the center line of said railway to the point on said center line where the Garvanza cut-off line diverges from the original center line of the old San Gabriel Valley Railroad, running thence easterly along the center lines of both the above lines of railroad to their intersection with the easterly line of the Rancho San Pascuals, and to said easterly line of said rancho. *Also all of the land lying between the two lines of said railway from their junction at Garvanza depot to Pasadena avenue, where said avenue lies between said railway lines.*" It is with reference to this particular description in the deed, which we have italicized, that the principal controversy in this case arises; the claim of appellants being that the deed is void for uncertainty in the description.

As far as the description on the face of the deed is concerned, it is quite apparent there is no uncertainty in it. It describes a triangular tract of land having for its boundaries two lines of railway and Pasadena avenue. In order to apply the description in the deed to the land in controversy, and as described in the complaint, the plaintiff introduced a map showing the location of the lines of railroad and Pasadena avenue, the essential features of which map are produced here on a smaller scale:



It will be observed that on this map there are two junctions of the lines of railways mentioned in the deed, one lying to the east, the other to the west of Pasadena avenue, and that there are two different triangular tracts of land bounded by the railways and said avenue. It was stipulated that the Garvanza depot was not located at either point of junction of said railways, but was located at the point indicated on the diagram above, and that the map as to railways, avenue, and location of depot presents the situation as it existed when the deed to McCool under which plaintiff claims was made. It is admitted by appellants that the tract west of Pasadena avenue embraces the land relative to which this action is brought, but it is insisted that as the map introduced in aid of locating the land as described in the deed shows that one of the calls therein—the junction of the railways—cannot be determined by reference to the Garvanza depot, and hence the description in the deed applies equally well to the two triangular tracts of land on either side of Pasadena avenue and similarly bounded, a patent ambiguity is created to which parol evidence could not be addressed, and therefore the deed was void for uncertainty in its description. It is further insisted, if this contention is not correct, that the description in the deed applies to the eastern and not to the western triangular piece involved in this suit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There can be no doubt that where a deed shows on its face an indefinite description of property, or where the description contained in it is so imperfect that with the aid even of surrounding circumstances a court is unable to say what particular land is intended to be conveyed, the deed must be declared void for uncertainty. In the case at bar, however, there is no uncertainty of description on the face of the deed. The uncertainty arose from the production of the map in an effort to identify the land described in the deed. There was no patent ambiguity appearing on the face of the deed, but a latent ambiguity arising from parol evidence—the production of the map—containing two junctions of the railway, and there can be no question that under such circumstances extrinsic evidence is properly admitted to explain such latent ambiguity and show which junction was meant.

A deed is only void for uncertainty where it is apparent from its face that the intention of the grantor as to the property conveyed is so uncertain that it is incapable of being made certain by resort to extraneous facts. When, however, the description only tends to create an uncertainty as to what property the grantor meant to convey by it, his intention may be sought for by a consideration of all the facts surrounding the parties when the instrument was made. The court will take these facts into consideration so as to place itself in the situation of the parties and determine, if possible, therefrom the identity of the land which was meant to be conveyed by the description used.

The general rules in that respect are well settled. "A deed is not to be held void for uncertainty if by any reasonable construction it can be made available. Parol evidence cannot be admitted to contradict or control the language of a deed, but latent ambiguities may be explained by such evidence, and the technical terms of art. Facts existing at the time of the conveyance, and prior thereto, may be proven by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties, when by the terms of the deed such line is left uncertain." 3 Washburn on Real Property (6th Ed.) § 2320. In 1 Jones on Real Property (1st Ed.) § 323, the author says: "A deed will not be declared void for uncertainty if it is possible by any reasonable rule of construction to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant." Our own court has declared in Stanley v. Green, 12 Cal. 148, that: "The law will not declare the instrument void for uncertainty until it has been examined with all the light which contemporaneous facts may furnish. If these render the intention clear and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed and the instrument enforced." So for the purpose of explaining and removing any latent uncertainty in a description "the court will place itself as nearly as possible in the position of the parties when the instrument was executed, and will consider the origin and sources of its derivation, all the attendant surrounding circumstances or the existing state of facts, the situation of the parties and of the property, or the condition or state of things granted at the time, the state of the country, and generally all sources of inquiry, naturally suggested by the description, or which may have acted upon the minds of the parties." 13 Cyc. 607, 608.

Under the rule announced parol evidence was introduced, and, though in some particulars conflicting, certain facts, among others, must in support of the conclusion of the court that the description in the deed embraced the tract of land west of Pasadena avenue and between the railways be taken as established. It was shown (which does not appear on the map introduced in evidence or on the foregoing diagram) that there was a deep and wide arroyo or gully known as the "Arroyo Seco" lying between the two points of the junction of the railways. This arroyo was between Garvanza depot and the eastern junction of the railways; the depot being west of the arroyo and distant about 1,000 feet from the western junction of the roads and some 2,000 feet from their eastern junction. When the deed was made the territory to the west of the "Arroyo Seco" was known by the name of "Garvanza," and the western junction of the railways was located in the territory so generally designated. This name "Garvanza" was not applied to any territory lying east of the Arroyo Seco in which the eastern junction was located. The territory or neighborhood near which this eastern junction was located was known generally as "Lincoln Park." It will be observed, too, from the description of the other property conveyed in the deed immediately before the description here involved, that when occasion is had to designate the eastern junction of the railways it is referred to as "their intersection near the easterly line of the Rancho San Pascuals."

It is to be presumed from the making of a deed that a grantor intended to convey some property by it, and that presumption is to be indulged in here and all proper evidence considered and all inferences and deductions therefrom to be indulged in to make the instrument effective for that purpose. The only trouble with the description in the deed under consideration arises from the call for a junction of the railways "at Garvanza depot" as part of the description of the property conveyed. It appears that there was no such junction at Garvanza depot itself. If that call must be construed as absolutely locative of the junction referred to, it is beyond doubt a false call and would have to be rejected, as it is conceded that there is no junction "at Garvanza depot." Rejecting this call as false, the effect would be that there would be nothing in the deed which would indicate which junction of the railways was meant, whether the western or the eastern junction, and hence the deed would be void for uncertainty, a conclusion which must not be reached if a different one can be adopted.

But the word "at," when applied to the place or location of an object, is not treated as definitely locative. Webster, defining the word "at," declares: "Primarily this word expresses the relation of presence, nearness in place or time, or direction toward. * * * It is less definite than in or on. At the house may be in or near the house." In 3 Ency. of Law (2d Ed.) 167, it is said: "At, used in reference to time or place has frequently the sense of near." A railroad was authorized by its charter to intersect another railroad "at Charlotte," and it was held that an intersection a thousand yards outside Charlotte satisfied the requirement; the court saying: "The word 'at,' when used in reference to place, frequently means in or within, but not always. It sometimes denotes nearness or proximity. That is its primary significance, and it is less definite than in or on. At the house may be in or near the house. Its significance would generally be controlled by the context and attending circumstances, if any, denoting the precise sense in which it is used." Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741. A tract of land near the terminus of a railroad was held exempt under a statute exempting certain lands "at" the terminus; the court considering the matter saying: "The word 'at' is somewhat indefinite; it may mean in, or within, * * * or it may mean near. Its primary idea, the lexicographer says, is nearness, and it is less definite than in or on." State v. Receiver, etc., 38 N. J. Law, 299, 302. See, also, Rogers v. Galloway, etc., College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; Minter v. State, 104 Ga. 743, 30 S. E. 989; Bartlett v. Jenkins, 22 N. H. 53; West Chicago, etc., Co. v. Manning, 70 Ill. App. 239. Other authorities to the same effect might be cited, but it is unnecessary, as the rule announced is hardly open to question.

Now applying this rule as announced, and taking the word "at" as having the primary meaning of nearness, and also that it is a relative term, the signification of which is to be determined by taking into consideration the circumstances surrounding and attending its use, and the meaning of the expression "at Garvanza depot" in referring to a junction, can be reasonably construed as applying to the western junction of the railways.

It must be assumed that the parties to the deed knew the conditions of the locality when the conveyance was made. They had a junction of the railroads in view or it would not have been referred to. If there were no other junction save the one west of Pasadena avenue, there could be no question but that the reference to a junction "at Garvanza depot" would be held to mean that junction. This would follow under the rule that the word "at" is merely indicative of nearness, and we think this signification was properly given to it by the trial court, as the Garvanza depot was much nearer to the western junction than the eastern, and was in the same territory as the western junction was situated on, and it would be only natural, when referring to a junction in the same territory—Garvanza—in which the depot was situated, to associate the junction with the depot. This construction is all the more reasonable and warranted when we consider that the eastern junction was not in the territory known as "Garvanza," but in territory known as "Lincoln Park." Added to this is the circumstance that, when there is occasion to refer to the intersection of the two lines of railroad at their eastern junction, such junction is not designated as "at Garvanza depot," but is designated as the "intersection near the easterly line of the Rancho San Pascuals." It will be observed, too, by examining the full description in the deed, that this description of the eastern junction is found immediately preceding, and by but a few lines, the description here in question, and yet, when we come to this later description where the junction of these railroads is again referred to, it is mentioned as a junction "at Garvanza depot." It is hardly possible that, if this last reference to a junction was intended to be to the same junction as previously described, the person drafting the deed would have in such a brief space of time indulged in such a variety of expression to describe it. This difference in expression as to the location of the separate junctions of these railroads was a potent circumstance warranting the conclusion that as the first description undoubtedly referred to the eastern junction, the subsequent immediate reference to a junction by different description must mean another junction, and, necessarily, the only other junction known to exist, namely, the western junction.

Under the evidence and the reasonable deductions to be drawn therefrom, we think the trial court was justified in concluding that there was no uncertainty in the description in question, but that the reference in the deed to the junction "at Garvanza depot" was intended to mean the western junction of the railroads, and that the land intended to be conveyed by the deed was the triangular piece of land lying to the west of Pasadena avenue and between the two railroads.

In this view it is hardly necessary to discuss the claim of appellants that the deed was intended to describe the easterly triangular tract of land.

Now, as to the other points on this appeal: The appellants W. B. Judson and Julia N. Rogers assert title to all the block described in the complaint except four lots therein. Their claim, however, was based solely on the proposition that the deed to McCool was void, and, as we have seen that it was not, no further discussion of the claim of these particular appellants is necessary.

The appellant Joseph E. Hannon asserts title to the four lots above referred to under a claim that, conceding the deed to McCool to be valid, appellant is nevertheless, the owner of the four lots by title superior to plaintiff. As to this claim: It appears that on December 26, 1885, Andrew Glassell, the then owner of the property in question, made an agreement with Ralph Rogers and W. E. Rogers (which was immediately recorded) to sell and convey the property in dispute to them. The contract provided that Glassell would convey the property to the Rogers "or to such person as they may request"; that the Rogers might negotiate sales of portions of the property and Glassell would convey to the purchasers; and that on receipt of the full consideration specified in the contract—$113,000—he would convey to the Rogers "whatever balance may remain (of said property) after deducting such lots * * * as may have been * * * conveyed by virtue of the privilege above stated." On October 27, 1887, Ralph Rogers made a deed of trust to A. D. Childress, purporting to convey to him some 180 lots, including the four lots in question, in trust for the benefit of persons to whom Rogers had sold or agreed to convey said property. On April 25, 1888, the deed from Glassell and Ralph Rogers to McCool was made, which embraced these four lots, and was the commencement of the title of plaintiff. On July 12, 1888, Glassell made a deed to Ralph Rogers, which was joined in by W. E. Rogers. No particular description of the land intended to be conveyed by this deed is given, but it is described as all the land which was agreed to be conveyed by the agreement of December 26, 1885, except "all the lands and property expressly excepted by the terms of the contract of December 26, 1885." In 1894 A. D. Childress made a deed to appellant Hannon, purporting to convey to him the four lots in dispute, and he asserts title to them under this conveyance, supported by the deed from Glassell to Ralph Rogers of July 12, 1888.

It is contended by appellant that, as the contract between Glassell and Rogers antedated the deed from Glassell to McCool, appellant, under the Childress deed to himself, supported by the conveyance from Glassell to Rogers, acquired a title superior to plaintiff to these four lots. This claim is met by the assertion on the part of plaintiff that the trust deed from Rogers to Childress is void for various reasons assigned. We perceive no necessity, however, for discussing that claim, because we are satisfied that, if the appellant acquired any title whatever to the lots in question, it was an equitable one, arising solely under the contract of sale between Glassell and the Rogers, which title he is in no position to assert in this action to quiet title.

Conceding that the deed of trust from Rogers to Childress was valid, it only transferred such right in the property as Rogers had under his contract of sale with Glassell, which was purely an equitable right. When Rogers made the deed to Childress, the legal title was in Glassell. It is true that Glassell had agreed to convey the land to Rogers, but in fact he conveyed the legal title to the property (Rogers joining in the deed) to McCool by the deed of April 25, 1888. The deed from Glassell to Rogers made July 12, 1888, which appellant contends operated in aid of the conveyance from Rogers to Childress, did not affect the situation whatever. Glassell could not thereby convey any legal title to the property, as he had already conveyed it to McCool. In fact, the Glassell deed did not purport to convey these lots to Rogers, but excepted them. Rogers had joined in the deed from Glassell to McCool. The only interest Rogers then had was that acquired under a contract of sale with Glassell, which provided that the latter might convey any of the property described in the contract to such persons as Rogers might request, and the only purpose of Rogers in joining in the conveyance to McCool was to show that it was made at his request. Now the deed from Glassell to Rogers, made after the conveyance by them to McCool, was in satisfaction of the contract of December 26, 1885.

But as that contract provided that Glassell should convey to Rogers only that portion of the property, which had not been conveyed at the request of Rogers to other persons, and the deed made by Glassell to Rogers in satisfaction of the contract excepted from its operation all portions so conveyed at the request of the latter, it is clear that, as Glassell had previously conveyed to McCool the lots in dispute at the request of Rogers, the latter took no title whatever to them under the deed of July 12, 1888.

It is apparent, therefore, that, if the appellant Hannon acquired any interest in the lots in question, it was purely an equitable one under the contract of sale between Glassell and Rogers. He has no legal title because that passed to McCool, and is now vested in the plaintiff. The appellant is not asserting any rights under the contract of sale. His answer denies title in plaintiff and alleges that he is the owner in fee of these four lots. In effect his answer is in the nature of a cross-complaint to quiet his alleged ownership of this property in fee. But it is clear that he is not such owner; he has no legal title to it; that is in the plaintiff. While appellant averred in his answer a legal title, he proved what is at best an equitable one, and this he seeks to have quieted against the legal title held by plaintiff. It is the settled law, however, that an action to quiet title cannot be maintained by the holder of an equitable title against one holding the legal title. Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Fudickar v. East Riverside I. Dis., 109 Cal. 29, 41 Pac. 1024; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; S. San Bernardino L. & I. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699. Under these authorities, as whatever right the appellant may have acquired under the contract of sale to the four lots in question is purely an equitable one, he cannot in this action and under his pleadings assert it against the legal title held by the plaintiff.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

SHAW, J., being disqualified, does not participate in the foregoing.

(159 Cal. 104)

MEIGS v. PINKHAM et al. (L. A. 2,463.)

(Supreme Court of California. Dec. 30, 1910. Rehearing Denied Jan. 28, 1911.)

1. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION—ACCRUAL—INJURY TO LAND BY DISCHARGE OF WATER.

Where defendants constructed ditches on their own land to carry away surface water, no right of action accrued to plaintiff, an adjoining owner, until actual injury, and mere anticipation of danger from the fact that a deposit of silt and sand on defendants' land would eventually raise it and cause the overflow to be on plaintiff's land did not give a cause of action against which limitations ran.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 305; Dec. Dig. § 55.*]

2. APPEAL AND ERROR (§ 843*)—EXTENT OF REVIEW—QUESTIONS NOT NECESSARY—LIMITATIONS.

Where defendants enjoined from maintaining a ditch flooding plaintiff's land claimed that overflows occurred in certain years, and that a certain statute was applicable, and the evidence as to the time of the overflows was conflicting, and the court decided that the action was not barred by the statute pleaded by defendants, the court on appeal would not decide the applicability of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

3. EQUITY (§ 87*)—LACHES—APPLICABILITY OF STATUTE OF LIMITATIONS.

As the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitation, unless there are some circumstances attending the delay which have operated to the injury of the defendants.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. § 87.*]

Department 2. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Peverill Meigs against Rufus F. Pinkham and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Wm. G. Griffith and H. C. Booth, for appellants. Canfield & Starbuck, for respondent.

LORIGAN, J. Plaintiff brought this action to abate, as a private nuisance, a dam and ditch maintained on the land of defendants adjoining lands of plaintiff, to enjoin defendants from further maintaining them and thereby diverting storm waters onto the lands of plaintiff, and for damages. Judgment was entered in favor of the plaintiff granting the injunction as asked, and awarding plaintiff damages, and defendants appeal from said judgment and from an order denying their motion for a new trial.

Reliance for reversal is based on three grounds: First, it is claimed that the evidence shows that plaintiff's cause of action is barred by the statute of limitations; second, that plaintiff has been guilty of laches in prosecuting his action; and, third, that the injunction granted by the court, if warranted at all, is broader than the law authorizes.

The general situation surrounding this litigation appears to be as follows: The plaintiff and defendants own adjoining tracts of land near the city of Santa Barbara; plaintiff owning the easterly and defendants the westerly one. Both tracts face southerly toward the Pacific Ocean, the northerly parts lying in the foothills from whence through several ravines the storm waters in the winter time flow through the lands of the parties to the Pacific Ocean. Immediately back of the dividing line between the lands of the plaintiff and defendants is situated one of these ravines, the storm waters of which in their ancient, natural, and accustomed course flow in a southwesterly direction diagonally across the land of defendants.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In 1889 one I. K. Fisher owned the lands now owned by defendants, and plaintiff then owned his lands. Fisher, in order to prevent the waters from flowing across his land in the accustomed diagonal course just mentioned, constructed a dam at the mouth of the ravine particularly referred to above, and dug a ditch therefrom due south along the west side of the division fence between his land and that of plaintiff, but on his side to the county road, and thence along the county road parallel to the southern boundary of his land westerly to an outlet into the ocean. As a result he carried the waters at right angles around his land and by preventing it from flowing diagonally across it redeemed his land. In its original natural and straight flow through the land of Fisher (which he subsequently conveyed to the defendants who have ever since maintained the dam and ditch), the storm waters carried with them in suspension sand and silt which in considerable quantities were deposited upon the land of defendants. When first constructed by Fisher, the ditch here involved had firm sides in the adobe land along the division fence, but, on account of its rectangular course, its longer length, and lesser average grade than the original shorter and more direct diagonal course, the flow of the water was impeded, and as a natural result the sand and silt were deposited quicker and in larger quantities along its course. To such an extent was this done that during the first flow of storm water after its construction the ditch filled up with sand at its right angle turn more rapidly than two men could clear it out, and, by reason of this impediment, overflowed the extreme southwest corner of plaintiff's land with water and sand. Fisher, however, exerted himself thereafter, as did defendants after they acquired the property, to keep the water off the lands of plaintiff, and were so successful that for many years no further flow upon plaintiff's land occurred. The ditch, however, during this interval of years repeatedly filled up and overflowed the land of defendants so that eventually there was deposited along the division fence on the land of defendants a blanket of sand which raised the surface of the defendants' lands from a foot to a foot and a half. The adobe ditch with its firm sides became filled up, and thereafter the water flowed in a ditch through the sand above the summit of a slight ridge dividing the land of plaintiff and defendants. The ditch, though kept in repair as far as possible by defendants, having no sufficient resistant power, would during the years when there were heavy storms melt away and flatten out, the storm waters overflowing the land of defendants, but not flowing upon that of plaintiff. These conditions continued for many years without affecting the plaintiff's land. While there is some dispute between respective counsel as to when the first injury to plaintiff's land occurred subsequent to the original construction of the ditch, it is at least undisputed that in February and March, 1906, and January and February, 1907, although defendants had repaired the said ditch, it was again flattened out and the waters rushed over plaintiff's lands. Without mentioning the damage to plaintiff's land by reason of any particular overflow, it appears that as a result of all of them during the two years last mentioned a large portion of plaintiff's land has been covered to a depth of from six inches to two feet with clear sand which is incapable of cultivation, and is to large in quantity to be plowed into the adobe land it covers. Gulleys were also cut through the land of plaintiff, successive crops of garden truck destroyed, and several hundred young gum trees died on account of the sand deposit about them. Plaintiff called on one of the defendants in an endeavor to have some measures taken for the joint protection of their lands, plaintiff offering to defray a portion of the expense himself. This defendant refusing to assist, or to take any measures to keep the water off plaintiff's land, and declaring an intention to continue the maintenance of the ditch as it then existed, this action was brought by plaintiff in July, 1907, to obtain the relief which the court by its decree awarded him. We make only this general statement of the facts because it is not questioned but that on the evidence the plaintiff was entitled to an injunction unless his right to maintain the action therefor was barred by limitation or by laches.

As to the question of limitation. This point is directed only against the action in as far as it is brought for preventive relief. No point is made on it as far as the action is one for damages.

It is insisted generally by appellant that at the time this dam and ditch were constructed by Fisher it was apparent to plaintiff, according to his own testimony, that, if they were maintained, the result would be that sand and silt would be gradually deposited in such large quantities on the land of defendants as would ultimately turn the waters upon the land of plaintiff. From this it is insisted that as there was an apparent invasion of the property rights of plaintiff from the time of the construction of the dam and ditch, a right of action to enjoin defendants' maintenance of them arose then, and that the statute of limitations began to run from that time, whether there was any actual damage to plaintiff or not. We cannot agree with this view. Every property owner has a right to construct ditches or artificial drains upon his land, and by such channels carry away the surface water therefrom, and this right is only limited by the inhibition of the law, that by such means he shall not deflect or discharge it upon his neighbor's land. The ditch here was built entirely upon the land of Fisher, and he had a right to maintain it there for the purpose contemplated as long as it did not injure the plaintiff. The testimony of the plaintiff was not that immediate danger was to be apprehended therefrom when the ditch was first constructed. He did not so state, and it is apparent as a fact that no such immediate danger was to be apprehended or that any material injury accrued. No injury could necessarily result until the land of defendant had been so raised by the deposition of sand on it that it became higher than the slope of plaintiff's land from the ridge along which the ditch ran. This did not occur until at least 14 years after the construction of the ditch. Although it is shown that in the first year it was built—in 1889—there was an overflow at the extreme southwest corner of plaintiff's land doing some trivial damage, this did not proceed from the accumulation of sand on defendants' land which now creates the trouble and makes the maintenance of the ditch continuing nuisance. This damage of 1889 was of a trivial character, arising from the unanticipated deposit of sand at the rectangular turn. The cause was immediately removed by Mr. Fisher, and the ditch was carefully taken care of by him and the defendants thereafter, and there was no further flow on plaintiff's land for 14, if not 17 years. The danger which the plaintiff apprehended, and which he stated would result from the deposition of sand on defendants' land through which the ditch ran, was not an immediate danger, but one which he was satisfied would result if the dam and ditch were maintained after the sand deposits had been made. As the ditch was in firm ground, and as the evidence shows deep and wide, when constructed, there was no immediate danger to be apprehended. While the injury occasioned by the overflow in 1889 gave plaintiff a right of action for nominal damages, as the injury was merely trivial, it gave him no rights to preventive relief in equity. The construction of the dam and ditch was not itself a nuisance, nor an invasion of the right of plaintiff, because they were not constructed on his land. As originally constructed, and while maintained as so constructed, they were not. The nuisance proceeded from the subsequent deposition of sand along the division fence on defendants' land and the destruction and obliteration thereby of the original ditch and the impossibility thereafter of carrying the water in a direct channel through the sand deposit, so that what in its original construction had been lawful had subsequently, and, on account of changed conditions, become a nuisance. Because this might occur, however, did not require plaintiff to commence an action at once under penalty of being denied preventive relief when the nuisance became actually established. The original construction of the dam and ditch being lawful was not itself an invasion of any property right of the plaintiff, and, though it might be anticipated that at sometime in the future conditions might arise which might make its maintenance such an invasion, it was not to be presumed that, when it became such nuisance, it would be continued. On the contrary, as the defendants had no prescriptive right to maintain the dam or ditch, and never, of course, intended to maintain it to the injury of plaintiff, and certainly exerted themselves so that it should not be, plaintiff had a right to assume that, when conditions arose so that its further maintenance would cause actual and continuous injury to plaintiff and become a nuisance, defendants would abate it. There was no danger to be apprehended if the ditch was maintained as originally contemplated. There was only a probability that, if the dam and ditch were maintained by defendants under certain future and changed conditions, injury would follow. Plaintiff had a right to assume that when those conditions occurred and actual danger to plaintiff's land was not only threatened, but actually occurred, the nuisance would be abated, and as it was not, his right of action may be legally said to have then accrued, and, if such action was brought within the statutory time thereafter, the claim of defendants that it should have been brought when the dam and ditch were originally constructed is untenable.

It is insisted by appellants, however, that even if the plaintiff's right to maintain this action did not accrue until the specific injuries to his land, other than the overflow of 1889, occurred, still his right of action was barred by the statute of limitations. This claim is predicated upon the assertion of appellants that actual damage to plaintiff's land by overflow occurred after the changed conditions as to the dam and ditch as early first, as the winter of 1902; again in the winter of 1903, and in September, 1904. As this action was not commenced until 1907, the theory of the appellants is that the two years' limitation in subdivision 1 of section 339 of the Code of Civil Procedure, pleaded by them, applied to this character of action, as one upon "an obligation or liability not founded upon an instrument in writing" within the purview of that section. In support of their position, they rely upon language used in the case of Piller v. Southern Pacific R. R. Co., 52 Cal. 42, which they claim sustains this contention. Respondent insists that the proper section of the Code limiting his right to maintain this action for an injunction (because no objection was made to that part of the judgment for damages) is section 343, and relies on Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, and Dore v. Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100. We perceive no reason for considering the discussion on this point. The evidence as to whether there was an overflow of plaintiff's land in the winters of 1902 and 1903 was conflicting, and, as the court decided that plaintiff's cause of action was not barred by the provisions of the code section pleaded by defendants, it necessarily decided the conflict, against any overflow having occurred in those years. As to the alleged overflow of 1904. The evidence of the witness whose testimony is relied on by appellants to sustain such an overflow is rather indefinite as to what fence he saw the water flowing through. He was not called by the defendants (whose witness he was) to prove that any water flowed upon the land of plaintiff in that year or any other. His testimony was as to what water flowed on defendants' land, and, while on cross-examination by counsel for plaintiff he stated that he saw a little bit of water running through a fence, he does not clearly specify what fence, and from the general trend of his testimony it is reasonably apparent that he was referring to an east and west partition fence, and not to the north and south division fence dividing plaintiff's and defendants' lands and along which the ditch ran. So that the only overflows upon the land of plaintiff having occurred during the heavy storm floods in February and March, 1906, and January and February, 1907, and as this action was brought in 1907, upon any theory as to the statute of limitations, it was brought in time.

As to laches. Under our law, as the statute of limitations is applicable to both legal and equitable actions, there can be no laches in delaying the bringing of an action if it is brought within the period of limitation (Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467; Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267), unless there are some facts or circumstances attending the delay which have operated to the injury of the defendants. Nothing of the kind appears here. It is neither alleged nor asserted that defendants have in any way been injured, or at all affected, with respect to the relation of their lands to this dam and ditch by anything the plaintiff did or did not do. They took their title to the land from Fisher with full knowledge of the conditions with respect to the dam and ditch and of the liability under certain conditions of injury to plaintiff's land by its maintenance, and they voluntarily assumed this liability. Hence, as the statute of limitations does not apply, neither can the bar of laches.

It is complained that the decree of injunction in the case is broader than the law allows. In that regard it is claimed that the decree literally construed, after ordering the defendants to remove the dam and ditch, enjoins them from doing three separate and distinct acts, first, restoring the dam and ditch; second, diverting the storm waters easterly from their natural course; and, third, turning the storm waters upon the land of plaintiff. Particular exception is taken to the second provision referred to; it being claimed that it is a limitation on defendants' undoubted legal right to divert surface waters from their lands in any course through their land that they see fit, so long as they do not injure their neighbor. Of course, defendants have this right and our examination of the decree satisfies us that the trial court by its decree has not curtailed it or attempted to do so; that it is not open to defendants' complaint that it does so. When the terms of the injunctive decree are examined, discarding verbal niceties, and with reference to the record in the case, and the case made to which it applies, it is evident that it does not, as contended by appellants, prohibit them from diverting the waters from the ancient and natural diagonal course across their lands, nor prohibit them from carrying them easterly over them or elsewhere across them, except that they shall not divert or carry them so that any part of the storm waters will flow upon the land of plaintiff.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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158 Cal. 551

UNION LABOR HOSPITAL ASS'N v. VANCE REDWOOD LUMBER CO. et al. (S. F. 5,299.)

(Supreme Court of California. Nov. 17, 1910. On Rehearing in Bank, Dec. 20, 1910.)

1. Conspiracy (§ 8*)—Injury to Business.

Defendants compelled all their employés to assent to deduction from their wages of $1 a month for hospital protection, which entitled the employés to hospital tickets in one of four hospitals, of which plaintiff's was not one. *Held,* that as there was no contract between plaintiff and defendants and the defendants were not acting in an illegal manner, they had the right to exclude plaintiff from their list, so that plaintiff could not recover on the ground of conspiracy to injure his hospital business.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 7; Dec. Dig. § 8.*]

2. Torts (§ 1*)—Nature of Act.

In the absence of contract, the master may dismiss the servant upon caprice or for any other reason, and the servant may leave his employment, and either one of them may exercise this option to injure some one else as long as it is done in a legal manner.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. Torts (§ 4*)—Violation of Right, Duty or Obligation Necessary — Bad Motive for Lawful Act.

As long as there is no right, duty, or obligation violated, bad motive will not make an act wrongful.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 4; Dec. Dig. § 4.*]

Department Two. Appeal from Superior Court, Humboldt County; George W. Hunter, Judge.

Action by the Union Labor Hospital Association against the Vance Redwood Lumber Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Denver Sevier, C. M. Wheeler, F. A. Cutler, and F. R. Sweasey, for appellants. J. F. Quinn, Coonan & Kehoe, for respondent.

HENSHAW, J. This action was brought by plaintiff against the named defendant and six other lumber companies, to obtain an injunction restraining and enjoining them from conspiring and combining together to vex, annoy, hinder, injure, and destroy the hospital business of plaintiff. The scheme of annoyance and destruction consisted in this: The defendants compelled every employé to consent to the deduction of $1 from his monthly wage, 12½ cents of which went into a contingent fund to help needy employés who might be injured and 87½ cents of which went to a hospital for an employé's ticket. This ticket entitled the employé to medical and surgical care and attendance in case of injury. The hospital could be selected by the employé from a list of three or four presented to him, but the Union Labor Hospital was not mentioned and was not on this list. These facts form the foundation of the charge of malicious and willful conspiracy, combination, and boycott designed to vex, annoy, hinder, injure, and destroy the plaintiff's business, and coerce and intimidate its patrons and customers, to ruin its credit and to prevent it from selling its bonds, etc. There was no issue over the question of what these defendants were doing. The court found, generally, in favor of the allegations of the complaint, found that the defendant companies derived a benefit from the existing hospital arrangement and the fund created by the 12½ cents taken out of the monthly hospital dues of each employé, since thus they were relieved of the burden of caring for indigent and injured employés. The court also found that the relations existing between the defendants and the agents of plaintiff were of such a nature that the defendants were justified in not entering into an agreement with the Union Labor Hospital, such as existed between the defendants and the other hospitals upon their list. And the court also found that the defendants, in entering into the agreement with the other hospitals, were acting solely for the purpose and with the intent to subserve their own (defendants') interests.

The defendants were all companies engaged in lumbering and milling in Humboldt county. The occupations of their men were dangerous. That provision should be made for the medical and surgical care of the men injured was most proper. No objection is made to this, nor to the means adopted to effectuate it, saving that plaintiff contends that because its hospital was not upon the list and because the employés were compelled to take out hospital tickets in one or another of the enumerated hospitals, a species of unlawful discrimination by the defendants against the plaintiff was thus established, a discrimination which it is urged and which the court found was an illegal boycott, against the continuance of which defendants were enjoined.

It is important to understand exactly what these defendants were doing. Essentially it was this: By agreement amongst themselves they selected a list of hospitals, of which plaintiff's was not one. By agreement amongst themselves, for their own protection and for the betterment of the condition of their men, they required of the men, as a condition of obtaining employment, or as a condition of remaining in employment, that they should assent to a deduction from their monthly wages of 87½ cents, which should be given to a hospital of the employé's own selection taken from the list presented. These defendants did not go so far as to discharge or even to threaten to discharge an employé who might buy a ticket entitling him to the service of the plaintiff's hospital. They insisted merely that he buy a ticket in one of their designated hospitals. An employé was at liberty to buy an additional ticket in plaintiff's hospital, but, in the nature of things, an employé having purchased a ticket in another hospital, would not be likely to lay out any more money for such a purpose.

There being no contractual relations between plaintiff and defendants, the defendants, individually or in combination, were under a duty only to refrain from inflicting a legal wrong upon plaintiff. The finding of the court is that defendants in making their agreements with the Sequoia, St. Francis, Marine View, and Trinity hospitals were acting solely for the purpose and with the intent to subserve their own interests. But if this were not so, and their purpose were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil motive which may inspire the doing of an act not unlawful will not of itself make the act unlawful. Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324. Unquestionably there was nothing illegal in the measures employed to accomplish this result. The suasion or intimidation or coercion was purely moral, and went no further upon the part of the defendants than a refusal to employ or to retain in their employ any one unwilling to comply with their hospital regulation. This was purely a matter between employer and employé, and where no contract between them stands in the way, it is the unquestioned right of the employé to leave the employment at his pleasure, and it is equally the right of the employer to discharge at his pleasure, or to impose conditions upon the retention of the employé in his employment. If imposed conditions are regarded as unjust, unfair, or onerous, the employé need not comply with them, but may resign, and, as has been said in the cases above cited, he may do this as an individual, or he may do so by concerted action as a member of an organized body or trades union. Precisely as may the employé cease labor at his whim or pleasure, and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to complain; so, upon the other hand, may the employer discharge, and, whatever be his reason, good, bad, or indifferent, no one has suffered a legal wrong. A man may have a profitable general merchandise business in the neighborhood of a mill or factory depending for its patronage upon the mill or factory hands. For reasons sufficient to them they may cease dealing at this store by concert of action, and so long as their methods (not their motives) are legal, they may perfect a boycott which will destroy the storekeeper's business. Upon the other hand, the millowner, being under no contractual obligation to the storekeeper, may indisputably shut down his mill at any time, and thus work a destruction of the storekeeper's business. It is conceivable that his motive may be so venomous that he shuts down his works merely to destroy the storekeeper's business and yet the storekeeper has no right of action, nor indeed has he right of inquiry into the motive which prompted the act. Since the millowner may do this, he may do less than this, and exact of his employés, as a condition of their continued employment, that they do not deal at that store, and for this, also, however grave the injury, the storekeeper will have no legal cause of complaint. These views touching the arbitrary right of the employé to labor or to refuse to labor, and the reciprocal arbitrary right of the employer to employ or discharge labor, without regard in either case to the actuating motives, are propositions settled beyond peradventure. "It is well settled," observes Chief Justice Shaw, in Commonwealth v. Hunt, 4 Metc. (Mass.) 133, 38 Am. Dec. 346, "that every man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, work or refuse to work, with any company or individual at his own option, except so far as he is bound by contract." In Payne v. Railroad Co., 81 Tenn. 507, 49 Am. Rep. 666, it is said: "Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers, and farmers. All may dismiss their employés at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong. A fortiori they may threaten to discharge them without thereby doing an illegal act."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The question will be found very elaborately discussed in Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373, and in the more recent case of Banks v. Eastern Ry. & Lumber Co., 46 Wash. 610, 90 Pac. 1048, 11 L. R. A. (N. S.) 485, a case very similar to the one at bar. Banks charged that he was conducting a public hospital, that the defendant was a corporation engaged in the manufacture of lumber and shingles, employing a large number of men; that 50 cents a month were retained from the wages of each man, to be disbursed for hospital and medical services; that 56 employés of the defendant selected plaintiff's hospital and served upon defendant a written demand that their hospital dues be thereafter paid to the plaintiff; that plaintiff, in consideration, issued to each of the employés a certificate entitling him to medical and surgical treatment in the hospital, and that defendant refused to pay the fees to plaintiff so demanded by the written request of its employés; but, to the contrary, notified its employés that all hospital dues would be paid to the Dumon hospital, and that any employé not consenting to such demand would be discharged. It was alleged that all the acts of the defendant were wanton, willful, and malicious, and done with intent to harass plaintiff and injure his business. A demurrer to the complaint was sustained. In upholding the ruling of the trial court the Supreme Court of Washington said: "The respondent was entitled to employ its servants upon the conditions alleged. It had a perfect right to contract for the retention of reasonable hospital fees and reserve to itself the privilege of selecting the physician to whom such fees should be paid. The contract, which did not profit the respondent, was made for the direct benefit of its employés. Appellant made no agreement with the respondent. There was no privity of contract between him and respondent. The contract between the respondent and the employé was not made for the benefit of appellant and he had no right of action thereon. If appellant made any contract which has been violated, it was with the 56 employés to whom he issued hospital certificates. He cannot dictate the manner in which the respondent shall conduct its business, nor can he, by any agreement with respondent's employés, to which respondent is not a party, compel it to change the terms of its contracts of employment. Appellant places much reliance on the allegations of malice, but if the respondent is conducting its business in a lawful manner, making and performing valid contracts with its employés, the mere incident of a malicious motive toward the appellant does not of itself warrant a recovery.

Appellant contends this is an action in tort, based on the malicious and wanton acts of the respondent, and seems to predicate his right to recovery upon respondent's wrongful motive. Judge Cooley, at page 1505 (832) of vol. 2 (3d Ed.) of his work on Torts, says: "Bad motive, by itself, then is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. Where one exercises a legal right only, the motive which actuates him is immaterial. When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." In substance, the act of respondent of which appellant complains is that it has maliciously caused its employés to violate their contract with him; but the acts herein alleged give the appellant no cause of action as against respondent. Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.

We are unable to perceive where any element of monopoly enters into this consideration, as respondent contends. Defendants had the undoubted right to deal with any hospital which they might select. In fact they are dealing with four, and they are not even prohibiting their men from engaging the services of plaintiff. We repeat, that since the acts of defendants are within their legal rights, the motive for those acts is not a subject of inquiry. "To entitle a plaintiff to recover, there must be a wrong done. 'No one is a wrongdoer but he who does what the law does not allow.' He who does what the law allows cannot be a wrongdoer whatever his motive. So no one is guilty of a fraud, because he exerts his rights. The motive which may induce such exertion is immaterial." Heywood v. Tillson, 75 Me. 237, 46 Am. Rep. 373.

The judgment is reversed and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

On Rehearing in Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. In response to the petition for a rehearing of this cause I desire to say that, while concurring in the judgment of reversal, I find some expressions in the opinion of Justice HENSHAW which I deem unnecessary to the conclusion of the court, and which, if not absolutely inconsistent with my views, as expressed in the case of Parkinson v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, are yet in apparent conflict with what I deem to be the true doctrine applicable in cases of this character. I take no exception to the proposition that an act in its essence lawful does not become actionable because inspired by a bad motive. But I am convinced that the weight of reason and authority is in favor of the view that the motive of a harmful act is material, where the act is not absolutely and unqualifiedly lawful in itself. This is illustrated by cases of malicious prosecution, unlawful imprisonment, and libel, in which the pleas of probable cause and privilege are defeated by proof of actual malice, and the doctrine of those cases rests upon a principle which makes it fully applicable to a case wherein it is made to appear that the ruin or injury of a legitimate business (by which I mean any useful vocation open to every citizen as of common right) is the direct result of a combination formed for the primary purpose of injuring that business, and this notwithstanding such injury may involve some incidental advantage to those who have caused it. This, which appears to be the necessary complement or counterpart of the proposition that injury incidentally resulting to a business from a combination entered into for the benefit by lawful means of those who engage in it, is not actionable, is supported, not only by reason, but by authority.

Besides the case of Quinn v. Leatham, referred to and commented upon in the Parkinson Case, I would call attention to the opinion of the Circuit Court of Appeals in National Fireproofing Co. v. Mason Builders' Association, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, from which I quote the following statement of the doctrine for which I am contending: "The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders the combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interest of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy, but that, when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy, and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy."

This doctrine, however, cannot avail the respondent here as the case is presented by the record; for although it is found by the trial judge that the defendants, without any interests of their own to subserve, or any lawful object to promote, did conspire and confederate together for the purpose of unlawfully injuring the plaintiff in the manner alleged in the complaint, it is also found, as shown in the opinion of the court, that the agreement with the four favored hospitals was entered into by the defendants solely for the purpose and with the intent to subserve their own interests. These two findings appear to me to stand in absolute and irreconcilable opposition to each other, and the result is no finding at all upon a point essential to the validity of the judgment, which must therefore be reversed.

(159 Cal. 159)

In re GRAY'S ESTATE. (Sac. 1,823.)

(Supreme Court of California. Jan. 5, 1911. Rehearing Denied Feb. 2, 1911.)

1. WILLS (§ 781*)—ELECTION.

A will may be so framed as to put the surviving spouse or any heir to his election whether he will take under the will or surrender such rights, and take what the statute grants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013-2017; Dec. Dig. § 781.*]

2. WILLS (§ 783*)—CONSTRUCTION—ELECTION.

A will bequeathing a sum to testatrix's widower and devising land to her sister did not put him to an election so as to preclude his receipt of the legacy after having a homestead granted on such land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2034; Dec. Dig. § 783.*]

3. WILLS (§ 783*) — INSTRUCTIONS—PRESUMPTIONS—HOMESTEAD RIGHTS.

Testatrix is presumed to have known that her power of disposition was subordinate to the power of the courts to grant to her surviving family a homestead for a limited period from her estate under Code Civ. Proc. §§ 1465, 1468.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 783.*]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

In the matter of the estate of Ellen McGarvey Gray, deceased. From an order denying a petition for distribution, Mary J. Dowling appeals adversely to James H. Fitzgerald, executor, and another. Affirmed.

Perry Evans, for appellant. P. B. Lynch, Keogh & Olds, and Harvey & Goodman, for respondents.

HENSHAW, J. By the will of deceased, she bequeathed to her husband, Daniel J. Gray, the sum of $1,000. To her sister she devised a lot of land in the city of Vallejo. The widower made application for a homestead upon the separate property of his wife, and the homestead was granted to him on the lot of land devised to the sister. No question arises as to the propriety of granting the homestead or the regularity of the proceedings to that end. Under proceedings for distribution, the widower made demand for his legacy of $1,000, and this was opposed by the sister, Mrs. Dowling, upon the ground that, by the terms of the will, the widower had been to his election, and, in having set apart to himself the homestead out of the separate property of his wife so as aforesaid devised to her sister, Mrs. Dowling, he had waived and forfeited his right to the legacy left in the will. This contention presents the sole question advanced upon the appeal.

There is no manner of doubt that a will may be so framed as to put either the surviving spouse or any heir to his election whether he will take under the will, or surrender his rights under the will and take what the statute grants. A typical instance of this is found in Estate of Lufkin, 131 Cal. 291, 63 Pac. 469, where the provision of the will in question was: "I give, devise, and bequeath to my wife Lucy the sum of $1,000, on the payment of which $1,000 she relinquish all further claim to my estate." But there is in the will before us no language designed to put the surviving husband to his election, nor can such design be inferred, as it is sought here to have it inferred, from the mere fact that the property out of which the homestead was granted was specifically devised to the deceased's sister. As was said in Sulzberger v. Sulzberger, 50 Cal. 385, a devise which clearly appears to have been intended as in lieu of a homestead would present a different question from the one at bar. But there the court held that the devise made by the will was not intended to be in lieu of a homestead, and that the widow was entitled to the homestead in addition to the property left her by the will. There is no presumption arising from the fact that the deceased devised the property to another that she meant thereby to force an election upon her husband. The presumption is that she executed her will with knowledge that her power of disposition was subordinate to the power of the court to carve out a homestead for a limited period from her separate estate. Code Civ. Proc. §§ 1465, 1468; In re

Sharp, 78 Cal. 483, 21 Pac. 182; In re Lahiff, 86 Cal. 153, 24 Pac. 850; In re Davis, 69 Cal. 458, 10 Pac. 671; Estate of Huelsman, 127 Cal. 275, 59 Pac. 776.

Wherefore the appeal from the order denying petition for distribution is denied, and the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

159 Cal. 172

CRAIG v. WADE et al. (L. A. 2,551.)

(Supreme Court of California. Jan. 6, 1911.)

Corporations (§ 80*)—Liability of Officers—False Reports—Grounds of Action—Statutes.

A report in the form of a circular to stockholders concerning the corporation and its business and assets, containing the statement: "Value of wells, 31, at $1,500........46,500," was not fraudulent within the meaning of Civ. Code, § 316, providing that any corporate officer who willfully makes a report concerning the corporation or its business, which is false in any material representation, shall be liable, etc., the statement being a matter of opinion, and one who purchased stock in reliance thereon could not recover under the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244–265; Dec. Dig. § 80.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by John W. Craig against R. D. Wade and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. T. Morrow, for appellant. G. P. Adams, for respondents.

HENSHAW, J. Appellant's action is founded on section 316 of the Civil Code of California, which provides as follows: "Any officer of a corporation who willfully gives a certificate, or willfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby, and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable." He charged that respondents, as officers and directors of the Oceanic Oil Company, a corporation, made an official report and public notice concerning the corporation and its business which contained the following false and untrue representations: "Value of wells, 31, at $1,500........46,500." He avers that, relying on the truth of this report, he purchased 20,000 shares of the capital stock of the Oceanic Oil Company for which he exchanged property of the value of $8,000, that the stock at the time of the purchase was worth $300, and no more, and he seeks a judgment for $7,700 as damages. A general demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was entered accordingly, and from this judgment plaintiff appeals.

His contention is that upon the authority of such cases as Woodland v. Hiatt, 58 Cal. 234, Cruess v. Fessler, 39 Cal. 338, and Loaiza v. Superior Court, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197, a knowing misrepresentation of value is the misrepresentation of a fact within the meaning of section 316 of the Civil Code. To this answer is made by the respondents that under certain circumstances a misrepresentation of value may be a misrepresentation of fact, but that the general rule is that a representation of value is an expression of opinion and that under the circumstances here presented it cannot be construed as anything other than a mere expression of opinion. We think it needs no extended discussion but a mere presentation of the facts to show that respondents' position in this matter is impregnable. The circular in question was one addressed to the stockholders explaining the necessity of an assessment. It gave in itemized form the receipts and expenditures of the corporation for the current year and then proceeded to itemize the assets of the corporation as follows:

Number of producing wells owned by the company	31
Production in 1904, gross barrels........	34,636
Average monthly product (in full operation) gross barrels....................	4,000
Amount of oil on hand................	7,438
Number of pumping plants (complete)...	5
Value of pumping plants...............	3,000
Value of wells, 31, at $1,500............	46,500
Value of tools, supplies, etc.............	3,000
Value of real estate (town lots)..........	12,000

By order of the board of directors,
Chas. F. Bicknell, Sec'y.

One of these items, that setting forth the value of the wells, is the one, and the only one, which the plaintiff selects and charges to have been willfully and falsely made. There may be property of such a character that its value can be correctly estimated and declared. Such, for example, would be the value of the oil on hand at the wells, but, on the contrary, property such as an oil well itself is always of such uncertain value as to make an expression of its worth in terms of money necessarily a matter of opinion. Twenty thousand dollars may have been expended in sinking a well which has not yet reached oil sands, and which may never reach them. To a sanguine man in the expectation of soon striking oil, the well may have a value of many hundreds of thousands of dollars. To the pessimistic man, who believes oil will never be struck, the $20,000 expended is money lost, and the well is valueless. So, too, if oil be in fact found, the duration of its flow is entirely uncertain, and the flow itself may increase or decrease without apparent reason. If the well yields 100 barrels of oil to-day, it may yield 1,000 barrels, or none at all, to-morrow. To place a value in terms of money upon such a flowing well must therefore itself of necessity be a matter of opinion merely, since it is not within human knowledge to foresee the contingencies which may result in greatly enhancing or utterly destroying its output.

No such expression of value, which is inevitably but the statement of a mere opinion, is contemplated by the statute which denounces the falsification of facts, wherefore the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

14 Cal. App. 632

BACIGALUPI et al. v. PHŒNIX BLDG. & CONST. CO. et al. (Civ. 833.)

(Court of Appeal, First District, California. Nov. 23, 1910.)

1. Damages (§ 141*)—Actions for Breach of Contract—Allegations of Complaint.

The complaint in an action for breach of defendant's contract to erect and complete a building for plaintiff alleged that defendant failed and refused to build "said building," but that it abandoned the work and left the "said" building in an uncompleted condition, and "that the reasonable cost to complete said building over and in excess of the contract price" was a certain sum. *Held* that, as against a general demurrer, the complaint sufficiently alleged damage to plaintiff by defendant's failure to perform its contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 406-408; Dec. Dig. § 141.*]

2. Appeal and Error (§ 762*)—Brief—Opening Brief—Points Not Presented.

The appellate court need not decide points first presented in appellant's reply brief in absence of strong reason why they were not made in the opening brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097; Dec. Dig. § 762.*]

3. Appeal and Error (§ 1040*)—Harmless Error—Overruling Demurrer.

Where in an action for damages for failure to complete a contract to erect a building, the evidence showed that the building was completed pursuant to the original plans after it was abandoned by defendant, and the jury found that the reasonable cost of completing it was the amount of the verdict for plaintiff, defendant could not have been prejudiced by the overruling of a demurrer to the complaint on the ground of the insufficiency of the allegation as to damage claimed by plaintiff by defendant's breach.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

4. Damages (§ 189*)—Breach of Contract—Evidence.

The actual cost of completing a building after it was abandoned by the contractor is some evidence of the reasonable cost of such work.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 512; Dec. Dig. § 189.*]

5. Damages (§ 189*)—Breach of Contract—Sufficiency of Evidence.

In an action to recover damages for breach of defendant's contract to erect and complete a building, evidence *held* to sustain a finding that a certain sum was the reasonable cost of completing it after it was abandoned by the contractor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 512; Dec. Dig. § 189.*]

6. Damages (§ 86*)—Liquidated Damages—Construction Contract.

A provision of a contract for the construction of a building that should the contractor fail to complete the building within the time fixed for completion he shall be liable to the owner for loss the latter suffers on account thereof, not to exceed $5 a day for each day the work remains uncompleted beyond the time fixed for completion, related only to damages from delay in completion, and did not fix the measure of damages for a total breach, such as the contractor's abandonment of the contract and failure to complete the building.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 182; Dec. Dig. § 86.*]

7. Action (§ 62*)—Premature Commencement.

A cause of action for breach of a contractor's agreement to erect a building within a certain time by abandoning the work before the building was completed, accrued as soon as the contract was abandoned so that an action then commenced was not premature, though the building was afterwards completed by the owner.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 718-723; Dec. Dig. § 62.*]

8. Appeal and Error (§ 882*)—Estoppel to Allege Error.

Defendant's submission of a special interrogatory in an action for breach of contract to erect a building, as to what date the contractor abandoned the contract and refused to complete it, in effect conceded that there was an abandonment, so that defendant cannot contend on appeal that the contract was not abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

9. Contracts (§ 306*)—Building Contracts—Completion by Owner—Notice.

A provision of a building contract that should the contractor during the progress of the work neglect without the owner's fault to supply sufficient materials or workmen to complete the contract within the time stipulated for a period of more than three days after having been notified by the owner to furnish the same, the owner may furnish such materials or workmen to finish the work, and deduct the reasonable expense thereof from the contract price, does not entitle the contractor to the three days' notice, where he has completely abandoned the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.*]

10. Contracts (§ 288*)—Building Contracts—Performance—Payment—"Architect."

A building contract required the erection of the building in conformity with the plans and specifications made by the owner's authorized architect, and provided that when payment became due certificates in writing should be obtained from the architect. *Held*, that the contractor and builder who was employed by the owner to make the plans and specifications for the building and to superintend its construction, though not a professional architect, was the "architect" authorized to make the certificates upon which payments were made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1308-1317; Dec. Dig. § 288.*

For other definitions, see Words and Phrases, vol. 1, pp. 490, 491.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

11. PRINCIPAL AND SURETY (§ 123*)—SURETY'S LIABILITY — NOTICE OF LOSS — TIME — "PROMPTLY AND IMMEDIATELY."

The requirement in a surety bond that notice of default or loss should be given the surety "promptly and immediately" means only that it shall be given within a reasonable time after default.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304–311; Dec. Dig. § 123.*

For other definitions, see Words and Phrases, vol. 6, p. 5684; vol. 4, pp. 3403–3410.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by M. S. Bacigalupi and another, administratrix, against the Phœnix Building & Construction Company and Title Guaranty & Surety Company. From a judgment for plaintiffs and an order denying a motion for a new trial, the last-named defendant appeals. Affirmed.

Wilson & Wilson, for appellant. Bacigalupi & Elkus, for respondents.

HALL, J. Plaintiffs entered into a contract with the Phœnix Building & Construction Company (which shall hereinafter be designated as the Building Company), for the construction of a building for the sum of $14,000. The Title Guaranty & Surety Company gave a bond to plaintiffs in the sum of $3,500, as sureties for the performance of the contract by the Building Company. The Building Company did not complete said building or perform its contract, but abandoned the same. The plaintiffs brought this action against the Building Company and the Surety Company to recover damages in the sum of $3,500 for breach of the contract. The Building Company defaulted, but the Surety Company defended. The jury returned a verdict for plaintiffs for the sum of $3,300, for which judgment was entered.

1. Appellant's first contention is that the complaint fails to state a cause of action, and that for that reason the court erred in overruling its demurrer to the complaint. The point of the attack made by the demurrer, as indicated in appellant's opening brief, is the alleged insufficiency of the allegation as to any damage caused plaintiffs by the failure of the Building Company to perform its contract. The allegation of the complaint upon this point is as follows: "That the reasonable cost to complete said building, over and in excess of the contract price, was thirty-three hundred ($3,300) dollars." The complaint also concludes with a prayer for judgment in the sum of $3,500. It is urged that it does not appear that the building was ever completed according to the original plans and specifications, or that the reasonable cost to complete the building according to the original plans and specifications was $3,300, or any other sum. So far as the attack by general demurrer is concerned we think the allegation is sufficient. The words "said building" fairly mean the building as contracted for, and not a different building or building other than as contracted for. It clearly appears from the allegations of the complaint that the Building Company failed and refused to build said building, but that it abandoned the work and left the said building in an uncompleted condition, and refused to continue under its contract. The facts stated would sustain a judgment for damages, and in such a case it has been held that the demand in the prayer is a sufficient statement of the amount of damages sustained, as against a general demurrer. Riser v Walton, 78 Cal. 490, 21 Pac. 362. But, however that may be, the most that can be said against the allegation of damage in the case at bar is that it is not as definite and certain as good pleading demands.

In this connection appellant in its reply brief calls attention to the fact that the allegation as to damage was attacked in the demurrer for uncertainty. It is perhaps sufficient to say that we are not called upon to notice points not presented by appellant in its opening brief, and only do so when cogent reasons are presented why the point was not made in the opening brief. Furthermore, in the case at bar the evidence showed that the building was in fact completed according to the original plans and specifications, and the jury specially found that the reasonable and necessary cost for so doing was $3,300. The appellant was thus not injured by the action of the court in overruling its demurrer for uncertainty. The allegation as to the reasonable cost of completing the "said building" was treated on the trial as an allegation as to the reasonable cost of completing the building according to the original contract, and the jury found $3,300 to be the reasonable and necessary cost of completing the building according to the original contract. No reversible error was committed in overruling the demurrer.

2. Appellant's second contention is that "plaintiffs failed to prove any loss or damage for failure of the Building Company to carry out its contract." Under this head it is contended that although it was shown that the building was completed, it is not shown that it was completed in accordance with the original contract with the Building Company, and that though it was shown that it did in fact cost $3,300 more than the price fixed in the original contract to complete the building, it was not shown that this cost was a reasonable cost or price.

As to the first contention the evidence in the record does show that the building was completed in accordance with the original contract. Plaintiffs did prove that the actual cost for completing the abandoned contract was $3,300 in excess of the original contract price; that plaintiff received bids for completing the work, and gave the contract to complete the work to the lowest bidder, which brought the total to a sum $3,300 in excess of the original contract price. No witness testified in terms that the accepted bid was a reasonable price or represented the reasonable cost of completing the abandoned contract; but no objection was made to this evidence. No evidence was given that the reasonable cost of completing the building was less than what it actually cost plaintiffs to complete it, or that it could have been completed for any less amount. Under the circumstances the evidence was sufficient to prove the reasonable cost. In the absence of any evidence to the contrary it tended to prove the reasonable cost. The actual cost is some evidence of the value or reasonable cost. Angell v. Hopkins, 79 Cal. 181, 21 Pac. 729; Bunting v. Salz (Cal.) 22 Pac. 1132; Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957; Levy v. Scott, 115 Cal. 39, 46 Pac. 892.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellant also claims that the original contract fixes the measure of damages. The clause relied on provides that, "should the contractor fail to complete this contract and the work provided for therein within the time fixed for such completion * * * he shall become liable to the owner for all loss and damages which the latter may suffer on account thereof, but not to exceed the sum of $5 per day for each day said work shall remain uncompleted beyond such time for completion." Manifestly this clause has relation only to damages resulting from delay only, and has no bearing upon the measure of damages for an abandonment of the contract and failure to complete the work at all.

3. The action was not prematurely brought because brought before the building was completed. The cause of action accrued as soon as the Building Company abandoned the contract. Taylor v. N. P. C. R. R., 56 Cal. 317; Lawton v. Fitchburg R. R. Co., 8 Cush. (Mass.) 230, 54 Am. Dec. 753; Cincinnati & Springfield Ry. Co. v. Village of Carthage, 36 Ohio St. 631.

4. Appellant also contends that "plaintiffs had no right to consider the contract of the Building Company abandoned, and to complete the building themselves." Under this head it is contended that the Building Company did not abandon its contract, and that by the terms of the contract with the Building Company it was entitled to three days' notice in writing to proceed before the contract could be treated as abandoned. That the contract was in fact abandoned by the Building Company is perfectly clear from the evidence. Indeed, appellant, in a special defense predicated upon the claim that the plaintiffs did not, as required by the surety contract, give appellant prompt or immediate notice of the default of the Building Company, pleaded that the Building Company "did make default in the performance of the terms, covenants and conditions of said contract, to wit, abandoned the performance of the said contract and failed to complete said building. * * *"

There was no real contention as to the fact that the Building Company did abandon the contract, and the appellant in effect conceded that the contract was abandoned when it asked, as it did, the court to submit to the jury the question, "On what date did the Phœnix Building & Construction Company abandon its contract with the plaintiffs and refuse to complete the contract?" This question was answered as follows: "Feby. 14th, 1907." Furthermore, we find nothing in the specifications of the insufficiency of the evidence that hints at any failure of the evidence to support this answer.

The contention that the Building Company was entitled to three days' notice in writing is based upon the following provision of the contract, to wit: "Should the contractor, at any time during the progress of the work, refuse or neglect, without the fault of the owner, architect or superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein, due allowance being made for the contingencies provided for herein, for a period of more than three days after having been notified by the owner in writing to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish said work, and the reasonable expense thereof shall be deducted from the contract price." This paragraph has no application to the case where the contractor entirely abandons the contract, but only applies where he is proceeding under the contract, but fails to supply a sufficiency of materials or workmen to complete the contract within the time limited by the contract. It was intended to give the owner the right, under such circumstances and after giving the notice, to take the completion of the contract into his own hands, and to deduct the cost thereof from the contract price. This we think to be the meaning of the paragraph as between the owner and the contractor, and by which the surety was bound. Such an interpretation was placed upon a similar provision in a contract in National Contracting Co. v. Hudson River Water Power Co., 118 App. Div. 665, 103 N. Y. Supp. 641. We have no doubt it is the meaning of the paragraph in question in this contract.

5. Two payments were made by plaintiffs to the Building Company before it abandoned the contract. These payments were made upon the certificate of one Quagelli, who was not a professional architect, but was a contractor and builder. Appellant contends that under the contract these payments were unauthorized, as not made, on the certificate of the architect. Quagelli, however, did make the plans and specifications for the building, and was employed and paid so to do by the plaintiffs, and, acting as such architect,

superintended the construction of the building. The Building Company agreed to erect the building "in conformity with the plans and specifications for the same made by the authorized architect of the owner, and which are signed by the parties hereto," and the contract provided that when payments shall become due "certificates in writing shall be obtained from the said architect." The architect here referred to is the person who for the owner made the plans and specifications and superintended the construction of the building. He was the only "authorized architect of the owner," and was the "said architect" empowered to give certificates. The payments made by the plaintiffs were therefore not unauthorized payments for want of the architect's certificate. The contention that the certificates must be given by a professional architect is without merit.

6. The building contract provided that the second payment shall be made "when building is inclosed."

This payment was made before the tin roof was on, and before the windows or sashes, or doors, or door frames were in. The board roofing was on and the siding to the house. Both parties without objection introduced evidence as to what is meant in a building contract by the word "inclosed." Not only was there a conflict upon this point, but a majority of the witnesses supported the contention of plaintiffs that it meant roughly inclosed. Anderson, a builder of many years' experience, testified that "The meaning of that word as applied to frame buildings is when the outside sheathing is on, whether it is rustic, sheath lath, or tongued and grooved or shingles, and the roof boarding is on, the rough boarding is on the roof." Architects and builders testified to the same effect. Under this theory as to the meaning of the word "inclosed" in a building contract there is no doubt from the evidence but that the building was inclosed when the second payment was made.

The contention of the appellant that the second payment was prematurely made, because made before the building was "inclosed," cannot be sustained. The surety was therefore not released by reason of such payment.

7. The seventh and last question presented upon this appeal grows out of a provision of the surety bond providing that no liability shall attach to appellant for any default upon the part of the Building Company, unless the plaintiffs shall promptly and immediately upon knowledge thereof give written notice thereof to the appellant. On February 14, 1907, one of the plaintiffs learned that two carpenters had been suspended from working on the building, and on the same day went to the building and found no one at work. He then sought the architect, whom he succeeded in finding late in the day, and arranged with him to see the manager of the Building Company the next day. He went to the office of the manager of the Building Company in the morning and afternoon of the next day, but did not succeed in finding him. He tried again the next day, which was Saturday, to find the manager of the Building Company, but without success. Either on the 15th or 16th of February he advised with his attorney, and on Monday, the 18th day of February, by advice of their attorney, plaintiffs gave the required notice to appellant. The court interpreted the provision of the contract, requiring plaintiffs to promptly and immediately give written notice of default, to mean that such notice must be given within a reasonable time, and he left it to the jury to determine whether or not such notice had been given within a reasonable time. The jury answered in the affirmative.

The correctness of the interpretation of the contract as to giving notice of default is presented by various rulings, to wit, the order denying the motion for a nonsuit, the refusal to give an instruction to the effect that if plaintiffs had knowledge of the default on February 14th, and did not give notice until February 18th, the verdict should be for defendant, and the substitution of a question as to whether or not the notice was given within a reasonable time, in place of one framed in the language of the bond. If the requirement of the bond that notice of default be promptly and immediately given is satisfied by notice given within a reasonable time, the action of the court in these various rulings was correct.

That the interpretation placed upon the clause of the bond in question was correct is supported by the great weight of authority. That the requirement in surety bonds, and in insurance contracts, that notice of default or of less shall be given promptly and immediately means only that it must be given within a reasonable time, is sustained by the following cases: Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; Remington v. Fidelity & Deposit Co., 27 Wash. 429, 67 Pac. 989; Fidelity & Deposit Co. v. Courtney, 103 Fed. 599, 43 C. C. A. 331; People's Mut. Accident Ass'n v. Smith, 126 Pa. 317, 17 Atl. 605, 12 Am. St. Rep. 870; Van Buren v. Am. Surety Co., 137 Iowa, 490, 115 N. W. 24, 126 Am. St. Rep. 290; Kentzler v. Am. Mutual Ass'n, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934; Solomon v. Continental Fire Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707; Lyon v. Ry. Passenger Ass'n Co., 46 Iowa, 631; Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Ward v. Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514. The cases of Fidelity & Deposit Co. v. Courtney, 103 Fed. 599, 43 C. C. A. 331, and 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193, and Remington v. Fidelity & Deposit Co., 27 Wash. 429, 67 Pac. 989, both arose out of a clause in a surety bond, and are in all respects identical with the case at bar.

The judgment and order are affirmed

We concur: COOPER, P. J.; KERRIGAN, J.

14 Cal. App. 526

RIVERDALE MINING CO. v. WICKS.

(Civ. 712.)

(Court of Appeal, Third District, California. Nov. 19, 1910.)

1. Corporations (§ 499*)—Filing of Copy of Articles—Trial.

Though a corporation plaintiff did not comply with Civ. Code, § 299, providing that any corporation failing to file its articles of incorporation at the places indicated cannot maintain any action until after such filing, a stipulation, entered into before the allowance of the amendment to the plea, setting up such failure that plaintiff at some time pending the trial might introduce proof that a copy of the articles had been filed at the proper office cured the defect, as the stipulation related to the time it was entered into.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 499.*]

2. Judgment (§ 570*) — Conclusiveness — Judgment of Dismissal.

The dismissal of an action brought by a corporation on the ground that it had failed to file its articles of incorporation, as required by Civ. Code, § 299, does not operate as a bar to another action to determine the merits after removal of the disability by compliance with the statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1045; Dec. Dig. § 570.*]

3. Corporations (§ 499*)—Actions—Failure to File Articles of Incorporation.

The failure of a corporation to file a certified copy of its articles of incorporation, as required by Civ. Code, § 299, does not impose on the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 499.*]

4. Corporations (§ 513*) — Action—Failure to File Articles of Incorporation—Demurrer.

In an action by a corporation, the absence of an averment in the complaint that plaintiff had filed its articles of incorporation, as required by Civ. Code, § 299, does not render the complaint subject to demurrer.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.*]

5. Corporations (§ 513*)—Failure to File Copy of Articles—Pleading.

The failure of a corporation to file its articles of incorporation before commencing suit, being merely a matter in abatement, is waived unless affirmatively pleaded.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.*]

6. Pleading (§ 106*)—Pleas in Abatement.

Pleas in abatement are dilatory, have never been favored, and are to be strictly construed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 219; Dec. Dig. § 106.*]

7. Judgment (§ 780*)—Lien—Property Affected—Title of Trustee.

Where a husband placed community property in the hands of an agent for sale, and executed to the agent a deed signed by himself and wife, which was placed in escrow to await a prospective purchaser, and, on a sale being effected, the deed was delivered to the agent, who on the same day executed his own deed to the purchaser, the agent took the naked legal title only as agent or trustee, and under Code Civ. Proc. § 671, providing that a judgment shall be a lien on all the property of the judgment debtor owned by him at the time of the rendition of the judgment or such as may be thereafter acquired, the land was not subject to the lien of a judgment existing against the agent.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1343–1349; Dec. Dig. § 780.*]

8. Quieting Title (§ 43*)—Issues Raised by Pleading.

A husband placed community property in the hands of an agent for sale, and executed to such agent a deed signed by the husband and wife, which deed was placed in escrow to await a prospective purchaser. On a sale of the land being effected, the deed was delivered to the agent who on the same day executed his own deed to the purchaser, who thereafter conveyed to plaintiff. The consideration actually paid to the husband was less than that stated in the escrow deed, which fact was not communicated to the wife. The land was sold at execution sale under a judgment against the agent. *Held*, in an action by plaintiff against the execution purchaser, defendant could not maintain that plaintiff's title was invalid on account of the fraud practiced on the wife, where such issue was not presented by the pleadings.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 43.*]

9. Quieting Title (§ 43*)—Parties to Action.

Such issue could not be tendered, since the wife was not a party to the suit.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 43.*]

10. Husband and Wife (§ 267*)—Community Property—Fraud on Wife—Presumption.

Under Civ. Code, § 172, giving the husband management and control of community property, a husband having sold community property for an amount less than the consideration stated in the deed, executed by the wife, it must be presumed in an action between subsequent purchasers of the land to which the wife was not a party that the husband received an adequate consideration for the land notwithstanding the disparity between the amount actually received and that stated in the deed.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 267.*]

11. Trial (§ 37*)—Statement to Court—Effect.

Where, in such case, defendant stated to the trial court that the only question before the court was not whether the husband could pass the title without being joined in the deed by his wife, but whether the agreement between the husband, the agent, and the purchaser, was such that the agent acquired no title to which the judgment lien could attach, defendant was precluded from asserting that the fraud practiced on the wife invalidated plaintiff's title.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 37.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by the Riverdale Mining Company

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against Corine Wicks. From a judgment for plaintiff, defendant appeals. Affirmed.

L. N. Peter, for appellant. Sam Bell McKee and Arthur Tasheira, for respondent.

HART, J. This is a suit to quiet title to certain land situated in Plumas county. Plaintiff obtained judgment, from which the defendant has taken this appeal.

The evidence from which the court made its findings of fact is undisputed, and may be epitomized as follows: On and prior to the 4th day of October, 1907, one W. W. Kellogg was the owner of the property in controversy. On said 4th day of October, 1907, Kellogg and wife, by deed, conveyed said property to one Lloyd P. Cornell. Said deed was delivered to said Cornell on the day of its execution, and was recorded on the same day in the office of the county recorder of Plumas county at 20 minutes past 4 o'clock p. m. Immediately after the delivery of said deed to Cornell, and on the said 4th day of October, 1907, the latter executed a deed to one Augustin S. McDonald, conveying to the latter the property concerned here, and said deed so executed to said McDonald was filed for record in the office of the county recorder of Plumas county at 22 minutes past 4 o'clock p. m. on the said 4th day of October, 1907. "On the 7th day of October, 1907, Augustin S. McDonald and wife conveyed the property to plaintiff, the deed having been recorded in the office of the county recorder of Plumas county on October 9th, 1907, at 30 minutes past 9 o'clock a. m." It appears that at the time of the happening of the several transactions so involving the property in dispute referred to in the foregoing statement there existed against said Cornell and in favor of one C. E. Wright an unsatisfied judgment for the sum of $410.50, together with costs and interest, "said judgment having been recovered by Wright on the 9th day of December, 1903, and duly entered and docketed on that date. * * * On the 2d day of March, 1908, said judgment being still unsatisfied, an execution issued thereon was levied by the sheriff of Plumas county on the property described in the complaint, and on the 24th day of March, 1908, said property was sold at sheriff's sale to appellant, who paid therefor the sum of five hundred and sixty dollars, and on said date received from the sheriff a certificate of sale."

The plaintiff is a corporation, organized under the laws of California, and the first point urged against the validity of the judgment is that, having failed before the commencement of this action to file in the office of the county clerk of the county of Plumas a copy of the copy of its articles of incorporation, certified by the Secretary of State, as required by section 299 of the Civil Code, the plaintiff is not entitled to maintain this action. Said section reads, in part, as follows: "Any corporation failing to comply with the provisions of this section cannot maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such articles of incorporation and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation are filed at the places directed by the general law and this section." It appears from the record that the original answer contained nothing by way of averment with regard to the failure of the plaintiff to file a certified copy of the copy of its articles of incorporation in the office of the county clerk of Plumas county. On the day on which the cause was called for trial, the attorney for defendant applied to the court for permission to amend the answer so that he could interpose a special plea against plaintiff's right to maintain the action, and in support of said application stated that he had learned for the first time only a half an hour prior to the hour at which court was opened that plaintiff had omitted to comply with the provisions of section 299 of the Civil Code. Counsel for plaintiff objected to the amendment, and at the same time requested a continuance of the trial of the case for a reasonable time within which to enable his client to file a certified copy of the copy of its articles of incorporation. He stated that he had up to that time supposed that such copy had been filed in the clerk's office, and that the application of defendant for permission to amend the answer had taken him by surprise. Finally, the court allowed the amendment upon an understanding between the attorneys for both sides and the court that preferably to a postponement of the trial for that purpose the trial might be proceeded with, and that either during its progress the filing of the articles might be shown, or, if found necessary for that purpose, the case might be kept open after the conclusion of the taking of testimony addressed to the merits, so that proof, if available, might be introduced of plaintiff's compliance with the terms of said section. Defendant objected, at the times that it was offered, to all the testimony submitted in behalf of plaintiff on the ground that said plaintiff was not entitled to maintain the action for the reason stated, and the court overruled said objections, subject to a reversal of its rulings thereon should plaintiff, as it was agreed that it might do, fail to prove that a copy of the copy of its articles had been filed in the office of the county clerk. Agreeably to the said understanding or stipulation, plaintiff, before the case was closed, offered, and, over the objection of defendant, was allowed by the court, to prove that subsequently to the beginning of the trial it had complied with section 299 in the respect referred to. The contention of the defendant is that the filing of the articles under the indicated circumstances could not have the effect of curing plaintiff's incapacity to maintain the action at the time the court permitted the amendment to the answer so that it would include the plea challenging its right to do so. The defense against the incapacity of a plaintiff to maintain an action involves a mere dilatory plea —in other words, a plea in abatement going only to the disability of plaintiff to maintain the action until such disability is removed. The disability having been removed before the close of the case, the plaintiff was properly allowed, under the stipulation to that effect, to show its capacity to maintain the action. If the court had, after allowing this plea to be added to the answer, and before plaintiff had complied with the terms of the statute, sustained the plea, the effect of such ruling would have been to abate the action only, and even if a dismissal of the action necessarily followed from the mere allowance of such a plea, which we do not decide, we know of no reason why it would operate as a bar to another suit upon the merits after the removal of the disability. As is said in the case of California Savings & Loan Society v. Harris, 111 Cal. 133, 43 Pac. 525, "the failure to file this certified copy does not impose upon the corporation a loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property. A previous filing of the certified copy is not a fact essential to the cause of action, or of an element constituting the plaintiff's right of action; and the omission of such an averment in the complaint is not a ground of demurrer (South Yuba Water Co. v. Rosa, 80 Cal. 333 [22 Pac. 222]), or for the reversal of the judgment (Labory v. Orphan Asylum, 97 Cal. 270 [32 Pac. 231]), and consequently not a jurisdictional element in the suit. Nor does such failure afford to the other party any defense to the cause of action upon which a suit has been commenced, but is merely a special defense in the nature of a plea in abatement (Ontario State Bank v. Tibbits, 80 Cal. 68 [22 Pac. 66]), by which the right of the plaintiff to maintain the action is suspended until the statute is complied with, and is subject to the same rules of pleadings as are other pleas in abatement. Being matter merely in abatement, it is a defense which may be waived by the defendant, and which is waived by him unless it is affirmatively pleaded." See Labory v. Orphan Asylum, 97 Cal. 270, 32 Pac. 231; First National Bank of San Luis Obispo v. Henderson, 101 Cal. 307, 35 Pac. 899; Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 Pac. 426; Nicholson v. Auburn Gold Min. & Mill. Co., 6 Cal. App. 547, 92 Pac. 651; Reed & Co. v. Harshall, 12 Cal. App. 703, 108 Pac. 719, and cases therein cited.

But appellant here undertakes to differentiate the foregoing cases from the case at bar by the fact that, while in the cited cases a copy of the articles was not filed before the actions were instituted, they were nevertheless filed before the special plea was interposed, which, it is claimed, is not the case here. But under the circumstances of this case the plaintiff is to be considered as having complied with the requirements of the statute before the interposition of the special plea, since the court declared, before allowing the amendment to the answer, that said amendment would be allowed only upon the understanding and agreement between the parties that plaintiff might, before the case was finally submitted for decision, introduce proof, if it could, that it had filed a copy of the articles in the office of the county clerk. In the first instance, the defendant had presumptively waived any objection to plaintiff's right to maintain the action for the reason urged under the special plea, and the order permitting the amendment, so that the answer would embrace the special plea was one of grace and not of right. The court could have disallowed the amendment, and such ruling would have involved only the exercise of a discretion with which no reason for interference by a court of review could well have been suggested; for "pleas in abatement, or dilatory pleas, have never been favored, and are to be strictly construed." Cal. Sav. & L. Soc. v. Harris, supra; Tooms v. Randall, 3 Cal. 438; Larco v. Clements, 36 Cal. 132; Parmele Company v. Haas, 171 N. Y. 583, 64 N. E. 440. "The party pleading them relies on technical law to defeat the plaintiff's action, and is held to a technical exactness in his pleading." Thompson v. Lyon, 14 Cal. 39. The general rule is, it is true, that a copy of the articles of incorporation must be of record in the clerk's office at the time the plea is interposed, otherwise the plea is good. But in this case, as we have seen, the court, in the exercise of its discretion, allowed the amendment so that the special plea could be interposed upon the condition, agreed to by the defendant, that the plaintiff might at some time pending the trial, or before the formal submission of the case for decision was made, introduce proof that a copy of the articles was on file in the proper office, and it seems to us that when such proof was made, in accordance with said agreement, it related back to the time of the making of the agreement, which was before the plea was interposed. Under this view, it seems to us, the order allowing the amendment being upon the condition mentioned, and such condition having as agreed been complied with before the close of the trial, amounted to nothing less, in substantial effect, than a refusal by the court to allow said amendment. Or, if we view the proposition in the light of a rebuttal by competent testimony of the special plea, the result is the same. In short, the defendant, by agreeing to allow plaintiff to make proof of its compliance with the requirements of the statute, stipulated away the force of her special plea as effectually as if it had never been interposed—that is, such was the effect of the stipulation the moment competent proof was offered and received of the filing of the articles.

On the merits of the suit, it is contended by appellant that the judgment lien in favor of said Wright and against Cornell immediately attached to said property upon the execution of the deed by Kellogg to said Cornell. This contention, it is asserted, is supported by the provisions of section 671 of the Code of Civil Procedure, which reads: "From the time the judgment is docketed, it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county owned by him at the time or which he may afterwards acquire, until the lien ceases." Under the facts of the several transactions concerning the property in dispute, as they are revealed by the record, this contention cannot be maintained. These facts may be summarized as follows: In the year 1906, Senator Kellogg, then owner of the property, desired to dispose of the same, and with that object in view had an interview with Cornell. "I tried to induce Cornell to get some parties to buy the place outright," testified Kellogg, "or open it up for development. Mr. Cornell agreed that he would take the matter up, take the matter under consideration, and do the best he could. I then made a bargain with him that I would sell the place for $6,500 clear to me; that any commission, that anything he did making the sale or developing the mine, he must look to those parties for. We talked of giving a bond on the mine, which I refused, but I made out to him a deed of the whole property, and had my wife also sign the deed, stating the consideration. I then deposited that deed in the Plumas County Bank under certain written instructions." These instructions, which accompanied the deed in escrow, were to the effect that the witness would execute a deed, conveying said property free from all liens, incumbrances, etc., to Cornell or his assigns, provided that within one year from the date of said deed the sum of $6,500 was paid to witness. In accordance with this understanding with Kellogg, Cornell entered into negotiations with a Mr. McDonald, of Oakland, said negotiations resulting in an effort on the part of said McDonald to work and develop the property for mining purposes. This venture failed, and after the year within which Cornell was authorized to dispose of the property or otherwise handle it for Kellogg, as agreed, McDonald, through Cornell (several different extensions of time within which Cornell might be able to sell the place having been accorded to the last named by Kellogg), started negotiations for the purchase of said property. Kellogg testified that these latter negotiations were conducted by and between himself and McDonald, although Cornell was present certain parts of the time during which they were in progress. McDonald was unwilling to pay for the property the sum of $6,500, the price demanded by Kellogg, and, after considerable discussion, the latter agreed to reduce the amount of the consideration to the sum of $3,250. McDonald accepted the proposition as thus modified, and so bought the property. Thereupon Kellogg delivered the deed in escrow to Cornell, who, in turn, as already seen, immediately conveyed the property to McDonald, the grantor of plaintiff. The purchase price was paid by McDonald to Kellogg; Cornell claiming and receiving no part thereof. With regard to the reason which inspired the act of delivering the deed in escrow to Cornell, rather than executing a conveyance of the property direct to McDonald, Kellogg testified: "After I reduced the price of the place from $6,500 to $3,250, I knew in my own mind that my wife would not sign it. I wanted to get rid of it. Therefore I told Mr. McDonald, I says, 'That deed, Cornell's deed, let that deed from me to Cornell, and Cornell make you a deed right here to-day. It would be just as good as if I made a new deed. I don't believe I can give you what you want.' * * * I used Mr. Cornell as a sort of trustee for a few minutes just to convey that title." Cornell's testimony was substantially the same as that given by Kellogg. He declared that he never had any interest in the property in dispute, and that his part in the transaction culminating in the conveyance of the property to McDonald was only that of a trustee, in which capacity he acted for about 15 minutes. The court found that Cornell was never at any time "the owner in fee simple, or otherwise, of said property," etc., and, as before declared in effect, this finding, under the evidence of which we have presented a brief résumé, is impregnable against successful attack.

The proposition that a judgment lien can operate as a lien only on the interest of the judgment debtor whatever it may be is too obvious to require the citation of authorities in its support. Freeman on Judgments (4th Ed.) § 357; Black on Judgments (2d Ed.) §§ 420, 421. Cornell, it is clear, had absolutely no interest in the property in controversy. The original arrangement between him and Kellogg involved no more than the relation of principal and agent, or, at best, amounted to no more than a mere option by which Cornell was given the right to buy the property within the time stipulated in the instructions accompanying the deed in escrow. If it was an option, Cornell did not exercise his right thereunder. But the fact is the legal relation existing between Kellogg and Cornell as to the property was at all times only that of principal and agent. In the conveyance of the property to McDonald, it transpired that it was more convenient for Kellogg to use Cornell as an instrumentality or a trustee—a conduit, so to speak, through which that act might be consummated. Cornell first proposed that the property be bonded to him, but Kellogg refused to accede to that proposition and then suggested the deed in escrow, said deed to remain undelivered until Cornell either bought the property himself or it was sold to others, and finally the delivery of the deed to Cornell was not because Cornell had bought the property or had acquired any interest whatever in it, but for the sole reason, as suggested, that, under the circumstances, that was the most convenient way of conveying to McDonald, the actual purchaser. Cornell's part in the transaction was therefore as both he and Kellogg declared on the witness stand that of a mere trustee of Kellogg.

The case of Atkinson v. Hancock et al., 67 Iowa, 452, 25 N. W. 701, is very similar to the case at bar. There one Cummins, against whom a judgment lien subsisted, purchased certain town lots for one Slead. Cummins took the deed in his name and conveyed to Slead, who paid the purchase price to the grantor. It was claimed that the judgment lien against Cummins attached to said lots, but the Supreme Court of Iowa held against the contention, and said: "* * * But, if it be conceded that Cummins paid the purchase money to Harrison, and the deed was delivered to him, the fact remains that the money so paid belonged to Slead, and that the payment was made for the purpose of vesting the title to the lots in the latter. Cummins was, it is true, vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit and held the legal title in trust for Slead. Under the circumstances, Cummins had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value." See Blaney v. Hanks, 14 Iowa, 401; Cresswell v. McCaig, 11 Neb. 222, 9 N. W. 52; Fleming v. Wilson, 92 Minn. 303, 100 N. W. 4; Dalrymple v. Security Loan & Trust Co., 11 N. D. 65, 88 N. W. 1033; Meier v. Kelly, 22 Or. 136, 29 Pac. 267. In Dalrymple v. Security Loan & Trust Co., supra, it is said: "* * * There must be an interest to which the lien can attach. The law is well settled that the lien of a judgment does not attach to a naked title, but only to the judgment debtor's interest in the real estate; and if he has no interest, though possessing the naked title, then no lien attaches." In Hays v. Reger, 102 Ind. 524, 1 N. E. 386, it is said: "The interest which the lien of a judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show (there being no intervening fraud) that the apparent ownership of another is or was not real; and, when the judgment debtor has no other interest except the naked legal title, the lien of the judgment does not attach." See Lounsbury v. Purdy, 11 Barb. (N. Y.) 490; White v. Carpenter, 2 Paige (N. Y.) 217; Keirsted v. Avery, 4 Paige (N. Y.) 9; Brown v. Pierce, 7 Wall. 205, 19 L. Ed. 134; Hydraulic Co. v. Loughry, 72 Ind. 562; Moyer v. Hinman, 17 Barb. (N. Y.) 137; Freeman on Judgments, §§ 355, 356; Black on Judgments, 421. The cases of Eby v. Foster, 61 Cal. 282, 286, Hibberd v. Smith, 50 Cal. 511, and First National Bank v. Hays, 7 Idaho, 139, 61 Pac. 287, cited by appellant, are not in point. Those cases hold that a judgment lien attaches to property during the smallest interval of time during which the real interest may be vested in the judgment debtor, while the judgment, having been docketed, subsists. No one has ever controverted this proposition, and it is not disputed here. But the proposition that the judgment debtor must have a real interest in the property before the judgment lien can attach thereto is equally as incontrovertible. As we have already seen, Cornell had no real interest in the property involved here, having acted in the transaction with relation thereto simply and solely as a trustee, and, as such, never having been invested with anything higher than the mere naked legal title.

Counsel for appellant declares that the "plaintiff, after participating in a fraud upon a third person in reference to the property in controversy, seeks to hold advantage of and at the same time obtain relief in equity from the result of its own fraud." This declaration results from the testimony of Kellogg to the effect that in conveying the property to McDonald the grantor of the plaintiff he used Cornell as a trustee for that purpose in order to prevent his wife, Mrs. Kellogg, from learning of the reduction of the purchase price of the property from $6,500 to $3,250, the insinuation being that Mrs. Kellogg was thus defrauded of her rights, and that, therefore, the appellant has thus placed itself in a position wherein it cannot ask relief from a court of equity consistently with the principles practiced in a court of conscience. In the first place, it is to be said, in reply to this contention, that no such issue is submitted by the pleadings, nor was there any such issue tried and adjudicated by the trial court. Secondly. It is to be observed that it is plainly manifest that no such issue as to Mrs. Kellogg could have been appropriately tendered in this case, for Mrs. Kellogg was and is not a party to the suit, and has not intervened to claim any rights as to the property in controversy. Thirdly. It is to be said that Kellogg himself was vested with plenary power to sell or dispose of the property, even assuming it to have belonged to the community, so long as he did not dispose of it by gift (section 172, Civ. Code), and that, having sold it, it is to be assumed that he received in return for it an adequate consideration, notwithstanding the fact that he accepted a much less sum for it than he had originally asked. Besides, counsel for respondent expressly and correctly declared to the court below during the trial that the only question before the court was, not whether Mr. Kellogg could pass the title without being joined in the deed of conveyance by his wife, but whether "the understanding and agreement between Mr. McDonald and Mr. Cornell and Mr. Kellogg at that time were such that Mr. Cornell had no title upon which this lien could operate and have effect." Thus it is to be observed that, if there had been anything in the pleadings which would have furnished a handle for erroneously lugging into the trial the question whether Mrs. Kellogg had been defrauded through the acts of her husband, McDonald, and Cornell, such issue would have been expressly eliminated by the statement of appellant's counsel himself.

Appellant has not disclosed to us any reason why the judgment should not stand, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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14 Cal. App. 538

KRIEGER v. FEENY et al. (Civ. 731.)

(Court of Appeal, Third District, California. Nov. 19, 1910.)

1. Sales (§ 353*)—Action by Assignee—Complaint—Sufficiency.

A complaint, alleging that defendants as partners became indebted in specified sums to plaintiff's assignors for merchandise furnished defendants at their special request; that before suit the assignors assigned the claims and their right, title, and interest therein to plaintiff, who remains the owner; that though requested defendants have not paid any part of the amounts due; and that such amounts are owing and unpaid—is sufficient as against a general demurrer, sustaining a judgment for the reasonable value of the merchandise, though no express promise to pay a stipulated sum for the merchandise is stated.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 353.*]

2. Pleading (§ 8*) — Account—Conclusion.

In an action on account, an allegation that defendant "has not paid any part of the amount due as aforesaid" is not bad as being a legal conclusion and is a sufficient averment of breach of the contract or of nonpayment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28; Dec. Dig. § 8.*]

3. Sales (§ 33*)—Implied Agreements.

The furnishing of merchandise by plaintiff's assignors and their acceptance by defendants constituted sufficient consideration to support defendant's promise to pay therefor, implied by law, and to render them liable thereon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 60; Dec. Dig. § 33.*]

4. Contracts (§ 4*)—Consideration.

The performance of services by plaintiff's assignors and their acceptance by defendants constituted sufficient consideration to support defendants' promise to pay therefor, implied by law, and to render them liable thereon.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 4–6; Dec. Dig. § 4.*]

5. Assignments (§ 131*) — Actions by Assignee—Pleading—Sufficiency.

A complaint on an account by the assignee thereof sufficiently shows his ownership at the time of suing as against a general demurrer, where it is fairly inferable from the allegations that plaintiff claimed ownership at that time.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 220–226; Dec. Dig. § 131.*]

6. Pleading (§ 204*) — Demurrer — Several Counts.

A demurrer to a complaint containing several counts is properly overruled if any count states a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486–490; Dec. Dig. § 204.*]

7. Appeal and Error (§ 1040*)—Harmless Error—Pleading.

A judgment for plaintiff will not be reversed for error in overruling a demurrer for uncertainty in the complaint, unless some substantial right of defendant has been affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089–4105; Dec. Dig. § 1040.*]

Appeal from the Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Philip Krieger against James Feeny and others. Judgment for plaintiff, and defendants, Feeny and Dyas appeal. Affirmed.

George Clark and W. A. Anderson, for appellants. Arthur H. McCurdy, for respondent.

HART, J. This is an action for the recovery of a judgment on a number of claims assigned to plaintiff by the owners of said claims. The complaint alleges that Feeny, Dyas, and Barnes are copartners, engaged as such in carrying on and conducting the hotel and saloon business in the city of Sacramento, and that the several claims upon which this action is brought are the result of goods and merchandise furnished and money loaned to and services performed for the defendants by the several parties assigning said claims to plaintiff. There are 12 of these claims, each separately pleaded in the form of a common count, and they aggregate in amount the sum of $1,558.68. The court gave plaintiff judgment for the sum of $1,096.74, having found against some of the claims. This appeal is by Feeny and Dyas from said judgment, on the judgment roll alone.

A demurrer, general and special, was interposed to the complaint by the defendants Feeny and Dyas; the defendant Barnes making no appearance. The demurrer was overruled, and Feeny and Dyas filed an answer, denying the material allegations of the complaint, and, by way of a "further and separate defense," averring certain facts which amount to a denial that they and Barnes ever constituted themselves partners for the purpose of carrying on the hotel and saloon business in the city of Sacramento. The principal point urged is that the complaint is bad for want of facts. The general demurrer is addressed to the entire complaint and not to any particular count therein set forth. The argument is that in none of the counts is there an allegation "that defendants agreed to pay any one any sum of money whatever"; that there is nothing in the allegations to show that plaintiff's assignors ever furnished goods, services, etc., to defendants at their request; that there is no allegation of any consideration supporting any promise to pay for any merchandise, services, etc.; that there is no direct averment of ownership in plaintiff of the various claims at the time of the institution of the action; that the allegations in all the several causes of action at best involve only legal conclusions. The court's findings follow the averments of the complaint; that is, without directly finding the facts as to each count, the court finds that the material allegations of certain causes of action set out in the complaint (designating said causes by number) are sustained by the testimony or not so sustained, according as the court found the facts. As against the force of a general demurrer, the facts pleaded as to each of the counts declared upon will stand as a sufficient statement of a cause of action.

The averments of the second count or cause of action may be taken as a sample of those of all the other pleaded counts, with the exception of the first, and said averments, following a paragraph reaverring in general language paragraph 1 as to the partnership of defendants, read as follows: "(2) That, within two years last past in the county of Sacramento, state of California, before the filing of this action, defendants became indebted to McCaw & Son, a copartnership, for and on account of wood and coal furnished defendants by McCaw & Son at the special instance and request of defendants, in the sum of $35. (3) That, before the filing of this action, said McCaw & Son sold and assigned said claim to plaintiff, and all their right, title and interest in and to said claim and account against defendants arising out of said claim as aforesaid, and plaintiff ever since has been and now is the owner and holder thereof. (4) That said defendants, although often requested, have not paid any part of the amount due as aforesaid, and there is now due, owing, and unpaid from the said defendants to the said plaintiff the sum of $35."

Thus it will be noticed that the complaint alleges the indebtedness to the assignors of plaintiff, an assignment of the claim to plaintiff, and that the plaintiff "ever since has been and now is the holder and owner thereof," and that no part of said claim has been paid. There can arise no uncertainty as to the meaning of these averments, and, while they do not involve the statement of an express promise to pay a stipulated sum for the merchandise furnished, they are nevertheless sufficient to entitle plaintiff to a judgment for whatever the evidence may disclose that the merchandise is reasonably worth. Manning v. Dallas, 73 Cal. 420, 15 Pac. 34; Preston v. Central Cal., etc., Irr. Co., 11 Cal. App. 197, 104 Pac. 462. Each count alleges that said defendant "has not paid any part of the amount due as aforesaid," and this is not a legal conclusion, but a sufficient averment of the breach of the contract or of nonpayment. Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891; Knox v. Buckman Contracting Co., 139 Cal. 598, 73 Pac. 428; Richards v. Lakeview Canal Co., 115 Cal. 642, 47 Pac. 683; Preston v. Cal. Irr., etc., Co., supra. Indeed, the complaint in the case at bar, as to all the causes of action except the first, is no less inartificial in any particular than those approved, as against the force of a general demurrer, in McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761, and Aydelotte v. Billing, 8 Cal. App. 673, 97 Pac. 698. In the first-mentioned case the complaint alleged, as the basis of plaintiff's claim, "that William A. Holcomb was at the time of his death indebted to the plaintiff in the sum of $7,500 as a balance due to plaintiff for nursing, boarding, lodging, counseling, advising, and taking care of the said William A. Holcomb almost continuously from the 29th day of November, 1870, down to the 4th day of November, 1895, in the city and county of San Francisco, state of California." The particular criticism urged against said complaint was that it did not aver that the services of the plaintiff were rendered at the request of the deceased, and that therefore it did not state a cause of action. Holding against that contention, the Supreme Court said: "Under the system of pleading at the common law, it was requisite that the declaration in an action in assumpsit upon an executed consideration should show that the consideration for the promise by the defendant was sufficient to support his promise, and it was sufficient to aver that the consideration was executed at his request; but this averment was unnecessary when the consideration as well as the promise were implied from the nature of the transaction set forth in the declaration—as an action for goods sold and delivered to the defendant, or for money loaned to him by the plaintiff. Fisher v. Pyne, 1 Man. & G. 265, note. Under our system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged."

In the case at bar, the furnishing of the merchandise and the performance of the services by the several assignors of plaintiff and the acceptance from them of such merchandise and services by the defendants constituted a sufficient consideration to support the promise for compensation therefor which is implied in law, and to render them liable therefor. McFarland v. Holcomb, supra.

But it is claimed that the first cause of action sought to be stated in the complaint is defective in that, while it discloses the assignment of the claim therein pleaded by the assignor to plaintiff, it does not show that plaintiff was the owner thereof at the time of the filing of the complaint. In Irish v. Sunderhaus, 122 Cal. 308, 54 Pac. 1113, which was an action brought by the plaintiff as assignee of certain claims of creditors, the complaint, after pleading the debt of each creditor, and after an averment that the debt was still due and unpaid, alleged: "That said claim was duly assigned to this plaintiff before the commencement of this action." No other averment appeared in the complaint from which it appeared that the plaintiff was the owner of said claim at the time the suit was filed. It was contended there, as it is here, that the complaint failed to state a cause of action by reason of the omission to aver that plaintiff, when he filed the complaint, was still the owner of the assigned claim. The Supreme Court held that, while the complaint would fall before a special demurrer, it would stand as against a general demurrer. There is to be gathered from the complaint here a fair implication that plaintiff, in his first-stated cause of action, claimed ownership of the claim at the time of the commencement of the action, and, as stated, that is sufficient as against a general demurrer. See Amestoy v. Electric, etc., Co., 95 Cal. 311, 30 Pac. 550, and Alexander v. McDow, 108 Cal. 25, 41 Pac. 24.

But, even if we might well concede that the first cause of action which plaintiff attempts to state is fatally defective for want of averment of present ownership of the claim therein set forth, still the point could be of no avail to appellants since the complaint, as a whole, states a cause of action, and both the general and special demurrers are aimed at the complaint as a whole, and not specifically directed to any particular one or more of the several counts set out. It is well settled that, where a complaint sets forth a number of causes of action in separate counts, a general demurrer, interposed to the complaint as a whole, will not be sustained if any single one of such counts states facts sufficient to constitute a cause of action. Pfister v. Wade, 69 Cal. 136, 10 Pac. 369. If any one of the counts is bad for want of sufficient facts, the demurrer for insufficient facts must, in order to achieve its purpose, be specifically aimed at such count. And, if there is any uncertainty in the averments of any one or more of the several causes of action set out, the special demurrer should have particularized such causes of action and pointed out wherein they were subject to the criticism of uncertainty. But the only point which appears to be urged under the special demurrer, apart from the charge of misjoinder of parties defendant and that of the incapacity of the plaintiff to maintain this action, is that it cannot be ascertained from the complaint what "relief plaintiff demands therein." We perceive absolutely no difficulty in readily determining, from the averments of the complaint and the prayer, what the plaintiff is seeking to attain through this action. There is certainly no uncertainty in the complaint in that regard. Indeed, the defendants themselves seem to have experienced no such trouble in comprehending the averments of the complaint and the purpose of the action as prevented them from submitting by their answer a clear-cut issue on their alleged indebtedness to plaintiff upon the several assigned claims set forth in the complaint. Uncertainty in a pleading must be such as to work a substantial injury or disadvantage to the defendant. The averments of a pleading may be cast in such form of language as to throw about them some degree of uncertainty, using that term in its technical sense, yet if, notwithstanding such uncertainty, the opposing party sufficiently comprehends the meaning of the averments and the intention of the pleader to enable him to reply to them and so tender a clear and direct issue upon the pleaded facts, then the order overruling a demurrer for uncertainty does not involve prejudicial error. In other words, "when a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed upon the ground of uncertainty in the complaint, it must appear that some substantial right of the defendant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint. Rooney v. Gray Bros., 145 Cal. 753, 79 Pac. 523; Alexander v. Central L. & M. Co., 104 Cal. 532 et seq., 38 Pac. 410; Bank of Lemoore v. Fulgham, 151 Cal. 234-237, 90 Pac. 936; Peterson Bros. v. Mineral King, etc., 140 Cal. 624-627, 74 Pac. 162; Huffner v. Sawday, 153 Cal. 86-89, 94 Pac. 424.

As stated, it does not appear that the defendants suffered in the slightest degree from the order overruling the special demurrer. The issue upon the question of the indebtedness of defendants to plaintiff upon the pleaded claims was squarely and clearly tendered and tried.

There is obviously nothing in the suggestion that there is a misjoinder of parties defendant, and that the plaintiff is without capacity to maintain this action.

The judgment is affirmed.

We concur: CHIPMAN, P. J; BURNETT, J.

14 Cal. App. 685

WASHINGTON v. PACIFIC ELECTRIC RY. CO. (Civ. 835.)

(Court of Appeal, Second District, California. Nov. 28, 1910. Rehearing Denied by Supreme Court Jan. 27, 1911.)

1. DAMAGES (§ 186*)—PERSONAL INJURIES—LOSS OF EARNING POWER.

In a personal injury action by a physician, that there was no evidence as to the amount that she earned or was earning in her practice would not preclude her recovery for loss of earning power where there was evidence of several witnesses that she had attended them professionally, and that she had practiced her profession for a number of years prior to the date of injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 509; Dec. Dig. § 186.*]

2. APPEAL AND ERROR (§ 932*)—PRESUMPTIONS.

In a personal injury action, wherein the amount of $25,600 damages were sought, including $600 for loss of earning power, and the court charged that the amount of damages awarded should not exceed the amount sued for, and there was no claim in the complaint for more than $600 for loss of earning capacity, it will be assumed that in estimating the damages the jury did not allow more than that sum on such account.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 932.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Lucy L. Washington against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Gibson, Trask, Dunn & Crutcher (Robert C. Gortner, of counsel), for appellant. E. P. Drake and Jones & Drake, for respondent.

JAMES, J. Plaintiff was awarded a judgment for damages in the superior court for personal injuries alleged to have been suffered by her through the negligence of defendant. The amount which she was found entitled to recover was the sum of $4,250.

It was admitted by the answer that the collision between the car upon which plaintiff was riding at the time she was injured and a car of the Los Angeles Railway Company was caused by the negligence of defendant. The issues, therefore, left for the jury to determine were: (1) What injuries, if any, were sustained by the plaintiff; and, (2) what amount of money would justly compensate her therefor. Defendant presented to the trial court a motion for a new trial and appealed from the order denying such motion, and also from the judgment entered against it. The giving of certain instructions, and the refusal of the court to give others offered by the defendant, are assigned as errors.

It was alleged in the complaint that at the time she suffered the injuries complained of the plaintiff was a practicing physician, that by reason of her injuries she had been unable to follow her profession since the accident, and in that respect was damaged in the sum of $600. Damages in all were claimed in the complaint in the sum of $25,600. The evidence showed that the plaintiff was a woman of the age of 67 years, that her business was that of a physician, and that she had practiced her profession for a number of years prior to the date when she sustained the injuries complained of. There was evidence of several witnesses that she attended them at different times professionally. There was no evidence as to the amount of money that plaintiff had earned or was earning in her practice as a physician, and upon this state of facts defendant offered an instruction by which it was sought to have the jury advised that they could not take into account the loss of earning power, if any had been suffered by the plaintiff, in estimating the amount of damages to be awarded. In this behalf it is insisted that without proof of some specific or particular sum of money which had been or was at the time of the accident being earned by the plaintiff no recovery could be had on this account. A number of decisions of the courts of other states are cited in support of appellant's view on this proposition, but the question seems to have been very definitely determined adversely to appellant's contention by the Supreme Court of this state. In this case of Storrs v. Los Angeles Traction Co., 134 Cal. 93, 66 Pac. 72, the point insisted upon by appellant here was there made. In its discussion of that matter the Supreme Court said: "The objection of the appellant that, as there was no specific testimony that the plaintiff was earning anything at the time of the injury, or of the amount that he was capable of earning, any verdict of the jury under this instruction would be merely conjecture, is untenable. His right to recover does not depend upon the fact that at the time of the injury he was actually employed in the service of another, nor does the amount of his recovery depend upon the amount of wages which he was receiving. The fact that he was not in the receipt of any salary or wages, but was attending to his own business, does not deprive him of right to compensation for the loss of his earning capacity, since it is what he was capable of earning, rather than what he was actually earning, that was to be considered by the jury. It may be conceded that, in the absence of all evidence tending in any respect to show an impairment of his earning capacity, the jury would not have been authorized to include any compensation therefor in their verdict, but it does not follow that it was necessary that there should be direct or specific testimony that he was in the actual receipt of wages, or capable of earning a specific sum in any particu-

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lar employment." This decision was followed by this court in the case of Evarts v. Santa Barbara Consolidated Ry. Co., 3 Cal. App. 713, 86 Pac. 830. In that case, like the one here, the plaintiff was a physician, and there was an absence of testimony showing what amount of money he had been or was earning in the practice of his profession at the time he sustained the injuries for which he recovered damages. This court there said: "In this case there was not presented to the jury the value of the services of the deceased to his patients, or the amount of his earnings, yet there was evidence that he was a regular practicing physician, that he possessed a number of patients, some of whom he was attending at the time of his injury, and that he was a strong man in the prime of life, from which facts alone the jury would be authorized to give substantial damages." Upon similar evidence was the issue presented to the jury as to whether or not there had been in this case an impairment of the earning capacity of the plaintiff.

Complaint is made because the court did not instruct the jury in terms that the amount for which recovery could be had because of the loss of earning capacity was limited to the sum of $600, as alleged in the complaint. It is true that the jury were not so specifically instructed, but in several of the instructions of the court it was stated that the amount of damages awarded should not exceed the amount sued for. The jury had the complaint of plaintiff before it, and in that complaint there was no claim for any greater amount of damages on account of loss of earning capacity than the sum of $600. It must therefore be assumed that in estimating the total amount of damages to be allowed the jury took into consideration the claim made by the plaintiff, and did in fact allow no more than that sum on such account.

What is said upon the points discussed disposes of other alleged errors.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 683

SERPIGLIO v. DOWNING et al. (Civ. 795.)

(Court of Appeal, Second District, California. Nov. 28, 1910.)

Appeal and Error (§ 977*)—Review—Discretion of Court—Rulings on Motion for New Trial.

The action of the trial court in granting or denying a motion for a new trial will not be disturbed on appeal, unless it appears that there has been an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action by John Serpiglio, an infant, by D. Serpiglio, his guardian, against H. C. Downing and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Chas. Atkinson, for appellant. Haas, Garrett & Dunnigan, for respondents.

SHAW, J. Action for the recovery of damages alleged to have been sustained by plaintiff on account of the negligence of defendants.

The appeal is from a judgment in favor of defendants and an order of court denying plaintiff's motion for a new trial. The sole ground upon which the motion for a new trial was made was newly discovered evidence, which plaintiff could not with reasonable diligence have discovered and produced at the trial. The record discloses that at the hearing of the motion one affidavit was presented in support thereof, but the evidence upon which the court made its findings is not brought up for examination. The action of the trial court in granting or denying a motion for a new trial is so largely a matter in the court's discretion that its rulings should not be disturbed, save and except in those cases where it is made to affirmatively appear that there has been an abuse of such discretion. In the absence of the evidence introduced at the trial, we cannot say that the court erred in denying the motion; indeed, the material facts averred in the affidavit are not necessarily inconsistent with the findings of the court. The action was based upon the theory that defendants were the owners of and engaged in the operation of a printing plant, from which was issued a newspaper known as the "San Pedro Tribune"; that plaintiff, who was a minor nine years of age, was in the employ of defendants, and while so employed was directed to ink one of the printing presses, in the performance of which work his hand was crushed; that by reason of his lack of appreciation of the dangerous character of the work, due to his tender years, defendants were guilty of negligence in directing plaintiff to engage in work the dangerous nature of which was unknown to him and known to defendants.

In his argument on the appeal from the judgment counsel for appellant lays much stress upon the alleged fact that the answer of defendants, as well as the findings, disclose the relation of a partnership existing between defendants. Conceding this to be true, we are unable to perceive how such fact can benefit appellant. It appears from the complaint and findings that the defendants, who with a number of others, including one Z. W. Craig, were the owners of a paper and printing plant, had let the possession thereof to the latter, and "that the said Z. W. Craig was in the sole management, possession, custody, and control of said printing plant and said newspaper." Conceding, further, that we should construe this finding as establishing the fact that Craig was operating the plant merely as the agent of defendants (which interpretation would be contrary to the rule that findings should be so construed, if possible, as to support the judgment based thereon), we are met with the finding "that it is not true that by reason of any act, or neglect, or carelessness, or default, or conduct on the part of said defendants, or either or any of them, or their agents or servants, or employés, or any of them (plaintiff) was injured or sustained injury, or sustained damages in any sum or in any manner whatsoever."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon this record we are unable to find any merit in either appeal, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

14 Cal. App. 689

LAW CREDIT CO. v. PROVIDENT MUT. BUILDING-LOAN ASS'N. (Civ. 861.)

(Court of Appeal, Second District, California. Nov. 28, 1910. Rehearing Denied by Supreme Court. Jan. 27, 1911.)

Building and Loan Associations (§ 14*)—Maturity Reserve Fund — Rights of Shareholders.

The by-laws of a building and loan association provided for a maturity reserve fund of 2 per cent. of the matured value of all installment shares to be taken from the first payment made, and that withdrawing members should be entitled to a certificate showing the amount of such reserve, and might thereafter subscribe for stock and be credited upon the dues with the amount of such certificate. *Held*, that the provision applied to all contracts for purchase of stock, and such certificate was available only as a credit in case he desired to take out new shares, and his assignee thereof could not recover thereon against the association, though at the time the certificate was issued Civ. Code, §§ 633 to 648a, were in force, having been enacted after the shares were purchased, providing that such association could only charge an entrance or withdrawal fee of not exceeding $1 on each share and a transfer fee not exceeding 10 cents on each share, and the by-laws embraced no provision for retention of the 2 per cent. reserve fund.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 14.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Law Credit Company against the Provident Mutual Building-Loan Association. Judgment for defendant, and plaintiff appeals. Affirmed.

Tanner, Taft & Odell, for appellant. Milton K. Young, for respondent.

ALLEN, P. J. Plaintiff and defendant were found by the court both to be corporations, the latter organized under the laws of California as a building and loan association; that one Wadleigh, plaintiff's assignor, was the secretary of the defendant corporation from its incorporation until the 19th of June, 1905; that prior to 1900 various persons had become members of said building and loan association, and while Wadleigh was secretary they desired to surrender their stock and accordingly delivered the same to Wadleigh, who thereafter made payments thereon of his own means, but carried the same on the books of the corporation in the names of the members. Wadleigh thereafter surrendered the stock so assigned to him and received the amount thereof, less $2 per share retained by the corporation under its by-laws as a maturity reserve fund, by which transaction he profited to the extent of $12,000. Under the by-laws of the association, it was stipulated that withdrawing members were entitled to a certificate showing the amount of this maturity reserve fund, and, if they were so advised, might thereafter subscribe for stock and be credited upon the dues with the amount of such certificate. Thereafter Wadleigh made application to retain his membership in the corporation and mature his stock and returned said maturity reserve certificates, together with $200 in cash, the same being received by the association as five months' advanced dues upon the new subscription, and in 1908 received back from the association the $200 paid and a maturity certificate as follows: "This certifies that G. H. Wadleigh of Los Angeles, county of Los Angeles, state of California, has paid into the maturity reserve fund of this association, the sum of one thousand dollars, on five hundred shares, stock of this association, and that he is entitled to a credit of one thousand dollars on taking a like number of shares and paying one month's dues thereon, and surrendering this receipt. This receipt is transferable." Afterwards Wadleigh assigned this certificate to plaintiff, who brings suit thereon.

In 1907 sections 633 to 648a, Civ. Code, went into effect, which provide that such loan associations should only have power by their by-laws to charge an entrance or withdrawal fee of not exceeding $1.00 on each share, and a transfer fee not exceeding 10 cents on each share; that no other fee, charge, or deduction shall be made, or permitted to be made, against any shareholder, or against his shares; that, on the expiration of the notice required, the shareholder shall be entitled to receive the full amount paid upon the stock or investment certificate, exclusive of entrance or withdrawal fee, together with a proportion of the profits, and so forth. Under these facts and under the law, the court found that plaintiff as the assignor of Wadleigh was not entitled to recover a judgment for the amount of the certificate and interest, and from this judgment plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is insisted by appellant that on the findings of fact judgment should have been entered for plaintiff as prayed for in the complaint, and that said judgment for defendant is not supported by the findings. The precise questions involved upon this appeal were presented to the trial court on a motion to vacate the judgment and the entry of a judgment in favor of plaintiff. There is contained in the record an opinion of the trial judge in denying such motion, which upon examination seems to cover all of the points involved and to state concisely and clearly the reason why the judgment is supported by such findings. This opinion, which we adopt as the decision of this court, is as follows: "Plaintiff in this action moves to vacate the judgment entered herein in favor of defendant, on the ground that the findings of fact do not support the judgment, but that upon said findings of fact a judgment should be entered in favor of plaintiff. If it were to be conceded that the receipt issued on the 25th of February, 1908, to plaintiff, wherein it is recited that plaintiff has paid into the maturity reserve fund of defendant corporation the sum of one thousand dollars, is conclusive against any right in defendant to show the entire transaction which resulted in the issuance of its receipt, then the motion is well taken. The plaintiff's assignor, G. H. Wadleigh, however, had been an officer of defendant association and was familiar with the entire transaction, which led up to the issuance of the receipt in question, and he was also familiar with the by-laws of the association and their various provisions at all times prior to the date of the receipt. The receipt was finally issued upon account of certain stock transactions had with the association by Wadleigh and partially by the assignors of Wadleigh. Wadleigh acquired stock of the association by assignment from holders thereof, and he, in turn, surrendered this stock, finally receiving the receipt, which upon its face recites that he has paid the sum of $1,000 on 500 shares of stock of the association, and that he is entitled to a credit of $1,000 on taking a like number of shares and paying one month's dues thereon, and surrendering the receipt. The $1,000 mentioned in the receipt was a part of the maturity reserve fund, which, under the by-laws of the association as they stood at the time of the issuance of the original stock acquired by Wadleigh, was to be retained by the association and was available only to be used as a credit on the purchase of new or additional shares. All contracts for the purchase of stock made at the time the original stock surrendered by Wadleigh was acquired were impressed with the condition declared in the by-laws that 'the maturity reserve fund shall consist of an amount equal to 2 per cent. of the matured value of all installment shares, and is taken from the first payment made. A member having paid this, and who is afterwards compelled to withdraw, shall be allowed to renew his membership and mature his stock, his new share being credited with the amount so paid.' Under this provision the association had the right to retain the 2 per cent. mentioned, which was only available for use by the surrendering stockholder as a credit upon new or other shares of stock taken out by him. I do not think that the fact that the receipt was issued at a time when the by-laws were without such a provision, and the statute of the state made it illegal for such a deduction to be made on account of a maturity reserve fund, affects at all the question involved in this case. The condition made by the by-laws at the time the subscription for stock was taken became a part of the contract from which Wadleigh, or his assignors, had they continued as holders of stock, have no escape. If the plaintiff here has the right to demand and receive $1,000, which appears to be a credit available to him, then there is no reason at all why each and every subscriber for stock, who took out shares during the time that the by-laws provided for the withholding of the percentum on account of maturity reserve fund, has not the right to make and enforce a similar claim. This I do not believe they are entitled to do. The motion for a different judgment to be entered will be denied."

Judgment affirmed.

We concur: SHAW, J.; JAMES, J.

14 Cal. App. 696

PEOPLE v. KOSTA. (Cr. 285.)

(Court of Appeal, First District, California. Nov. 30, 1910.)

1. Criminal Law (§ 507*)—Accomplices of Defendant.

Because certain witnesses were jointly indicted with accused does not necessarily require them to be considered accomplices as against the state at every stage of the case, whether they are so in fact or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. § 507.*]

2. Criminal Law (§ 507*)—Accomplices—Admission of Evidence.

The filing of an information against several defendants and its subsequent dismissal as against one for want of evidence does not establish for the purposes of the trial of the remaining defendants that the defendant dismissed was an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1096; Dec. Dig. § 507.*]

3. Criminal Law (§ 780*)—Trial—Instructions—Accomplice.

An instruction that an accomplice is one who willfully and knowingly aids, encourages, or assists another in the commission of the crime is not objectionable because the disjunctive conjunction was used, in view of the use of the qualifying words "willfully and knowingly."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859–1863; Dec. Dig. § 780.*]

4. Criminal Law (§ 1172*)—Appeal—Prejudice.

Where accused was prosecuted as a principal, an instruction defining accomplices which was faulty only in that it required too high a degree of proof on the part of the people was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3163; Dec. Dig. § 1172.*]

5. Criminal Law (§ 720*)—Argument of Prosecuting Attorney—Proof.

A district attorney was not guilty of misconduct in his argument where he did not make any statement of fact not fairly deducible from the evidence, though his reasoning might have been faulty or his deductions illogical.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

George Kosta was convicted of arson, and he appeals. Affirmed.

Geo. B. Keane and J. K. Ross, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

HALL, J. Defendant, together with four other persons, was charged by information with the crime of arson. Upon his trial defendant Kosta was found guilty, and in due time appealed to this court from the judgment and order denying his motion for a new trial.

At the trial of defendant the four persons jointly charged with him were witnesses for the prosecution. Two of these witnesses were undoubtedly accomplices of defendant, and gave ample evidence to justify the conviction of defendant, provided it was sufficiently corroborated by other evidence, as required by section 1111 of the Penal Code. The charge as to the other two defendants, Giannetos and Cochomihos, was dismissed by the court, upon motion of the district attorney, upon the ground that the evidence against them was insufficient to justify a trial, and they gave evidence for the prosecution. The evidence which they gave in itself, and without the aid of the testimony of the other two defendants, tends to connect appellant with the commission of the offense.

It is now contended that, because these witnesses have been jointly charged with defendant, they must be conclusively presumed to be accomplices of appellant, as against the state, at every stage of the case, whether so in fact or not. The only case cited in support of this contention is Commonwealth v. Desmond, 5 Gray (Mass.) 80, and it does not support the contention. It only decides that where the defendant argues that a given witness is an accomplice of the defendant, and the district attorney in his reply assumes and claims that such witness is such accomplice, and that his testimony was so corroborated as to make it the duty of the jury to convict the defendant, it was error for the court to leave it to the jury to find whether or not the witness was an accomplice. In the case cited the district attorney in open court, in his argument to the jury, admitted the witness to be an accomplice, and the court said that "the admission of the fact in court by the district attorney, for the purposes of the trial, was, as against the government, conclusive evidence of such fact." No such condition exists in the case at bar. The filing of an information against several defendants, and the subsequent dismissal of such information as against one of the defendants for want of evidence, is certainly not an admission, for the purposes of the trial of the remaining defendants, that the defendant dismissed was an accomplice. Such a proceeding bears no analogy to what occurred in the Desmond Case. The district attorney did not admit that either Giannetos or Cochomihos was an accomplice of appellant, and the evidence does not compel the conclusion that either of them was in fact such accomplice. It is not contended that it does. On the contrary, the evidence is ample that neither of these two witnesses had any criminal or guilty connection with the appellant or the offense of which he was found guilty, and about which they gave evidence. Their evidence, therefore, was sufficient corroboration of the evidence of the admitted accomplices, and the verdict is sufficiently supported by the evidence.

It is claimed that the court erred to the prejudice of appellant in instructing the jury as to what constitutes an accomplice. The court, in explaining what is an accomplice, said: "An accomplice to a crime is one who willfully and knowingly aids, encourages, or assists another in the commission of a crime." The objection made to the instruction is that in the sentence above quoted and in other parts of the instruction the court connected the words "aids, encourages, and assists" by the disjunctive "or." But the court qualified the words by the words "willfully and knowingly," and thus committed no error under the very cases cited by appellant. People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People v. Warren, 130 Cal. 683, 63 Pac. 86; People v. Morine, 138 Cal. 626, 72 Pac. 166. Furthermore, this appellant was not prosecuted as an accomplice, but as the one who actually with his own hands set fire to the building, and such was the case proved. The instruction complained of was given in connection with the charge concerning the necessity for corroboration of the evidence of accomplices. If it was faulty in the respects complained of, it bore too hard upon the witnesses for the prosecution, and was for the advantage of the appellant and to the disadvantage of the people. Appellant could not have been prejudiced by the fault claimed to exist in the instruction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Complaint is made that the district attorney was guilty of such misconduct as to entitle appellant to a new trial. We do not think that the district attorney was guilty of conduct that invaded the right of appellant to a fair trial. He does not seem to have made any statement of any fact in his address to the jury that may not be said to be fairly deducible from some evidence in the record. "Counsel have the right to present to the jury their views of the proper deductions or inferences which the facts warrant. Their reasoning may be faulty, their deductions from the premises illogical, but this is a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel." People v. Willard, 150 Cal. 543, 89 Pac. 124.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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14 Cal. App. 706

LANE v. GLENN et al. (Civ. 902.)

(Court of Appeal, Second District, California. Dec. 1, 1910.)

Appeal and Error (§ 1071*)—Harmless Error—Finding not Within Issues.

The court having found, in an action for false imprisonment by police officers, that plaintiff was not actually damaged, he was not prejudiced by a finding outside the issues that when arrested on another charge, on which he was convicted earlier in the day of the particular arrest, he was intoxicated and had not recovered when released from the first arrest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Austin Lane against William W. Glenn and others. Nominal judgment for plaintiff, and he appeals. Affirmed.

W. B. Coleman, for appellant. Leslie R. Hewitt, City Atty., and Charles D. Houghton and C. D. Pillsbury, Deputies, for respondents.

SHAW, J. Action to recover damages alleged to have been sustained by reason of plaintiff's arrest and false imprisonment. The court made findings to the effect that the arrest and imprisonment was wrongful and without warrant, but further found that plaintiff had sustained no actual damage by reason thereof. Thereupon judgment was given in his favor for nominal damage only, from which he appeals upon the judgment roll alone.

Appellant claims the court committed prejudicial error by finding facts not within the issues. It appears both by the answer and findings that on the morning of the day of his arrest plaintiff had been convicted upon a charge of disturbing the peace and a fine imposed therefor, upon payment of which he was released. The wrongful arrest, made upon complaint that he threatened a further disturbance by doing violence to his wife, occurred on the evening of the day upon which he was so released. The court made a finding to the effect that at the time when plaintiff was arrested upon the complaint for which he was convicted and fined he was intoxicated and had not recovered from the effects of such intoxication when released from custody on the morning of the day when again arrested without warrant. Conceding there was no issue to which such finding could be deemed responsive, nevertheless, the court having found that plaintiff sustained no actual damage, he could not have been prejudiced by this immaterial finding of fact outside the issues.

It is also urged that the findings are inconsistent, in that they both justify the acts of defendants and also find them liable for such acts. There is no merit in this contention. The findings as to all material facts, save alone upon the question of damage sustained, are in plaintiff's favor.

Our attention is directed to no prejudicial error, and the judgment is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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14 Cal. App. 642

LIGHTNER MINING CO. v. SUPERIOR COURT OF CALAVERAS COUNTY et al. (Civ. 785.)

(Court of Appeal, Third District, California. Nov. 23, 1910. Rehearing Denied by Supreme Court Jan. 16, 1911.)

1. Mines and Minerals (§ 51*)—Action for Damages—Jurisdiction.

Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), provides how patents for mineral lands may be obtained, and declares that if no adverse claim is filed at the expiration of the 60 days of publication it shall be assumed that the applicant is entitled to a patent and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard except it be shown that the applicant has failed to comply "with the terms of this chapter." Section 2326 (page 1430) provides that where an adverse claim is so filed all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy is settled by a court of competent jurisdiction. In an action for damages for encroaching on plaintiff's mining claim, defendant answered that plaintiff had made application for a patent on his mine, and that defendant had filed its protest against the issuance of a patent, and the Land Department had ordered a hearing. *Held*, that under section 2326 the superior court had jurisdiction of the action; for, if the protest was not an adverse claim within the statute, there was no controversy to be settled by the Land Department, and, if it was an adverse claim, the court had jurisdiction to decide the controversy.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137–141; Dec. Dig. § 51.*]

2. MINES AND MINERALS (§ 51*)—ACTION FOR DAMAGES—JURISDICTION.

In a suit by an owner of a mining claim against the owner of an adjoining claim for damages for encroaching on the plaintiff's claim, in which both plaintiff and defendant allege title to the property in question, the superior court has jurisdiction of the controversy, and the question is one of law for a court of competent jurisdiction and not for the Land Department.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 137–141; Dec. Dig. § 51.*]

3. PROHIBITION (§ 3*)—NATURE AND GROUNDS—ADEQUACY OF REMEDY AT LAW.

The owner of a mining claim sued the owner of an adjoining claim for damages for encroaching upon plaintiff's claim. Defendant alleged title to the property in question and further claimed that there was a contest before the United States Land Department involving the title of the property, and applied for a writ of prohibition to restrain the judge of the superior court from proceeding with the trial of the action for damages until the determination of the Land Department of the controversy before it. *Held*, that the writ would not lie, as defendant had a plain, speedy, and adequate remedy in the ordinary course of proceedings at law by appeal from any judgment of the superior court.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Application by the Lightner Mining Company for a writ of prohibition to restrain the Superior Court of Calaveras County and A. I. McSorley, Judge thereof, from proceeding in the trial of the action of James V. Coleman against the Lightner Mining Company. Writ denied.

Nutter & Orr, Street & Street, and J. P. Snyder, for petitioner. C. E. McLaughlin and W. J. McGee, for respondents.

BURNETT, J. This is an application for a writ of prohibition to restrain the judge of said superior court from proceeding with the trial of the action of James V. Coleman, Plaintiff, v. Lightner Mining Company, Defendant, until the final determination by the Land Department of the United States of an application for a patent to the land involved in the controversy. Among other facts, it appears that the complaint in said action was filed in 1903. Therein it was alleged that "plaintiff for more than 15 years last past has been and now is the owner and in the possession and entitled to the possession of all that certain quartz mine, mining property situate, lying, and being in the Altaville townsite, in the county of Calaveras, known as and called the 'Billings' quartz mine." Then follows a particular description of the property. "That within the surface lines of the said Billings quartz mine extended downwards vertically are certain lodes, ledges, and veins of quartz and rock in place carrying gold and other valuable minerals. That the said Billings quartz mine is contiguous to and adjoins on the east the so-called Lightner quartz mine owned and operated by the said defendant corporation. That said defendant has sunk upon the said Lightner quartz mine a shaft, and within three years last past has by means of said shaft and crosscuts, levels, drifts, winzes, and stopes connected therewith wrongfully and unlawfully and without the consent of plaintiff entered into and upon the said Billings quartz mine and property, * * * and has taken out and extracted therefrom and converted to its use large quantities of quartz and rock carrying gold and other valuable minerals to the value of $150,000." The prayer is for this amount and costs of suit. In the answer the material allegations of the complaint are denied, and it is averred: "That on the 20th day of April, 1875, the government of the United States issued a patent to W. B. Norman, county judge of Calaveras county, Cal., in trust for the several use and benefit of the occupants of the townsite of Altaville in the county and state aforesaid, for the lands therein described. That by mesne conveyances the defendant became and now is the owner of, and it and its grantors for more than forty years last past have been the owners of, in the occupation and possession of and entitled to the possession of lot 13 in block 5 of said Altaville townsite, the north 77 feet of which is within the exterior boundaries of the so-called and alleged Billings quartz mine in the amended complaint described. That on or about the ——— day of ———, 1909, plaintiff made application, through the United States land office at Sacramento, Cal., for United States patent for the so-called and alleged Billings quartz mine. Thereafter this defendant duly filed in said land office its protest against the issuing of a patent for said alleged Billings quartz mine, and the Land Department ordered that a hearing be had on the 20th day of April, 1910, before the register and receiver of the said Sacramento land office, to determine whether at the date of the said Altaville townsite entry the alleged Billings quartz claim was known to be a valid mining claim and as such was excepted by operation of law from the said townsite patent." It was therefore claimed by defendant that the Land Department of the United States has the exclusive power to determine whether the alleged Billings quartz mine was known to be a valid mining claim at the date of said Altaville townsite entry, and that the trial of the case should be stayed until the determination of that question by said department. A motion was made to that effect in the court below. It was heard upon affidavits and denied, and the case was set down for trial. That was the occasion for this application. In response to the order to show cause a demurrer and an answer have been presented by the trial judge. It is necessary to consider only the demurrer, and our attention need not extend beyond the ground "that said petition does not state facts sufficient to warrant or authorize the issuance of a writ of prohibition by the above-entitled court against the respondents or either of them."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Two questions are involved herein and these we now proceed to consider. The first is, does it appear that the court below has exceeded its jurisdiction? and, secondly, if so, is it a proper case for prohibition? The answer to each of these must unquestionably be in favor of respondents.

The office of the writ of prohibition has been so frequently considered by this and other appellate courts and so well settled that no extended discussion of the subject is here required. It is sufficient to refer to the sections of the Code of Civil Procedure (1102 and 1103) wherein it is provided in what instances the writ will issue.

As to the court's jurisdiction to deny the defendant's application for a continuance and to set the case for trial, it is contended by respondents that the court was called upon simply to determine whether certain evidence was required to establish one of the issues made by the pleadings, and in the exercise of its judgment as to this it is difficult to understand why the court did not have the juridical power to reach a wrong as well as a right conclusion. Since admittedly this court has jurisdiction of the parties and of the subject-matter of the action, and the issue being properly framed, it had authority to try the cause at any time—so it is claimed—and its refusal to continue the trial was no more in excess of its jurisdiction than would be the denial of a similar motion made upon some other ground. But petitioner does not concede the jurisdiction of the court as to the entire subject-matter of the action, although admitting that the parties were properly before it and that it had the authority to grant the relief prayed for. It is insisted, however, that exclusive jurisdiction to determine one of the issues, without which no judgment could be rendered, was vested in another tribunal. Therefore, it is said, the court should have pursued the course pointed out in Potter v. Randolph, 126 Cal. 461, 58 Pac. 906, wherein it is declared: "The court, very properly, then delayed the trial until the question as to the character of the land was determined by the Land Department, which alone had the power to decide that controversy. The court had jurisdiction of the action, but could not try that particular controversy which was involved in the action." But that case and others cited by petitioner are inapplicable to the situation here. The pleadings disclose that an application was made in due form to the Land Department for a patent to a quartz mining claim. Section 2325 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1429) provides how "patents for mineral lands" are obtained, and therein it is declared that, "if no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." And section 2326 (page 1430) provides that: "Where an adverse claim is filed during the period of publication, * * * all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession and prosecute the same with reasonable diligence to final judgment." The case before us is brought clearly within the contemplation of said section. It may be that the paper filed by petitioner in the Land Department could not be said to constitute an "adverse claim" in the sense of the statute, it being denominated a "protest against the issuance of the patent"; but in that event there was no controversy to be settled by said tribunal, and it was proper for the said superior court to determine the issue between the parties. Whether the opposition be considered an adverse claim or not, therefore, it would seem that the court was justified in denying the motion to continue the trial.

But, viewing the case from a somewhat different point of view, it is clear that the superior court had complete jurisdiction over the entire subject-matter of the controversy. The question of jurisdiction must be determined, of course, by the averments of the pleadings. It thereby appears, both by the allegations of the complaint and those of the answer, that there is no issue as to who is entitled to a patent, but it is assumed that a complete title has long since vested, and the controversy is as to the ownership of the property, it being averred by plaintiff that he has been for many years and is now the owner in the possession and entitled to the possession of said property, while, in defendant's answer, we find the equally positive allegation, as before stated, that it is now the owner and it and its grantors for 40 years past have been the owners of and in the occupancy and entitled to the possession of said property. Thus is a question of law presented for the determination, not of the Land Department, but of a court of competent jurisdiction. This may be made clear by a reference to some of the decisions. In Gage v. Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141, we have a comprehensive statement of the function of the Land Department in such matters. There it is declared that "the decision of the Land Department of the United States upon any question of fact, in determining the right of any person to receive a patent for any of the public lands under the laws of the United States, is conclusive upon all other tribunals, in the absence of fraud, mistake, or imposition in obtaining the patent"; but "if in making its determination of fact the Land Department has disregarded the law applicable thereto, or has erred in its construction of the law or by mistake has issued to one person a patent, which upon undisputed facts should have been issued to a contestant, the patentee will be held a trustee for the contestant in proceedings to be taken in a court of equity and governed by the rules of equity procedure."

In Potter v. Randolph, 126 Cal. 461, 58 Pac. 906, it is said: "The Land Department of the United States is not a special tribunal organized to determine who is the owner of land. The department is the medium through which parties may acquire the title of the United States. Its functions are mostly administrative and only incidentally judicial. It determines the existence or nonexistence of alleged facts, to enable it to select the person who is entitled to purchase. The proceeding is to acquire title, not to determine who has it."

In Iron Silver Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155, it is declared that, "when a person has once obtained a patent of the United States for his land, he should be only required to answer persons who have some established claim, and to contest with the party not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property. * * * We have more than once held that, when the government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that patent before the officers of the Land Department of the government." If a patent to this land was issued in 1875, as claimed by defendant in its answer, then, of course, the control of the Land Department over it must have ceased, and the issue as to whether the defendant or plaintiff had been the owner of the land for many years was within the exclusive jurisdiction of the superior court.

Again, the writ of prohibition should not issue for the reason that there is a plain, speedy, and adequate remedy at law. It is not disputed that the court's action can be reviewed on appeal, and there is no sufficient reason why petitioner should have invoked this extraordinary remedy instead of pursuing the usual course. The determination of causes on appeal is probably not always as speedy as it should be but that is not the fault of the law. It may be admitted also that as to this question there is some conflict in the decisions; but we think the true rule is declared in the cases cited by respondents.

In Jacobs v. Superior Court, 133 Cal. 364, 65 Pac. 826, 85 Am. St. Rep. 204, it is held that: "Since the amendment in 1897 [St. 1897, c. 62] to section 939 of the Code of Civil Procedure, allowing an appeal from an order appointing a receiver, and the amendment at the same time of section 943, providing for the staying of the order by an undertaking on appeal, a writ of prohibition will not lie to arrest proceedings under such an order, as the party aggrieved has 'a plain, speedy and adequate remedy in the ordinary course of law,' within the meaning of section 1603 of that Code, notwithstanding a question of jurisdiction is involved in the application for the writ." In the course of the opinion it is declared that: "There might, perhaps, be exceptional facts in a case which would call for a writ of prohibition, notwithstanding an appeal from an order appointing a receiver; but the general rule is as stated above, and applies to the case at bar."

In Cross v. Superior Court, 2 Cal. App. 342, 83 Pac. 815, it is said: "There are cases on the border line in which it is a matter of some difficulty, and generally, in this state, a matter of discretion, as to whether or not there is a plain, speedy, and adequate remedy in the ordinary course of law. It is the general rule that, where there exists an opportunity for a review and correction of the wrong complained of in a higher court on appeal, prohibition will not lie."

In line with the foregoing are the other cases, cited by respondents: Agassiz v. Superior Court, 90 Cal. 103, 27 Pac. 49; Lindley v. Superior Court, 141 Cal. 220, 74 Pac.

765; McAdoo v. Sayre, 145 Cal. 351, 78 Pac. 874; McAneny v. Superior Court, 150 Cal. 10, 87 Pac. 1020; Johnston v. Superior Court, 4 Cal. App. 92, 87 Pac. 211; Lange v. Superior Court, 11 Cal. App. 6, 103 Pac. 908; Burge v. Justice Court, 11 Cal. App. 215, 104 Pac. 581.

The cases cited by petitioner to the contrary involve peculiar features that led the Supreme Court to determine that an appeal was not an adequate remedy.

In Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225, it appeared from the undisputed facts, as stated by the court, "that the superior court of Yolo county has taken unto itself the determination of a question of fact, jurisdiction to determine which question of fact is in the first instance exclusively vested by law with the board of supervisors of Yolo county. Further it appears that the superior court of Yolo county, as it shall determine the fact to be, will proceed to enjoin the board of supervisors in the performance of a legislative duty, the execution of which is made their sole province under the law." In such a case the higher court should undoubtedly exercise its discretion in granting the writ. Sound public policy requires that an attempt, whether intentional or otherwise, on the part of a court to usurp the functions of the legislative department of the government, should not be tolerated, but should immediately be arrested.

In Dungan v. Superior Court, 149 Cal. 99, 84 Pac. 770 (117 Am. St. Rep. 119), the writ was issued to restrain the superior court of Fresno county from taking any further proceedings in the matter of the settlement of an estate. It appeared that said court had no jurisdiction whatever, and it is quite apparent, as said by the court, that, "in view of the complications which will necessarily follow the attempted exercise of jurisdiction in the matter by two superior courts, it cannot be said that there is a plain, speedy, and adequate remedy in the ordinary course of law."

The other cases cited will also be found, upon examination, to be clearly distinguishable from the one at bar. Here the court could only render judgment for damages. An appeal would effectively correct any wrong that might be done to petitioner. No harm could possibly result except some delay in affording appropriate relief. The cases seem to be agreed, as stated in Agassiz v. Superior Court, 90 Cal. 103, 27 Pac. 50, that "a remedy does not fail to be speedy and adequate because by pursuing it through the 'ordinary course of law' more time would probably be consumed than in the proceeding here sought to be used."

We think no sufficient reason has been shown for delaying any further the trial of said action in said superior court.

The order to show cause is therefore discharged, and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

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14 Cal. App. 708

PEOPLE v. ERNSTING. (Cr. 162.)

(Court of Appeal, Second District, California. Dec. 1, 1910.)

1. HOMICIDE (§ 254*)—MURDER IN THE SECOND DEGREE—EVIDENCE.

Where the jury believed from the evidence that accused took decedent to his room and robbed him, and that in the accomplishment of the robbery he either intentionally or otherwise injured decedent so that death resulted, they could find accused guilty of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533–538; Dec. Dig. § 254.*]

2. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

The jury must consider the facts and weigh the testimony, and their verdict, sustained by evidence, will not be disturbed on the ground alone of insufficiency of testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 1163*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

In a close case the court, on appeal, must assume that the jury weighed every small fact, and if the trial court erred in admitting or rejecting proof of any such fact, the error will be deemed prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090–3099; Dec. Dig. § 1163.*]

4. HOMICIDE (§ 338*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

Where, on a trial for murder, the case was a close one on the evidence, the error in admitting the testimony of a witness as to statements by a bystander at the time of the finding of decedent's body, disclosing a demeanor indicating a brutal and unfeeling disposition on the part of the bystander, was prejudicial; the only testimony to identify the accused as the bystander being the similarity of appearance between the bystander and accused, based on their build.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709–713; Dec. Dig. § 338.*]

5. WITNESSES (§ 393*)—IMPEACHMENT.

Where the testimony of a witness at the preliminary examination was contrary to his testimony at the trial, it was proper to show that fact to impeach the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252–1257; Dec. Dig. § 393.*]

6. CRIMINAL LAW (§ 1120*)—RULINGS ON EVIDENCE—RECORD—APPEAL.

The ruling of the court in excluding the testimony of a witness at the preliminary examination to impeach the witness testifying at the trial cannot be considered, where the testimony given at the preliminary examination is not made a part of the record of the trial in any way, but is merely set out in the brief of counsel of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931–2937; Dec. Dig. § 1120.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. Criminal Law (§ 485*)—Evidence—Opinion Evidence—Form of Question.

A question put to a physician as to whether a small instrument implanted with force against a human body would leave more surface marking than a larger one implanted in the same way calls for an answer involving the assumption of many different conditions and is objectionable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.*]

8. Criminal Law (§ 476*)—Evidence—Opinion Evidence.

The question is also objectionable as calling for an opinion on a matter not within the scope of expert testimony, and the admission of an affirmative answer thereto is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.*]

9. Criminal Law (§ 730*)—Improper Argument—Effect.

Where a statement by the prosecuting attorney in his argument to the jury was not warranted by the evidence, but he told the jury that he was presenting it as an inference only, and the court, at the conclusion of the trial, instructed the jury that inferences must be founded on facts legally proved, the statement was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

10. Criminal Law (§ 829*)—Trial—Refusal of Instructions Covered by the Charge Given.

It is not error to refuse requested instructions sufficiently covered by the instruction given correctly stating the law applicable in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Willis Ernsting was convicted of murder in the second degree, and he appeals. Reversed, and new trial ordered.

W. H. Dehm and Earl Rogers, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged by an information of the district attorney with having, on or about the 15th day of August, 1909, in Los Angeles city, murdered one William Salter. The jury by their verdict found him guilty of that crime and of the second degree thereof. He was sentenced to serve a term of 20 years' imprisonment. An appeal having been taken from the judgment, and from an order denying defendant's motion for a new trial, the record of the proceedings had in the superior court is brought here for review. Insufficiency of the evidence to sustain the verdict and judgment, and errors claimed to have been committed by the trial court in admitting and refusing to admit testimony, and in giving and refusing to give to the jury certain instructions, are the grounds upon which a reversal of the judgment and order is sought.

William Salter at the time of his death was a man about 70 years of age, in good health, well preserved physically, and very active. He weighed nearly 200 pounds. On the 15th day of August, 1909, he resided at a lodging house at 618½ South Spring street, in Los Angeles city. Nearby about one-half a block from the intersection of Spring and Sixth streets, a saloon known as "The Gordon Bar" was located. This bar was situated in the block bounded by Main and Spring streets on the east and west and Fifth and Sixth streets on the north and south, respectively. An alley running midway between Main and Spring streets from Fifth to Sixth streets divided the block into two sections and furnished a passageway wide enough for teams to travel on between the streets last mentioned. This alleyway was paved down its central portion with rough cobble stones. At 515½ South Main street was located the lodging house where defendant resided. This lodging house was kept by Mrs. Margaret E. Osgood, and it had a rear entrance which led from the alley referred to through a brick archway to a flight of stairs. As near as can be gathered from the record, the rear entrance to this lodging house was distant at least 150 feet from the intersection of the alley with Sixth street.

Salter was addicted to the use of intoxicants to excess, and on the 15th day of August had been drinking heavily. He appeared at the Gordon Bar at about 10:30 or 11 o'clock that night so much intoxicated that he was refused more liquor by the barkeeper on that account. At that time defendant was conversing with a friend named Bob Marquis near the end of the bar counter. Salter, whom defendant had not been acquainted with theretofore, approached the latter and placed his arm about defendant and attempted to embrace him affectionately. Salter used terms of endearment toward Ernsting and finally attempted to fondle him in a lewd manner, at the same time making by words a proposal that Ernsting permit the commission of a disgusting and degenerate act for the gratification of Salter. Ernsting repulsed the intoxicated man and treated the matter lightly. The acts of Salter in embracing Ernsting were observed by Gordon, the proprietor of the bar, and Bob Marquis, who had met defendant by appointment at that place. No further attention was paid to the men by Gordon, Marquis, or the barkeeper. Marquis left the place at about 11:30 p. m. and at that time Ernsting and Salter were still there. No witness testified to having noticed the two men leave the place. Up to this point in the narrative given at the trial there is no conflict of evidence. When next seen together both Salter and Ernsting were in the lodging house at 515½ South Main street, where Ernsting resided. Mrs. Osgood, the landlady, testified that about 1 o'clock in the morning she heard the noise of a heavy fall and opened her door to see what caused the disturbance. She saw defendant and Salter on the floor; defendant being on top of Salter and in the act of arising. Defendant helped Salter up and took him down the stairway at the rear of the house leading to the alley heretofore referred to. Salter kept saying, "Don't! Don't!" and resisted the efforts of Ernsting to take him down. At the foot of the stairs both men fell to their knees, and Ernsting arose, and, as Mrs. Osgood believed, carried Salter out through the rear archway into the alley. Another witness, a woman lodger, testified that the men appeared to walk from the foot of the stairs into the alleyway. Ernsting was of the age of 41 years, and physically about the same size and weight as Salter. He was afflicted, however, with a hernia or rupture, which interfered slightly with his ability to work. Mrs. Osgood testified that after Ernsting and Salter disappeared through the archway into the alley Ernsting returned in about 20 minutes and went to his room. Between 1 and 1:30 o'clock of the same night a garbage gatherer was driving through the alley. He was driving three animals hitched abreast—a horse on either side with a mule between them. It was quite dark in the alleyway, but a lantern hung on the left side of the wagon at the front threw some little light between and ahead of the animals hitched to the wagon. At a point about 60 feet from the intersection of the alley with Sixth street, the animals pulling the garbage wagon suddenly came to a standstill. The driver saw some dark object in front of their feet at the left and threw on his brake. He then got down and found the body of a man lying close to the foot of the team. He pulled it out of the way. The body proved to be that of William Salter, who was then in a dying condition. As was developed at the post mortem examination, Salter's breast bone and all of the ribs on either side of it had been broken in. The ends of the broken ribs had penetrated the liver, causing a great hemorrhage from which death resulted. Salter never spoke after being found by the garbage gatherer. He made no sound at all except to groan a few times, and he died before he could be removed. About $5 in silver coins were found by the officers in the pockets of Salter when the body was searched.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant when arrested made several conflicting statements as to when he had last seen Salter on the night of August 15th, but finally admitted and testified at the trial that he had seen him at the lodging house at 515½ South Main street and had taken the man down the back stairs. He testified that he had disengaged himself from Salter at the saloon and had gone to his room; that upon leaving his room to get some water a short while afterward he found Salter in the hallway; that the latter again embraced him and wanted him to consent to the consummation of the lewd act before suggested by Salter; that Salter gave him $15; that he refused to consent to the desire of Salter and took the man down the rear stairs, telling him he must go away; that in his struggle with Salter to force the latter to leave the house the two had fallen down at the head of the stairs; that after getting Salter down to the alley he proceeded with him south to Sixth street; and that Salter there went on his way toward Spring street, he (Ernsting) calling at the saloon for a package and then returning to his room.

The contention was made at the trial on behalf of defendant that the injury received by Salter must have been caused by the team of the garbage gatherer. If the story told by defendant was true, of course, he would not have been guilty of murder. Neither would he have been guilty had the injury been caused to Salter at the time the two fell together in the hallway of the lodging house, under the circumstances testified to by defendant; for, if defendant's statement that he was followed by Salter from the saloon to the lodging house was true, then defendant would have had the right to cause Salter to leave the place, using all necessary force to accomplish that purpose. On the other hand, if the jury believed, as they must have, that defendant took Salter to his room and robbed him of money, and that in the accomplishment of that act he, either intentionally or otherwise, injured him so that his death resulted, the verdict was right. It was for the jury to consider the facts and circumstances and weigh them, and their determination cannot be disturbed on the ground alone that there was no evidence warranting the conclusion reached, for there was evidence to sustain it.

In considering the alleged errors of the court in the admission or rejection of testimony, or in the giving or refusing to give instructions to the jury, examination of those questions is approached with the consideration in mind that the charge against defendant is a most serious one and the punishment visited upon him necessarily of great severity. Further, that the evidence upon which he was convicted presents a case where, had the jury decided in his favor, it could not be said with assurance that such a verdict was not in accordance with the evidence, or that there had been thereby a miscarriage of justice. In a "close case," such as the one under consideration, it must be assumed that the jury weighed every small fact and circumstance, and, if the court erred in admitting or rejecting proof of any such, the error will be deemed prejudicial. Very differently will the same questions be viewed in cases where the proof is plain and abundant of a defendant's guilt.

1. The court erred to the prejudice of de-

fendant in admitting the testimony of witness S. F. White as to statements made by a bystander at the time the body of Salter was found in the alley. This witness did not pretend to have known defendant at that time. He saw a man there who apparently came in through the alley from Sixth street, but because of the darkness he had no opportunity to observe the man's face. White testified that when he inquired of the man where an officer could be found the person addressed replied: "What the hell do you want to call an officer for? It makes no difference if he is drunk, an officer is the last one you want to call. What are you doing here anyway? Are you a damned hobo?" White testified that he told the man that he was driving the garbage wagon, and that the man then said, "Oh!" and turned and walked out of the alley. The only testimony as to any similarity of appearance between this man whom White saw and held the conversation with and the defendant was the following given by White: "Q. How did he correspond in appearance with defendant? A. About the build, just the build." This was not sufficient evidence of identification (and there was none other) upon which to permit proof of the statements made by the bystander. The evident purpose of the testimony was to show that the defendant was present at the body of Salter at that time; that he was harsh of demeanor as indicating a brutal and unfeeling disposition; and that he desired to avoid the coming there of police officers. The admission of this testimony was prejudicial to defendant. The same observations may be made of the admission of the statements of witness Gomez, who told of a conversation had by him with an unknown man in the alley while the body of Salter was lying there.

2. Willard F. Smith, a police officer, testified that he found no marks on the clothing on the front of the body of Salter; that the vest was white; and that he examined it with the aid of a flash light and saw no marks or dirt thereon. Defendant's counsel proceeded to show the witness a transcript of his testimony as given at the preliminary examination of Ernsting, and asked him if he did not testify as shown by that transcript. An objection made to the question by the district attorney was sustained. If the testimony given by the witness at the preliminary examination was contradictory of his then testimony, it was proper for that fact to be shown; but nowhere in the record presented does it appear just what the testimony offered to be proved was. Counsel for defendant, upon being halted by the objection and ruling of the court, said: "Your honor, to have it shown in the record that we offer to show the transcript of the preliminary examination, commencing at line 27, on page 148, and running to and including line 4 of page 149, offer that in order to impeach the witness to show that he has testified different at another time." There was an objection by the district attorney to the offer, and the objection was sustained. There the matter was allowed to rest. Counsel sets out the testimony given by Smith at the preliminary examination in his brief, but it was not made a part of the record of the trial in any way that entitles this court to consider it.

3. Dr. George W. Campbell, a witness, was asked by the district attorney this question: "Q. A small object inflicted the same kind of a wound it would be more likely to leave an impression on the outside of the skin than a large object?" This question, which was answered by the witness in the affirmative, was not clear in the form it was put; but the evident intent was to ask whether a small instrument implanted with force against a human body would leave more surface markings than a larger one implanted in the same way. The question was not intelligible, and an answer to it necessarily would involve the assumption of many different conditions. Besides being incompetent because of this fact, it called for an opinion upon a matter not properly within the scope of expert testimony. The admission of the answer was, therefore, error.

4. Complaint is made of certain statements of the district attorney used in his argument to the jury. C. A. Jones, a police officer, testified that when he went to arrest the defendant he did not disclose the true charge upon which he was making the arrest, but told defendant at that time, when asked for a reason, that "there had been some little holler made about his living there." In his argument to the jury the district attorney said, referring to the defendant: "At the time he was arrested the neighbors complained about him living there. What sort of a man is this, that the neighbors should be complaining about his living there?" Defendant's counsel objected to the statement that the neighbors had complained, and the district attorney retorted that he was drawing an inference from the testimony. It is true there was no evidence proving, or tending to prove, that the neighbors had complained of the residence of Ernsting at the place where he lived when arrested. He was not then living at the lodging house of Mrs. Osgood, but in a district remote from that locality. While the statement was not warranted by the testimony, it does not appear that defendant was prejudiced by it, for the district attorney told the jury that he was presenting it as an inference only, and with the testimony before them the jury could determine whether such an inference was well founded or not. Furthermore, the court at the conclusion of the trial instructed the jury that inferences which they were entitled to draw must be founded upon a fact legally proved.

The instructions given by the trial judge covered sufficiently all matters upon which defendant asked further instructions to be given. The law applicable to the case was fully and, in our opinion, correctly stated in the charge to the jury.

Because of the rulings made at the trial in the admission of testimony, which, for the reasons given, constituted prejudicial error, the judgment and order are reversed, and a new trial ordered.

We concur: ALLEN, P. J.; SHAW, J.

(159 Cal. 182)

SALINAS VALLEY LUMBER CO. v. MAGNE-SILICA CO.

(L. A. 2,524.)

(Supreme Court of California. Jan. 7, 1911. Rehearing Denied Feb. 6, 1911.)

1. SALES (§ 81*)—CONSTRUCTION OF CONTRACT—TIME AS ESSENCE OF CONTRACT.

Where an offer to sell lumber asked for time to have it shipped direct from the mills, but stated that prompt delivery could be given if necessary, barring the condition of the railroad freight system, and the buyer in accepting the offer asked for immediate delivery, and was told that the lumber would be coming in, possibly some of it in 20 days or from 20 to 30 days, but no specified date was set for its arrival, time is not made of the essence of the contract by its terms.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 81.*]

2. SALES (§ 81*)—CONSTRUCTION OF CONTRACT—TIME FOR PERFORMANCE.

Where time is not made of the essence of a contract to sell lumber by its terms, the fact that the buyer, when it found that there was a delay in delivery, wrote urgent letters and made urgent appeals to the seller to furnish the lumber as promptly as possible, and the seller endeavored to do this, did not form a part of the consideration of the contract, and could not bind the seller to any more prompt performance than that called for by the contract, under which the seller was entitled to reasonable time, though, if time had been of the essence of the contract, the rule allowing reasonable time would not apply.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 81.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF COURT.

In an action for the price of lumber, where the evidence on the quality of the lumber was conflicting, the court's finding that it was up to the standard called for will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. SALES (§ 353*)—REMEDIES OF SELLER—ACTIONS FOR PRICE—COMPLAINT.

A complaint in the form of a common-law count for goods sold and delivered is sufficient under the reformed system of code pleading.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 995-1004; Dec. Dig. § 353.*]

5. SALES (§ 179*)—REMEDIES OF SELLER—ACTIONS FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for the price of lumber, in which the court found that the lumber was up to the standard called for by the contract, there was no error in excluding testimony as to how much less the lumber the buyer received was worth than the lumber which was described in the original contract, where it had been proved that the lumber was tendered in fulfillment of the contract, that its delivery was at a fixed price, that it had been inspected by a representative of the purchaser and all unsatisfactory pieces rejected and the remainder accepted unconditionally and used in the defendant's building, and a witness had testified fully as to the grade of lumber delivered.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 179.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the Salinas Valley Lumber Company against the Magne-Silica Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

John M. York and Waldo M. York, for appellant. Canfield & Starbuck, for respondent.

HENSHAW, J. This is an action to recover for lumber sold to and used by the defendant company. Plaintiff had judgment, and defendant appeals from that judgment and from the order denying its motion for a new trial.

The contract between the parties was in writing evidenced by the following letter from the plaintiff lumber company to the defendant and the defendant's acceptance thereof: "Lompoc, Cal., April 18, 1906. Mr. Geo. Mason, Los Angeles, Calif.—Dear Sir: We herewith enclose list of lumber, which was handed to us by your Mr. Hannaman which we agree to sell to you f. o. b. cars at Lompoc for $3,328.65. This is a very close figure considering the price lumber is selling at now, and we trust that we may be successful in securing your order. Furthermore, we anticipate that you may want some lumber out of our yard stock, which is usually the case in all building operations, and anything of this kind we will sell to you on the same basis rate of the entire bill of lumber. We will sell you stock, which we feel perfectly safe in saying cannot be excelled as to quality by any other lumber company on the coast. We would like to have you allow us time enough to have this lumber shipped direct from the mills if it is possible, which would mean about 30 days' time. However, we can give you prompt delivery if necessary barring the 'balled up' condition of the S. P. Co's freight system just at present. Trusting that we may receive a favorable reply from you at an early date, we beg to remain, Yours very truly, S. V. Lumber Co., A. C. Whittemore, Agt." Defendant's acceptance was oral, defendant's agent testifying: "I told him (Mr. Whittemore) that we wanted the lumber on immediate delivery, and he said it would be coming in, possibly some of it in 20 days, or from 20 to 30 days the lumber would be coming in." Such was the contract. Defendant was engaged in mining an infusorial earth called "Sil-O-Cel" and desired the lumber principally to construct a warehouse for the storage of this product. It particularly desired to erect the warehouse before the on-coming rains, since the effect of water upon the Sil-O-Cel was greatly to impair, if not utterly to destroy, its value. Thus it became important to defendant to house the earth and protect it from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the winter rains. Much confusion resulted to all transportation lines following the San Francisco earthquake and fire, and deliveries of freight were delayed. This lumber was not delivered, and the warehouse was not constructed until after the rains had fallen and damaged greatly defendant's unprotected Sil-O-Cel. For this damage defendant sought compensation by way of counterclaim. The cause was tried by the court. It was also insisted that some of the lumber furnished by plaintiff was of a quality inferior to that called for by the contract. In an addendum to the letter above quoted was given the estimated quantity, the grade and the price of the different kinds of lumber required.

Defendant's contentions upon the trial were that time was of the essence of the contract; that at the time of entering into the contract plaintiff knew that defendant's purpose was to use the lumber to erect its warehouse, knew that the warehouse was necessary to protect the infusorial earth from damage by rain, and knew that, if the warehouse was not completed before the rain should fall, the infusorial earth then mined, and which plaintiff knew was mined, would be greatly damaged. The findings of the court were against the defendant upon all the issues joined. Defendant here contends that by its very terms time was of the essence of the contract, and that plaintiff's agreement was to furnish the lumber within 30 days.

It is apparent, however, that time is not made of the essence of the contract by its terms, and the cases to which appellant refers are those where the specified time of performance was named in the contract, and it was left for the court to say whether under the terms and conditions of the contract this time so specified was of the essence. Such cases are very different from that of the one at bar where no time for the completion of the contract is specified at all, and where plaintiff's agent, in answer to the testimony of Mr. Wayne Mason above quoted, declares that he did not make any promise to deliver lumber at any specified time, made no statement of the kind, and "never agreed with Mr. Wayne Mason or promised Mr. Wayne Mason or any other person connected with the defendant corporation that any lumber would arrive at any specified date or within any specified number of days." It abundantly appears that the defendant company when it found that there was delay in the delivery of lumber wrote urgent letters and made urgent appeals to plaintiff to furnish the lumber as promptly as possible and it appears also that plaintiff endeavored to do this. This was after-acquired information, and it did not form a part of the contract or the consideration thereof, and could not, of course, modify its terms or bind plaintiff to any more prompt performance than called for by the contract itself, under which, since time was not of the essence, plaintiff was allowed reasonable time. As to this, the court found upon sufficient evidence that the delay resulted from the disturbance and confusion of transportation facilities and was not unreasonable. Of course, if time had been of the essence of the contract and it was possible for the plaintiff to have completed it, there would be no room for the operation of the rule which allows reasonable time accompanied by reasonable effort (Luckhart v. Ogden, 30 Cal. 547; Reedy v. Smith, 42 Cal. 245), but, as has been said, in this case, as time was not of the essence of the contract, all that the plaintiff was bound to do was to fulfill its contract by reasonable effort within reasonable time, as the court found it did. The evidence upon the quality of the lumber was likewise conflicting, and the court's finding that it was up to the standard called for will therefore be sustained without discussion.

The complaint was in the form of a common-law count for goods sold and delivered. It is earnestly contended that it states no cause of action under our reformed system of code pleading—this, notwithstanding the declaration in McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090, cited by the defendant, where the court declares that the sufficiency of such a complaint has been settled by repeated decisions. Whatever may be thought of the sufficiency of such a pleading we will not undertake to overthrow it at this late day. It certainly prejudiced the defendant in no way, since the defendant may always exact a statement of the particulars of the account. Code Civ. Proc. 454.

Error is assigned in the court's sustaining an objection to a question asked one of defendant's witnesses as to how much less, if anything, the lumber which he received was worth than the lumber which was described in the original contract. This ruling took place at a stage of the trial when it had been proved that the lumber was tendered in fulfillment of the contract, that its delivery was at a fixed price, and that it had been inspected by a representative of the purchaser and all unsatisfactory pieces rejected, and the remainder accepted unconditionally and used in the defendant's building. The witness had also testified fully as to the grade or grades of lumber delivered. As the trial judge at that time must have concluded that the lumber which was furnished was up to specification, he was correct in ruling that the difference in value between the lumber furnished and that contracted for opened up an immaterial inquiry.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

159 Cal. 133

BEESON v. WRIGHT.

WRIGHT v. BEESON et al.

(S. F. 3,696.)

(Supreme Court of California. Jan. 4, 1911. Rehearing Denied Feb. 2, 1911.)

1. CORPORATIONS (§ 116*) — CONTRACTS FOR SALE OF STOCK—SUBSEQUENT AGREEMENT—ALTERATION.

Where a written contract for the sale of corporate stock partly deposited in court provided that it was subject to the determination of pending litigation, and that the price was not payable until the stock was ready to be transferred, a subsequent oral arrangement by which a part of the price was paid before the stock was ready to be transferred did not so modify the contract as to permit a recovery of the balance of the price prior to delivery or a transfer of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 493; Dec. Dig. § 116.*]

2. CORPORATIONS (§ 119*)—SALE OF CORPORATE STOCK — SEPARABLE CONTRACT — EXECUTED ORAL AGREEMENT.

A written contract for the sale of 60 shares of corporate stock fixed a different price for 20 of the shares which were not in litigation, but provided that the price was not payable until the stock was transferred or ready for transfer on the books of the corporation on the termination of the litigation. After the suit had been decided in the state court, it was orally agreed that the buyer should surrender the seller's note for the price of the 20 shares for which the stock had been deposited as collateral, and that the sale as to such shares should be deemed complete. *Held*, that the contract was divisible as to the 20 shares, and that the oral arrangement constituted an executed contract of sale as to that amount of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 499-503; Dec. Dig. § 119.*]

3. CONTRACTS (§ 238*)—WRITTEN CONTRACTS—ALTERATION—METHOD.

A written contract cannot be altered except by a contract in writing, or by an executed oral agreement, as provided by Civ. Code, § 1698.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1123; Dec. Dig. § 238.*]

4. CORPORATIONS (§ 116*) — CONTRACTS FOR SALE OF STOCK — CONDITIONS—VOLUNTARY PAYMENTS.

Voluntary payment of a part of the price of certain corporate stock sold under a conditional written contract before the time for payment had arrived did not constitute such a consideration for an oral modification of the contract as would authorize a recovery of the balance of the price without performance of the conditions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 493; Dec. Dig. § 116.*]

5. FRAUDS, STATUTE OF (§ 17*)—NOTE OF ANOTHER.

An oral promise to pay the note of another as a part of the consideration of a contract for the sale of corporate stock was unenforceable under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

Sloss and Angellotti, JJ., dissenting in part.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Actions by W. F. Beeson against C. I. Wright, and by Wright against Beeson and another. From a judgment against Wright in both actions, and from an order denying his motion for a new trial, he appeals. Judgment in the first action reversed and affirmed in the second.

Frank H. Short, F. E. Cook, and Irving Wright (Page, McCutchen & Knight, of counsel), for appellant. H. P. Brown and Dixon L. Phillips, for respondents.

SHAW, J. The case involves two actions, relating to the same transaction, appealed from the superior court of Fresno county. Appeals are taken in each case from the judgment, and from an order denying Wright's motion for a new trial. All the appeals are presented upon one transcript.

On September 13, 1900, in the superior court of Tulare county, Beeson began case numbered 9,184, against Wright, alleging that in June, 1900, he sold and delivered to Wright 60 shares of the capital stock of the Enterprise Lumber Company for the agreed price of $5,285.12, which Wright then promised to pay; that Wright had paid thereon $2,900; that the balance, $2,385.12, remains unpaid, for which sum he asks judgment. On September 21, 1900, Wright began the action numbered 9,149, against Beeson and Brown. This is a suit upon a promissory note for $1,900 executed by Beeson to Wright on May 11, 1900, payable one day after date, with interest until paid, and secured by the pledge of 20 shares of stock of said company, the said 20 shares being a part of the 60 shares mentioned in the suit of Beeson v. Wright (No. 9,184). It is alleged that Brown claims some interest in the stock. Judgment was asked for the amount of the note and for the foreclosure of the lien of the pledge of the stock. Brown answered, disclaiming any interest.

The two cases were tried together upon the stipulation that the same evidence should be taken and considered, so far as applicable, in each case. Judgment was given in favor of Beeson in the case of Beeson v. Wright (No. 9,184) for the recovery of $2,385.12 alleged to be due as the balance of the price of the stock. In the case of Wright v. Beeson (No. 9,149), upon the promissory note, judgment was given in favor of the defendants that the plaintiff take nothing thereby. The only contention which it is necessary to notice is that the judgment in each case is contrary to the evidence.

There is no substantial conflict in the evidence, except upon one point. On March 24, 1900, Beeson was the owner of the 60 shares of said stock; Brown having at that time some subordinate interest therein. Forty of these shares were the subject of litigation in an action then pending in the superior court, entitled Feusier v. Wright, and were deposited in court, awaiting the final decision in the case. On the day mentioned Beeson and Brown executed a written contract with

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wright, whereby it is declared that they sold and delivered to Wright the 60 shares of stock in controversy, 40 of said shares to be taken at the price of $3,000, and the remaining 20 shares at the price of $1,900. The agreement further provided that no part of the price fixed for said stock was to be paid until the entire 60 shares should be delivered and transferred, or was ready to be transferred, on the books of the corporation, to Wright, and that, if it should become impossible to transfer the whole 60 shares to Wright, he would reassign and convey to the sellers all his interest therein. On May 11, 1900, Wright, at the request of Beeson, advanced to Beeson the sum of $1,900 as a loan, for which Beeson executed the note sued on in the case of Wright v. Beeson and pledged to Wright, as security therefor, the 20 shares of stock which was not involved in the suit with Feusier. According to the testimony of Beeson, it was then understood that, if the litigation with Feusier resulted in favor of Beeson and Wright, the stock should be retained by Wright and the note canceled. About that time the case of Feusier v. Wright was tried, and about June 12th, a decision was announced by the court in favor of Wright, but no findings or judgment were filed or entered in the case until June 18th. On June 12th, after the decision was announced, Wright, Beeson, and Brown met on the street in Fresno. At that time Wright was secretary of the company, the 20 shares were in his possession as pledgee, and the 40 shares were on deposit in court in the case of Feusier v. Wright and in control of the court. What took place at that meeting is the controlling factor in the case. The evidence upon that subject is conflicting. As the finding is in favor of Beeson and Brown, we must, in the consideration of the appeals, accept their version as true. They testified that Brown, at Beeson's request, presented to Wright a statement purporting to be a statement of account between Beeson and Wright. The statement charged to Wright $3,000 for the 40 shares of stock and two notes due from one McFadzen, one of $626.25 to Brown, the other of $78.87 to Beeson, and gave Wright credit for a balance of $315, due from one Young, leaving a balance due from Wright to Beeson of $3,385.12. Thereupon, according to their statement, Beeson stated that he wanted to settle up in full, and close the transaction for the 60 shares of stock and wanted Wright to return the $1,900 note. Wright said he could not pay all the money that day, but that he could pay $1,000, that he did not know when he could pay the remainder, but that he would pay it within a short time. Beeson said he would need the money on July 6th to pay on some land he had bought, to which Wright replied that he would see that Beeson was not cramped and would make the payment in time to enable Beeson to meet the obligation for the property and that he would return the note, which he had left at his home, as soon as he could find it. Wright then paid the $1,000, and it was entered by him as a credit on the said statement of account. Beeson and Brown also testified that Wright agreed to take the stock in the condition it was in at that time at the price of $5,285.12, and also agreed to pay the two notes of McFadzen, amounting to $704.12, and that he would allow the $1,900 advanced on the note and secured by the pledge of the 20 shares to stand as a payment for the 20 shares and would cancel the note of Beeson for that sum, that thereupon they all called it a deal and said the trade was finished, Wright also agreeing that, if an appeal was taken in the case of Feusier v. Wright, he would take care of it at his own expense.

This was substantially all the testimony given in support of the suit of Beeson v. Wright for the balance of the alleged price of the 60 shares of stock. The execution of the note for $1,900 is admitted, and the only defense to it consists of the claim that by the transaction of June 12, 1900, Wright agreed to take the pledged stock in the condition in which it then was in satisfaction of the debt due upon the note. The transaction of June 12th was entirely oral. No writing modifying, rescinding, or amending the contract of March 24, 1900, was ever executed by the parties.

It is obvious that this transaction could not have operated to alter or change the written contract with regard to the forty shares of stock deposited in court. A written contract cannot be altered, except by a contract in writing, or by an executed oral agreement. Civ. Code, § 1698. Taking the testimony of Beeson and Brown at its full value, it is quite clear that there was no executed oral agreement concerning those shares. The price to be paid for them was fixed by the contract at $3,000. They were then on deposit in court, not in control of the parties and not ready for transfer on the books of the company. There is no evidence that they ever have been ready for such transfer, and therefore the price was not then due. Wright merely paid $1,000 of it and agreed to pay the remainder before it was due, or in time to enable Brown to meet a collateral obligation. Nothing further in that behalf was done. Furthermore, as to the 40 shares, there was no consideration for the oral agreement that it is claimed was made. The voluntary payment of a part before maturity did not constitute such consideration, since it did not benefit Wright nor cause prejudice to Beeson. Civ. Code, § 1605. There was no evidence of any consideration for the promise to pay the two notes of McFadzen, and, besides, that was a special promise to answer for the debt of another, and, not being in writing, nor within the scope of section 2794 of the Civil Code, it was void. Civ. Code, § 1624, subd. 2. The judgment in the case of Beeson v. Wright was upon an obligation not due at the time it was rendered, and it is wholly without support in the evidence.

The evidence shows that there was, in substance, an executed oral agreement with respect to the 20 shares of stock. There was, in effect, an execution of that part of the contract. The part of the written agreement stipulating for the sale of the 60 shares as an entirety, and providing that there was no obligation upon the buyer to take any of it unless all of it was available, was not an immutable compact. The parties still retained power to change it in any respect and to make further contracts relating to its subject-matter. The fact that separate and different prices were fixed for the two blocks of stock made it easy to alter the contract so that it could be executed as to one, without affecting it as to the other. If, after its execution, Wright had paid the $1,900 specified as the price of the 20 shares, and Beeson and Brown, in consideration of such advance payment, had completed the sale as to the 20 shares by transferring and delivering the same to Wright, no one would contend that the transaction was not complete and binding as an executed sale of the 20 shares, or that the original contract was not, to that extent, performed and discharged, including the obligation to pay the $1,900 as the price thereof. This was exactly what the two transactions of May 11th and June 12th amounted to in legal effect.

The loan of $1,900 on May 11th was made with the express purpose of transforming it into a payment of the $1,900, fixed as the price for the 20 shares, if the decision in Feusier v. Wright should be rendered in favor of the defendants therein. It was, in effect, so agreed by the parties at the time said loan was made. Beeson testified that the superior court decision was the one referred to in the conversation. The subsequent transaction of June 12th, when the decision of the superior court was rendered, confirms that view, and, as the court below found in accordance therewith, it must now be taken as the fact. On June 12th, after the decision was given, the parties met and carried out the agreement of May 11th. The certificates for the 20 shares having been already indorsed and delivered to Wright in pledge at the time the loan was made, and he being the secretary of the company with power to enter the transfer on the books, no further delivery thereof was necessary. Beeson having received the $1,900, actual delivery thereof in payment was not required. All that was essential to complete the arrangement of May 11th, if it did not become complete by the mere happening of the event upon which the loan was to become a payment, was the mutual consent of the parties to accept as performance what they had previously received as a loan and pledge, respectively. Each thereupon accepted the decision of the superior court as the event which was to terminate the loan and pledge, each accepted the previous delivery of the stock and payment of the money as performance of the respective obligations, and the oral agreement to complete the sale of the 20 shares separately from the 40 shares became then and there an executed agreement.

The fact that the note was not then canceled or destroyed does not prevent the transaction from having this effect. It was fully paid and satisfied by the transaction, and, being past due, it thenceforward remained without force or validity into whosesoever hands it might fall, whether surrendered or not. The effect of the entire proceeding was the same as if no loan had been made or note given on May 11th, and the $1,900 had been paid and the stock transferred on June 12th, as part performance of the original agreement. Wright retains the stock and has a complete legal title thereto, and he should not be allowed to recover judgment on the note after it has been thus discharged.

In view of this conclusion, the evidence of the conversation at the time the note was given, to the effect that, although upon its face payable one day after date with interest, it was not to be payable until after the decision of the Feusier Case and was not to bear interest, was manifestly harmless, even if erroneous.

As the appeals have been presented upon one transcript and each party prevails in part, it is proper that each should pay one-half of the costs of appeal.

The judgment and order in the case of Beeson v. Wright are reversed, the judgment and order in the case of Wright v. Beeson upon the promissory note are affirmed, and it is ordered that each party shall pay one-half the costs of appeal, and that the court below give the proper judgment for such costs if either party has paid more than one-half thereof.

We concur: LORIGAN, J.; HENSHAW, J.; MELVIN, J.

Concurring Opinion in Beeson v. Wright.

SLOSS, J. I agree with what is said in the foregoing opinion concerning the forty shares, and, therefore, concur in the reversal of the judgment and order appealed from in the case of Beeson v. Wright.

Dissenting Opinion in Wright v. Beeson.

I dissent, however, from the affirmance of the judgment and order in Wright v. Beeson. The opinion of the majority proceeds upon the theory that the agreement of June 12th was executed with respect to the twenty shares and the nineteen hundred dollar note, and constituted a valid oral modification of the original writing, under section 1698 of the Civil Code. I shall not stop to discuss the appellant's argument to the effect that, even if the parties had, from the outset, been dealing with the twenty shares alone, the occurrences of June 12th would not have been sufficient to operate as a valid modification of a written agreement. Assuming their sufficiency to that end they could be given effect only by treating the sale of the twenty shares as severable from the remainder of the contract. This cannot be done without making for the parties and imposing upon them a contract which they never intended to make. That the original written agreement was entire is clear from its terms. It provided that no part of the price fixed was to be paid until the entire sixty shares should be delivered and transferred, or be ready for transfer. The alleged modification of June 12th did not purport to make the contract severable. The testimony of Beeson and Brown, as stated in the main opinion, is that Beeson declared to Wright that he wanted to settle up in full and close the transaction for the sixty shares of stock. If the oral agreement then made was effective at all, it must have operated upon the rights of the parties to the entire full sixty shares. Neither Beeson nor Wright intended to make an agreement which should apply solely to the twenty shares. Just as the original agreement was entire, so was the attempted modification. If it cannot be given effect in toto, it cannot be given effect at all. To enforce it in part is to hold Wright to a payment for twenty shares, when the only contract he has ever made is an entire one for sixty shares. Viewing the modification, then, as an entirety, it was not effective unless fully executed. Execution in part would not suffice. "There must be a complete execution of the obligations of both parties in order to bring the modification within the terms of the statute." Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159, and cases cited. The majority opinion shows that the agreement remained executory as to the forty shares. As these shares were bound up with the others so as to make a single agreement for the sale of the sixty shares, the rights of the parties must be determined by their written contract. There is no foundation in either the findings or the evidence for a claim that the conversation of June 12th constituted a novation whereby a new contract was substituted for the existing one. See Pearsall v. Henry, supra. The parties were, not, under the testimony of Beeson and Brown, undertaking to abrogate the old agreement and put a new one in its place, but were dealing with a view to carrying out the old agreement, subject to certain stipulated changes.

I think too that the court below erred in admitting evidence of an oral understanding, contemporaneous with the execution of the note, that such note (although upon its face made payable one day after date and bearing interest) was to be payable after the decision in the Feusier Case and be without interest. S. J. Sav. Bank v. Stone, 59 Cal. 183; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283; Leonard v. Miner, 120 Cal. 403, 52 Pac. 655.

I concur: ANGELLOTTI, J.

(159 Cal. 142)

HANNAH v. STEINMAN. (S. F. 5,327.)

(Supreme Court of California. Jan. 4, 1911. Rehearing Denied Feb. 2, 1911.)

1. CONTRACTS (§ 93*)—RESCISSION—"MISTAKE OF FACT"—NATURE OF MISTAKE.

Under Civ. Code, § 1689, providing that a party to a contract may rescind it if his consent was given by mistake, while the mistake may be one of fact, as defined by section 1577, or of law, as defined by section 1578, in which latter case the mistake must be by both parties, not only must the mistake be one but for which the party would not have consented to the contract, section 1568 declaring that consent is deemed to have been obtained through mistake "only when it would not have been given had such cause not existed," but in case of mistake of fact, the mistake must be "material to the contract," this being an element of a mistake of fact, as defined by section 1577.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415–419; Dec. Dig. § 93.*

For other definitions, see Words and Phrases, vol. 5, pp. 4542, 4543; vol. 8, p. 7723.]

2. LANDLORD AND TENANT (§ 27*) — LEASE — RESCISSION—MISTAKE.

The mutual mistake, the belief that the lot was not within the district where construction of wooden buildings was prohibited by ordinance, on which the parties executed a lease of a vacant lot, reciting that the lessee contemplated erecting buildings thereon, and might remove them at the termination of the lease, is not only one but for which the lessee would not have consented to the lease, but is also material to the contract (that is, not as to a purely collateral matter, but going to the essence of the contract, so as to entitle the lessee to rescind the lease); the lease for only five years, and for a substantial rent, being of no substantial value without the right to erect a wooden building.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 82; Dec. Dig. § 27.*]

3. LANDLORD AND TENANT (§ 27*) — LEASE — RESCISSION — "MISTAKE"—NEGLECT OF LEGAL DUTY.

The mistake of persons in executing a lease of a lot, the belief of both parties that the lot was not within the district where construction of wooden buildings was prohibited by ordinance, whereas two days before the lease was executed an ordinance was passed putting it within such district, was not, as regards the lessee's right to rescind, a mistake caused by any neglect of his legal duty, within Civ. Code, § 1577, providing, as part of the definition of a "mistake," that it "was not caused by the neglect of a legal duty on the part of the person making the mistake."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 82; Dec. Dig. § 27.*]

4. LANDLORD AND TENANT (§ 34*) — LEASE — RESCISSION—OFFER TO RESTORE.

Under Civ. Code, § 1691, providing as a condition to a party rescinding a contract that "he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same on condition that such party shall do likewise, unless the latter is unable or positively refused to do so," the offer of a lessee, attempting to rescind the lease, to restore possession of the land, is not invalid because conditioned on the lessor restoring "all moneys and things of value received as consideration for said lease," though the lessor be entitled to reasonable compensation for use of the land prior to rescission, if the circumstances make it just that he should have such compensation; the further part of the offer "to do and perform all acts and things which may be necessary or proper in order to fully restore to you any and all things of value received by me from you as fully and completely as if said lease had never been made," being broad enough to include such compensation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 34.*]

5. Landlord and Tenant (§ 34*) — Lease — Rescission—Laches.

Under Civ. Code, § 1691, subd. 1, providing as a condition to one rescinding a contract that "he must rescind promptly on discovering the facts which entitle him to rescind if he * * * is aware of his right to rescind," one taking a lease of a vacant lot, for purpose of constructing thereon a wooden building, under the mistaken belief of both parties that the lot was not within the district where construction of wooden buildings was prohibited by law, acted seasonably, having at once, on discovery of the mistake, made known to the lessor that the lease was valueless to him unless he could have a longer term, and made ineffectual negotiations for a longer term, and having had no idea till he consulted attorneys, which he did immediately on refusal of an extension, that he had a right of rescission, and having acted immediately on learning of his right; there having been no circumstances prior to termination of his negotiations calling for a conclusion that a resort to law must be had, and mere knowledge of facts entitling one to rescind not being enough to necessarily put him on inquiry as to his remedy at law, but it being necessary to put him on such inquiry that he at least have knowledge of such facts as would reasonably put him on such inquiry.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 97; Dec. Dig. § 34.*]

6. Landlord and Tenant (§ 34*) — Lease — Right of Lessee to Rescind—Waiver.

A lessee does not waive his right to rescind the lease of a vacant lot, for the mistake on which it was made, the belief of both parties that the ordinances did not prohibit his erecting a wooden building by paying rent, under protest, and without knowledge of his right to rescind, and while negotiating for an extension of the lease for a term that would justify him in making another kind of improvement.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 34.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Jesse D. Hannah against B. U. Steinman. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Aitken & Aitken, for appellant. Heller, Powers & Ehrman, for respondent.

ANGELLOTTI, J. Plaintiff appeals from a judgment denying him any relief and from an order denying his motion for a new trial in an action brought by him to obtain a decree that a contract of lease had been rescinded.

Defendant is the owner of an unimproved lot of land in San Francisco, with a frontage of 90 feet on the northerly line of Geary street between Larkin and Hyde streets. On July 7, 1906, a contract of lease was executed by the parties, whereby defendant let to plaintiff and plaintiff hired from defendant said lot for a term of three years commencing August 7, 1906, for the sum of $9,000, payable in monthly installments of $250, and the privilege was thereby given to plaintiff to extend the lease for a further term of two years at a monthly rental of $300. It was recited therein that as the lessee contemplated erecting buildings on the premises he would hold the owner free of any claim of lien on account thereof, that all buildings or other improvements placed thereon by plaintiff should be plaintiff's property at the termination of the lease, that he would pay all taxes thereon and that he should have ten days free of rent at the termination of the lease in which to remove them. Up to the 5th day of July, 1906, the ordinances of the city and county of San Francisco were such that a permit could be obtained for the construction of a wooden building on this property, but on July 5, 1906, an ordinance was enacted that rendered it unlawful to erect or construct wooden buildings within certain limits prescribed therein, which included this lot. Neither plaintiff nor defendant knew of this change in the laws of the city and county at the time of the execution of the lease, each supposing that he knew and understood the law relative to such matters, and each apprehending the law to be that the erection of a temporary wooden building on said lot would be lawful. Plaintiff and defendant never met personally until long after the execution of the lease, all negotiations between them having been conducted through a firm of real estate brokers who acted purely as middlemen, and who were not the agents or representatives of the defendant. The finding on this question of agency is fully sustained by the evidence. About two weeks after the execution of the lease plaintiff, having already paid $250 rent, applied to the board of public works of the city and county for a permit to erect a wooden building on said property, and he then discovered that the law relative to fire limits had been changed and that no permit could be obtained. There was no attempt to question the positive evidence introduced by plaintiff to the effect that without the right to erect a wooden building upon this lot, the lease for three years only with the privilege of two years more at the prescribed rental was absolutely without value to a tenant and that plaintiff never would have entered into the contract had he supposed that he could not erect such a building thereon. It was impossible to use the lot to advantage without a building, and the cost of such a building as could be constructed in view of the building ordinances applicable would be so great as to render the lease in question valueless. The evidence compels the conclusion that it was within the contemplation of both parties that the lessee could use the lot to advantage only by constructing a wooden building thereon and that he was taking it for such use. Upon learning that a wooden building could not be constructed plaintiff so informed the real estate agents, said the lot was of no value to him unless he was given a longer term, and protested against paying the rent for the second month. He subsequently paid rent for two additional months to Mr. Israel, of the Union Trust Company, for defendant, protesting at each payment against the same. He was informed by Mr. Israel that defendant was East, but would shortly return, and he allowed the matter to remain in abeyance until defendant's return. The evidence indicated that defendant was advised of plaintiff's dissatisfaction with the lease, and that he (plaintiff) was disposed not to go on with it. Immediately upon his return (January 26, 1907) negotiations were commenced between the parties looking to a longer term, but they came to nothing. In his written proposition of February 24, 1907, regarding the terms of a new lease for 20 years, plaintiff asked defendant, if not satisfied with the proposition, to consider releasing him, saying that he had already paid dearly for his experience. As soon as it had developed that no satisfactory arrangement could be made plaintiff consulted an attorney, and was informed that he had a right to rescind the contract of lease. This was on March 1, 1907. He had full knowledge of the facts which entitled him to rescind two weeks after the agreement was entered into, but did not know that an agreement could be rescinded on account of such a mistake until so advised by his attorney. On March 5, 1907, he served a notice of rescission on defendant, specifying mistake and failure of consideration as the grounds, offering therein to restore possession of the land, authorizing defendant to enter upon and hold the same, offering to execute such release of the lease as defendant might desire, and to do all acts necessary in order to fully restore to defendant any and all things of value received by him as fully and completely as if said lease had not been made, "on condition that you restore to me all moneys and things of value received as consideration for said lease." Defendant refused to agree to a rescission, and this action was at once commenced.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The trial court found as facts "that the use of said real property described in said lease by the erection of a building or buildings which could be removed was not the only valuable consideration for the obligation of plaintiff under said contract," and that plaintiff "did not use due diligence in rescinding said agreement." Both of these findings are attacked as not being sustained by the evidence. In its purported conclusions of law was one that plaintiff "did not rescind said contract promptly upon discovering the facts which entitled him to rescind the same and when he was aware of his right to rescind," and this, treated by plaintiff as a finding of fact, is also attacked as being unsupported by the evidence.

A party to a contract may rescind the same if his consent thereto was given by mistake either of law or fact. Subdivision 1, § 1689, Civ. Code. We deem it unimportant whether the alleged mistake in this case be held to be a mistake of fact or one of law. The mistake was the belief of both parties that the lot was not within the limits fixed by ordinance wherein it was unlawful under the ordinances of the city and county of San Francisco to construct a wooden building—ignorance of the fact that an ordinance had just been adopted placing such lot within such limits. Unconscious ignorance of a fact material to the contract or belief in the present existence of a thing material to the contract constitutes a mistake of fact (section 1577, Civ. Code), and a misapprehension of the law by all parties, all supposing that they know and understand it, and all making substantially the same mistake as to the law, constitutes a mistake of law (section 1578, Civ. Code). Upon the facts of this case there was a mutual mistake either of fact or of law. Was it such a mistake as warrants rescission? Consent is deemed to have been obtained through mistake "only when it would not have been given had such cause not existed." Section 1568, Civ. Code. It cannot be doubted that plaintiff would not have consented to the lease but for this mistake. The principal question in this connection is whether it was "material to the contract" within the meaning of those words as used in our statute. That it was material in the sense that but for it plaintiff would not have considered for a moment the making of the contract we have seen, but that clearly is not enough. The same thing might be said as to mistaken expectations of both plaintiff and defendant as to plaintiff's ability to obtain tenants for the building he proposed to erect on the leased land, and, of course, a mistake in that regard would not furnish ground for rescission, although plaintiff never would have entered into the contract but for such mistaken belief. It is declared by Mr. Page in his work on Contracts that a mistake will not be operative to render a contract void, although in some cases it may render it voidable, if it merely affects some "collateral" though highly material matter, constituting merely a matter of inducement, but that it must affect the execution and the essential elements of the contract (sections 58 and 60), which elements are stated to be the parties, the subject-matter, the consideration, and the offer and acceptance. We may assume for the purposes of this decision that our Legislature had some such idea as this in the use of the word "material" in this connection, but, so assuming, we are nevertheless of the opinion that the mistake here was not as to a purely collateral matter, but rather went to the essence of the contract. The authorities recognize the difficulty in determining whether a mistake applies to an essential feature of the contract or to a purely collateral matter. 1 Page on Contracts, § 71. It is thoroughly established that if the parties to a contract enter into it under the belief that the subject-matter or consideration is in existence, and in effect condition their contract thereon, and as a matter of fact, it is not in existence, the mistake will enable a party to avoid the contract. We are, of course, not speaking of cases where the parties are aware that the existence of the subject-matter is doubtful and contract with reference thereto. Thus, an ordinary contract of sale of property supposed to be in existence, but which in fact no longer exists, may be avoided. In such a case it is plain that the mistake is material and goes to the very essence of the contract. The assumed fact of existence is the whole basis of the contract. The same rule must necessarily apply where a material part of the subject-matter, as to which the parties supposed they were contracting, is not in existence at the time the contract is entered into. An example of this is the case cited by Mr. Page in section 72 of his work (Bedell v. Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871), a lease of property to be used for manufacturing purposes where entered into under a mistake as to water rights which were thought to be easements appertaining to the realty, and without which it could not be used for such purposes. See, also, Blakeman v. Blakeman, 39 Conn. 320; Champlin v. Laytin, 1 Edw. Ch. (N. Y.) 467. So, also, a material mistake as to the identity of the subject-matter or consideration may go to the very essence of the contract. A leading case in this regard is that of Kennedy v. Mail Co., 2 L. R. Q. B. 580, an action to rescind a contract of subscription for shares of the defendant on the ground of mistake. The prospectus of the defendant company stated that the shares were issued to enable the company to perform a contract for mail service entered into with the government of New Zealand. As a matter of fact the purported contract was invalid, but all parties believed it to be valid, and plaintiff had subscribed because of that mistaken belief. The value of the shares would have been greater had the contract been valid, but they were, nevertheless, of considerable value, the court in fact saying that the difference in value was not greater than "might very well be accounted for by the change of times, quite independently of the dispute about the contract." While relief was denied in that case, the court expressly recognized that if the invalidity of the mail contract really made the shares plaintiff obtained "different things in substance from those which he applied for" he would be entitled to rescission. The court said that "the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole transaction." It cannot be doubted that if the value of the shares had been entirely dependent on the validity of the mail contract the court would have held that the mistake was as to the substance of the whole transaction. The principles enunciated in this decision were applied in Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531, where a mistake as to whether a cow was barren and would not breed was held to avoid a contract of sale thereof, the record being taken as showing that both parties supposed the cow to be barren and dealt with each other upon that theory, in consequence thereof fixing the price ("five and a half cents per pound") according to the value of the animal for beef, while, if a breeder, she was worth at least $750. The court held that the mistake went to the whole substance of the agreement, that the parties would not have made the contract except upon the understanding that the cow was incapable of breeding and of no use as a cow, that the cow was not in fact the animal or kind of animal the defendant intended to sell or the plaintiff intended to buy, that the mistake went to the very nature of the thing, and affected the substance of the whole transaction, and that there was no contract to sell or of sale of the cow as she actually was. Such a case is, of course, very different from one where there is no mutual understanding as to a supposed fact relating to the subject-matter of the contract known by both parties to be the sole basis of the proposed contract, and upon the assumption of which they actually conduct their negotiations. The case before us is very much stronger in favor of plaintiff than either of the cases just discussed. The evidence demonstrates that the parties negotiated and executed the lease upon the assumption that a wooden building could lawfully be constructed upon the demised land, and that such was the use to which the lessee must put the land and was the main inducement of the contract. Without the right to construct such a building, it could be of no substantial value to any one holding a lease for only five years who was required to pay any substantial rent. While there was no mistake as to the identity of the land itself, without that right and viewed with reference to a lease for only five years the land was a substantially different thing from the land supposed to be contracted for. It is very analogous to a case of land bought and sold upon the mistaken supposition that an absolutely necessary way of ingress and egress is appurtenant to the land and passes by the conveyance, where, in fact, there is no such way. Without the right to construct a wooden building the tenant, so far as all practical considerations are concerned, was obtaining nothing. If an effectual prohibition against a wooden building on this lot had been imposed by the terms of a prior conveyance, and this lease had been given and received in ignorance of the existence thereof, it would probably not be questioned that the mistake would be of such a nature as to enable the lessee to rescind, the prohibition amounting to a practical and material impairment of the estate contemplated by the parties. Here we have practically the same result because of an ordinance of the city of which the parties were ignorant. We cannot believe that the equitable rules relative to mistake should be so narrowly construed as to require us to hold that this mistake did not go to the very essence of the contract between these parties. We have examined the cases cited by learned counsel for defendant on this proposition, but find nothing therein compelling a different conclusion from that at which we have arrived. It would unnecessarily prolong this opinion to discuss these cases. It is proper, however, to note that the quotation from 9 Cyc. 395, to the effect that where one buys land in the expectation of procuring a consent which is required for building on it, and fails to obtain such consent, his mistake will have no effect on the agreement, is not opposed to our conclusion. The connection in which this is said shows that the expectation there referred to is one not so regarded by the parties as to constitute an essential feature of the contract of sale, but as a mere expectation of the vendee as to what he may be able to obtain from another party in the future. In the case cited in support thereof (Adams v. Weare, 1 Bro. Ch. 567, 28 Eng. Reprint, 1301) it appeared that it was understood between the parties that the vendee assumed the risk of being able to get the consent, and that the sale was not conditioned upon his obtaining it. The trial court in this case concluded, as we have, that the consent of plaintiff to said contract was given and obtained by and through a mistake, and would not have been given had not such mistake existed, and its denial of relief to plaintiff was based purely on the ground of want of diligence on his part in rescinding the agreement.

Section 1577, Civ. Code, defining "mistake," declares that it is a mistake "not caused by the neglect of a legal duty on the part of the person making the mistake." We find nothing in the record warranting a conclusion that the mistake was caused by the neglect of any legal duty on the part of plaintiff.

Section 1691, Civ. Code, provides that, except where effected by consent, rescission can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: "(1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

We see no force in the claim that the attempted rescission was incomplete for want of a sufficient offer of restoration of all that plaintiff had received under the contract. The offer was in full accord with the above-quoted provision of the Civil Code. The point of learned counsel for defendant in this connection appears to be that it was invalid because made upon the express condition that defendant restore "all moneys and things of value received as consideration for said lease," which would include all amounts received by him as rent stipulated thereby. Such, however, is the provision of our Code relative to the offer, that condition being expressly provided for therein. In the event of rescission, plaintiff was entitled to have restored to him all sums paid by him under the contract. This does not mean that defendant was not entitled to have reasonable compensation for the use of his land for the time preceding the rescission, if circumstances were such as to make it just that he should have such compensation. The offer of plaintiff was broad enough to include such compensation. In addition to offering possession of the land, etc., he offered "to do and perform all acts and things which may be necessary or proper in order to fully restore to you any and all things of value received by me from you as fully and completely as if said lease had never been made."

The decision of the learned trial judge against plaintiff is based upon his conclusion that he had not used reasonable diligence to comply with the requirement of subdivision 1 of section 1691 of the Civil Code, to rescind promptly on discovery of the facts entitling him to rescission, if "aware of his right to rescind." Is there sufficient support in the evidence for this conclusion? There is not a vestige of evidence to indicate that plaintiff, after discovery of the facts, delayed action looking to a repudiation of the lease by reason of any desire to hold the same for a time, with the possibility of profiting thereby. It was demonstrated by the evidence that from the moment of discovery of the facts it was recognized by plaintiff that his lease was absolutely valueless, as in fact it was, and contended that he should, in justice, be released from his obligation to pay rents thereunder, unless the contract was modified in such a way as to give him a term sufficiently long to warrant the construction by him of a building in accord with the requirements of the ordinance. He at once made known his position in regard to the matter to the agents who had effected the lease and who collected the rents for the second month, and maintained that position until it was finally apparent that a longer term upon a satisfactory basis could not be agreed upon. The delay in ascertaining that fact was due principally to the absence of defendant from the state, and the evidence is such as to practically compel the conclusion that plaintiff acquiesced as long as he did solely because he hoped that some satisfactory solution might be agreed upon by himself and defendant, and that he had reasonable grounds for such hope. The facts of the case were such that defendant could not but know as soon as he learned of the ordinance that the lease already executed was practically worthless to plaintiff. It is absolutely clear too, that plaintiff did not have any idea that the law gave him the right to rescind the contract of lease for such a mistake as this until, upon the conclusion of his efforts to adjust the matter with the defendant in some way, he, on March 1, 1907, consulted a lawyer. His letter of February 4, 1907, to defendant, in which he asked to be released if defendant would not accept his proposition for a new lease, showed that he was still absolutely ignorant of any such right. It cannot be disputed that he proceeded with all due diligence upon learning that such a remedy existed, but it is urged, in accord with the views entertained by the learned judge of the trial court, that he should earlier have made himself acquainted with his legal rights in the matter, upon the theory that means of knowledge are equivalent to knowledge. The words "and is aware of his right to rescind" in subdivision 1 of section 1691 of the Civil Code necessarily mean something more than that a party could have ascertained that the remedy by rescission existed by investigating as to what remedies the law afforded. Meaning no more than this they would be entirely superfluous. Discovery of the facts entitling him to rescind would alone suffice. The statute provides that in addition "to discovering the facts" he must be "aware of his right to rescind." These words imply in regard to the right to a remedy by rescission at least as much as the word "discovering" implies in regard to the facts entitling him to rescind, viz., that he should actually have knowledge of circumstances sufficient to put him on an inquiry which if followed would have developed the truth (see Lady Washington C. Co. v. Wood, 113 Cal. 487, 45 Pac. 809), or as said in Guarantee Co. v. Mechanics', etc., Co., 183 U. S. 420, 22 Sup. Ct. 131 (46 L. Ed. 253), not as meaning "becoming satisfied," but rather "having reason to believe" or "to be put on one's guard in respect thereto." Mere knowledge of the facts that entitle one to rescind is not enough to necessarily put one on inquiry as to the possible remedies afforded by law. There must at least be knowledge of such facts as would reasonably put the party upon such inquiry. This knowledge may perhaps be afforded by the very facts that entitle him to rescind, as, for instance, in a case where those facts show a deliberate intention on the part of the other party to defraud and practically demonstrate that the only relief the injured party may obtain is such as he can have by diligently pursuing such remedy as the law may afford. As to this, however, we express no opinion. But there was nothing of this kind in the case at bar; no circumstances calling for the conclusion that a resort to law must be had. There was simply a mistake on the part of both parties honestly made, and it does not appear to us that there was anything in the circumstances to sustain the conclusion that the plaintiff was required at once or at any time prior to the termination of the negotiations between himself and defendant to consult a lawyer to ascertain his legal rights. If there were a vestige of evidence to indicate that plaintiff delayed proceeding in this matter because of any uncertainty in his own mind as to whether or not it might be profitable to him to retain this lease, a very different case would be presented. It is proper, also, to say that there is no evidence whatever to indicate that defendant may have been injured by the delay. He must have known practically from the outset that, in view of the ordinance of which each was ignorant at the time of the execution of the contract, plaintiff's lease was valueless, and that plaintiff was not willing to retain it or keep the property unless a new arrangement could be made. There was nothing to indicate that he had any opportunity to let the property to any other person except his statement referred to in the letter from plaintiff of February 4, 1907, as being made a few days before, to the effect that "other parties were anxious to negotiate for this property," and in this very letter plaintiff asked him to consider releasing him.

We do not think that the complaint of plaintiff affirmatively showed such laches on his part in rescinding as to render it defective. The payment of rent under the circumstances shown did not constitute a waiver of the right of rescission.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

59 Cal. 57

BELL v. WILSON et al. (L. A. 2,343.)

(Supreme Court of California. Dec. 28, 1910.)

1. Absentees (§ 5*)—Nonresident Distributees—Appointment of Agents.

Code Civ. Proc. § 1691, authorizing appointment of an agent for a nonresident distributee who has no resident agent, does not limit the power to appoint to orders therefor made before the decree of distribution as affecting the validity of a bond given by such appointee; the statute being merely intended to permit final closing of an estate where a distributee does not claim his share.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 3–11; Dec. Dig. § 5.*]

2. Executors and Administrators (§ 315*)—Distribution—Duty of Court.

Under Code Civ. Proc. § 1666, requiring a decree of distribution of a decedent's estate to name the distributees and their shares, the court in making such decree need not investigate whether a distributee is a nonresident or whether he has a resident agent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1299; Dec. Dig. § 315.*]

3. Executors and Administrators (§ 314*)—Nonresident Distributees—Rights.

Under Code Civ. Proc. § 1666, authorizing distributees to recover their shares from any persons in possession, that the distributee is a nonresident does not preclude him from recovering his share from the executor or administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1280; Dec. Dig. § 314.*]

4 Absentees (§ 5*)—Nonresident Distributees—Appointment of Agent—Validity.

The validity of an order under Code Civ. Proc. § 1691, appointing an agent for a nonresident distributee, is not affected by any impropriety in also making him agent for the assignee of a distributee, where the assignee was not a party to the decree of distribution.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 3; Dec. Dig. § 5.*]

5. Absentees (§ 5*) — Agents for Nonresident Distributees — Appointment — Requisites.

Under Code Civ. Proc. § 1691, it is not necessary to designate by name or at all for whom the agent is appointed.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 3; Dec. Dig. § 5.*]

6. Absentees (§ 5*) — Agents for Nonresident Distributees — Appointment — Requisites.

It is essential under Code Civ. Proc. § 1691, that the distributee be found to be a nonresident having no resident agent.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 3; Dec. Dig. § 5.*]

7. Absentees (§ 5*) — Agents for Nonresident Distributees—Liability.

An agent for a nonresident distributee appointed under Code Civ. Proc. § 1691, holds his share as agent for any one who, after the order of appointment shows right thereto, whether as distributee or as claimant under him.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 7, 8; Dec. Dig. § 5.*]

8. Absentees (§ 5*) — Agents for Nonresident Distributees—Accounting.

The superior court has jurisdiction of a proceeding to settle the accounts of an agent appointed for a nonresident distributee, and to direct payment to the distributee's assignee's administratrix, though the order appointing the agent was made after the decree of distribution.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

9. Absentees (§ 5*) — Agents for Nonresident Distributees — Accounting — Decree—Conclusiveness.

A decree of a superior court settling the accounts of an agent for a nonresident distributee, and in directing payment to the distributee's assignee's administratrix, having never been appealed from, is final and conclusive.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

10. Absentees (§ 5*) — Judgment Against Principal—Effect upon Surety.

A decree on settlement of accounts of the agent of a nonresident distributee being binding upon him is equally conclusive upon his surety.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

11. Absentees (§ 5*)—Agents for Nonresident Distributees—Breach of Bond.

Refusal by an agent of a nonresident distributee to comply with the decree settling his accounts and directing payment was a breach of his bond, rendering the sureties liable thereon.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. § 8; Dec. Dig. § 5.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Mary Jane Bell, Solomon Bell's administratrix, against C. N. Wilson and another. From a judgment for defendants, and from an order refusing a new trial, plaintiff appeals. Reversed.

Will D. Gould, for appellant. Lawler, Allen & Van Dyke, for respondents.

LORIGAN, J. This action is brought against the principal and one of his sureties on a bond given pursuant to section 1692 of the Code of Civil Procedure. On November 15, 1875, the probate court of Los Angeles county rendered a decree of final distribution in the estate of Jacob Bell, deceased, wherein it was ordered that there be distributed to Daniel L. Bell, as an heir at law of deceased, one-sixth of the estate. Sixteen months thereafter, to wit, on March 8, 1877, C. E. Thom, administrator of said estate, filed a petition therein, setting forth that all the heirs and distributees of the estate had received and receipted for their shares thereof, except Daniel L. Bell, who was a nonresident and had no agent in this state; that said Daniel L. Bell had on December 21, 1875, transferred and assigned all his interest in said estate to one Solomon Bell, also a nonresident without an agent here to represent him; that it was necessary to appoint an agent to act for both these persons, and asked that C. N. Wilson be appointed "to act as the agent for and in behalf of said Solomon and said Daniel L. Bell and each of them * * * to receive the sum of $1,133.95, * * * and for them and each of them to take charge and possession of all the real estate that might belong to them or either of them as his distributee or assignee from the estate of Jacob Bell, deceased." An order of court was made on said petition appointing said Wilson agent "of the said Solomon Bell and Daniel L. Bell for them and each of them * * * to receive from the said C. E. Thom the sum of $1,133.95 the amount ordered * * * to be distributed to Daniel L. Bell by the decree of distribution * * * entered on the 15th day of November, 1875, * * * and also all the property of the estate of Jacob Bell, deceased, belonging to said Solomon Bell and the said Daniel L. Bell, as is set out and prescribed in the aforementioned decree of distribution," and directing that a bond in the sum of $2,000 for the faithful performance and discharge of his duties as such agent be given by Wilson. This bond was given, the defendant Lord being one of the sureties thereon, and it recited as a condition of his obligation the appointment of Wilson as agent of Daniel L. Bell and Solomon Bell, to receive their and each of their distributive shares of the estate of Jacob Bell, deceased, and, upon said bond being approved and filed, the administrator turned over to Wilson the money and all the property distributed to Daniel L. Bell, and as agent for said Daniel L. and Solomon Bell, Wilson receipted to the administrator therefor.

On July 27, 1903, in a proceeding entitled "In the Estate of Jacob Bell, Deceased," brought by plaintiff in the superior court of Los Angeles county against said Wilson for an accounting, and in which proceeding he appeared, said court entered a decree settling the final account of said Wilson as agent, and adjudged that he had in his possession belonging to the estate of Solomon Bell, deceased, a balance of $7,843.41 in cash, and decreed that he pay that sum over to said plaintiff as administratrix of the estate of Solomon Bell, deceased. After the judgment became final a demand for payment of the sum adjudged due was made on Wilson, and, upon his refusal to pay it, plaintiff brought this action in which she prays for a judgment against Wilson for the amount awarded her in said judgment, and for judgment against Lord for $2,000, the amount for which he became surety upon the bond. The trial court gave judgment for defendants, and from that judgment and an order denying her motion for a new trial she appeals.

As we understand the view taken by the trial court, as gathered from its findings, as also that of the district court of appeal from which this case is brought here for further hearing, it is that not only had the probate court no power to appoint an agent to receive for Solomon Bell the distributive share assigned to him by Daniel L. Bell, but that said court had no authority at all to appoint an agent to receive the distributive share of any nonresident distributee having no agent in the state, unless such appointment is made before the decree or order of distribution is made; that hence the order appointing Wilson agent of both Daniel L. Bell, the nonresident distributee, as well as agent for Solomon Bell, the nonresident assignee of Daniel L. Bell, or for either of them, was void, and no liability attached upon the bond given by the sureties, under this void order. We cannot agree with this view as far as it declares that the former probate court (and the superior court now because the code section is practically the same) was or is limited in its power to appoint agents for absent distributees to orders therefor made prior to the decree of distribution. This is too narrow and constrained a view of section 1691 of the Code of Civil Procedure governing the subject. That section provides that: "When any estate shall be assigned or distributed by a decree of the court, or distributed by commissioners, as provided in this chapter, to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the partition and distribution." There is nothing in this section which says that the agent shall be appointed before the distribution. In making a decree of distribution, it is the duty of the court to "name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and receive their respective shares from the executor or administrator, or any person having the same in possession." Code Civ. Proc. § 1666. It is not enjoined as a duty upon the court in making the decree of distribution to enter into any investigation as to whether a distributee is or is not a resident of the state, or, if a nonresident, whether he has or has not an agent here. Whether he is a resident or not only becomes of real importance after the distribution is made, and is then only important in as far as it may affect the closing of the administration of the estate. The fact that the distributee is a nonresident does not preclude him from receiving from the executor or administrator his distributive share. When a nonresident knows that he is entitled to a portion of the estate, he may be relied on to take measures to obtain it either personally as soon as the administrator is prepared to deliver it, or to appoint his own agent for that purpose, and, in either event, furnish the administrator with proper vouchers so as not to embarrass the closing of the estate and the final discharge of the administrator. Usually it is only after distribution, and his failure to personally claim his distributive share or select an agent for that purpose that "it is necessary that some person should be authorized to take possession and charge of the same" (quoting from section 1691), and this necessity for the appointment proceeds from the fact that the executor or administrator cannot have the estate closed and obtain a final discharge and release of his sureties from liability until the entire distributive share is turned over to the distributees and their receipts therefor presented to the court. It is to accomplish this purpose that the "necessity" for the appointment of an agent for a nonresident distributee arises and could generally only arise after distribution and the failure of the nonresident distributee to either personally or through his agent receive his share and deliver proper voucher therefor, and section 1691 contemplates the appointment of an agent after distribution and under the necessity therefor in order to effect a final closing of the estate.

We are not to be understood as holding that the appointment of an agent for a nonresident distributee unrepresented in the state would be unauthorized if contained in the decree of distribution itself, but only that the section does not require such appointment to be made before the distribution or in the decree therefor, and that such appointment may be appropriately made after the decree and upon a showing that it is necessary that such an appointment should be made. There is nothing in the case of Buckley v. Superior Court, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135, particularly relied on by respondent, opposed to this construction. Section 1691 was not under consideration there, and section 1676, which was, expressly provides for the appointment of agents before the decree of distribution when partition is contemplated and has no bearing whatever on section 1691. Under this view of the jurisdiction of the court to appoint an agent for an unrepresented and nonresident distributee, and addressing ourselves to the particular order made by the court, therefore, it will be observed that by that order Wilson was appointed not only agent for Solomon Bell, but as agent for Solomon Bell and Daniel L. Bell, and each of them. Conceding that the order as far as it appointed Wilson agent for Solomon Bell as assignee of Daniel L. Bell's distributive share was unauthorized because the court could only appoint an agent for a distributee and had no jurisdiction over the claims of strangers to the decree (Estate of Ryder, 141 Cal. 366, 47 Pac. 993; Cooley v. Miller, 156 Cal. 510, 105 Pac. 981), still the court undoubtedly had jurisdiction to appoint an agent for the absent distributee Daniel L. Bell, and did so. It is of no consequence as affecting the validity of that order that the appointment of an agent ran in favor of both Solomon and Daniel L. Bell. The order was in terms a distributive one and was valid to the extent the court had jurisdiction to make it. In fact, we do not believe that under the provisions of the section authorizing the appointment of the agent it is of any moment that the court should designate by name or at all for whom the agent was appointed. Of course, in order to warrant the appointment of an agent, it must appear to the court that a particular distributee is a nonresident, having no agent in the state. This showing is jurisdictional, but, these facts appearing, in making the order it is not necessary to the validity that it designate the agent as appointed for the distributee by name. We apprehend that if the order had recited that Daniel L. Bell was a nonresident distributee of Jacob Bell, deceased, and had no agent in the state, and then simply appointed Wilson to take possession and charge of said distributive estate without designating for whom he was appointed agent, the validity of such an order and the liability of Wilson and his sureties for the property received under it could not be questioned. The primary purpose of the section as far as appointing an agent is concerned is to give him possession and charge of the property distributed to hold it for whomsoever at any time may be entitled to it. When originally appointed, it is true that he holds it as agent for the distributee, but this proceeds from the fact that the decree of distribution has fixed a distributee as entitled to the property the agent is appointed to take charge of, and not from any provision of the statute requiring the order to designate him as agent of the distributee. In law he holds it as agent for any one who subsequent to the order of appointment may show that he is entitled to it, whether it be the distributee or some third person claiming under him. So that it is really a matter of no consequence as affecting the validity of the order or the agent's liability or that of his surety who stands sponsor for the proper discharge of the agency whether the court was without power to appoint an agent for Solomon Bell or not. The order was a valid one in as far as it appointed Wilson agent to hold the distributed estate for the distributee Daniel L. Bell as it would have been equally valid if it had not mentioned him as agent of any particular person, but had appointed him generally to take charge of the distributive share of Daniel L. Bell, a nonresident distributee. It related primarily to the distributed property and its conservation for any person who could show he was entitled to it, and whether any one was particularly named for whom Wilson was appointed or a person was improperly designated together with the proper person as those for whom he was to stand as agent could not affect its validity.

The trial court held that the order or judgment of July 27, 1903, settling the accounts of Wilson as agent and directing payment of the balance in his hands to the plaintiff administratrix, was void for want of jurisdiction in the court to entertain the proceeding. This ruling proceeded upon the theory that after the decree of distribution the probate court had no jurisdiction at all to make an order appointing an agent for an absent distributee and particularly no jurisdiction to appoint an agent for Solomon Bell. The judgment does not appear to be questioned on any other ground. We hold, however, that the court had jurisdiction to make such an order, and, as it did make it as to the absent distributee Daniel Bell and it would have been a valid order had it not declared particularly for whom Wilson was appointed agent, it is a matter of no consequence that the court had no jurisdiction to appoint an agent for Solomon Bell. In law, when Wilson took the distributed estate as agent, he took it for the benefit of any one who might show himself entitled to it, whether as original distributee or his successors in interest by assignment or otherwise, and was liable to account for it at the instance of any person interested in the distributed property. It is conceded that Solomon Bell succeeded by assignment to all the interest of Daniel Bell in the distributed property of which Wilson took charge. In the proceeding brought by the plaintiff as administratrix of the estate of Solomon Bell, the court had jurisdiction of the subject-matter of the accounting by Wilson as agent in behalf of those entitled to the property in his hands, and jurisdiction of the parties to the proceeding for such an accounting, and the judgment settling the account and declaring plaintiff administratrix entitled to the balance in his hands having never been appealed from is final and conclusive.

The judgment being binding on the agent is equally binding and conclusive upon his sureties (Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566; Brodrib v. Brodrib, 56 Cal. 563; Treweek v. Howard, 105 Cal. 445, 39 Pac. 20), and upon refusal of the agent to comply with the decree and pay over the money there was a breach of the bond, and the defendant Lord, as surety, became liable for the payment of the judgment in the amount in which he had become responsible on the bond.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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14 Cal. App. 700

HANNON v. NUEVO LAND CO. et al.

(Civ. 898.)

(Court of Appeal, Second District, California. Nov. 30, 1910. Rehearing Denied by Supreme Court Jan. 28, 1911.)

1. Action (§ 50*)—Misjoinder.

A joint action does not lie against A. and B. on the theory that either A. converted crops from land purchased by plaintiff from B. under a wrongful claim of lease from B., or that the lease existed, constituting breach of an implied covenant by B.; such action being authorized by neither Code Civ. Proc. § 379, authorizing any one having an interest in the controversy, or who is a necessary party, to be made a defendant, nor section 389, empowering a court to determine any controversy between parties before it, etc.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. § 50.*]

2. Venue (§ 41*)—Change—Rights of Nonresidents.

Where an action is brought against two defendants, one of whom resides in the county where the action is commenced and the other a nonresident, the latter is entitled to have the place of trial changed to the county of his residence, unless the resident defendant be a necessary party.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

3. Venue (§ 41*)—Change—Rights of Nonresidents.

Where it appears that both resident and nonresident defendants are necessary parties, an order granting a change of place of trial will not be made upon the demand of the nonresident defendant, unless the former joins in the demand.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

4. Parties (§ 75*)—Necessary Parties—How Determined.

Who are necessary parties must be determined from the complaint unaided by affidavits.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 75.*]

5. Venue (§ 41*)—Change—Rights of Nonresidents.

Joining resident parties as defendants against whom no cause of action is stated does not deprive the real defendant of his right to a change of place of trial.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

6. Venue (§ 41*)—Change—Pleading.

A complaint against a company impleaded states no cause of action for converting crops from land purchased from plaintiff under a wrongful claim of lease from plaintiff's grantor, where it does not show that the company's possession, of which plaintiff had notice, was not held under such lease, thus making it an unnecessary party as affecting a question of right to a change of venue.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 41.*]

7. Venue (§ 41*)—Change—Pleading.

A complaint against a vendor impleaded states no cause of action for breach of an implied covenant consisting of an existing lease to a third party, where it does not show that the possession and use of such party was under any lease or authority from vendor, thus making the vendor an unnecessary party as affecting a question of right to a change of venue.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 41.*]

8. Venue (§ 41*)—Change—Rights of Nonresidents.

Where a complaint against a resident and a nonresident defendant states no cause of action against either, they occupy the same relative position that they would if both were necessary parties, and hence respective rights as to a change of place of trial should be controlled by the converse of the rule applicable to such cases, denying the right to a change to the nonresident when both are necessary parties.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 41.*]

9. VENUE (§ 5*)—NATURE OF ACTION.

As affecting venue, an action on the theory that either defendant A. converted crops from land purchased by plaintiff from defendant B., under a wrongful claim of lease from B., or that the lease existed, constituting breach of an implied covenant by B., is not one to determine an estate or interest in land.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 5.*]

Appeal from Superior Court, Los Angeles County; Geo. H. Hutton, Judge.

Action by Joseph E. Hannon against the Nuevo Land Company and another. From an order denying a change of place of trial, defendant land company appeals. Affirmed.

Leonard & Surr, for appellant. McNutt & Hannon, for respondent.

SHAW, J. The defendant Nuevo Land Company appeals from an order of court denying its motion for a change of place of trial from Los Angeles county, wherein the action was commenced, to the county of Riverside.

The motion was made upon the ground that said defendant was a corporation having its principal place of business in the county of Riverside; that its codefendant Union Hardware & Metal Company was not a necessary or proper party in the action, which involves the determination of an interest or estate in real property located in Riverside county. It appears both from the complaint and affidavit filed in support of the motion that the Nuevo Land Company is a resident of Riverside county.

It is alleged in the complaint that the Union Hardware & Metal Company granted plaintiff an option to purchase certain lands in Riverside county; that within the time specified in the option plaintiff elected to purchase the lands, and that said defendant Union Hardware & Metal Company, for the agreed price, made, executed, and delivered to him a grant deed (which is fully set out in the complaint and is without limitations) whereby it conveyed the property to plaintiff; that prior to the execution and delivery of this grant deed plaintiff learned that defendant Nuevo Land Company had entered upon and was in possession of said lands, having seeded the same to grain, all of which was done prior to the giving of the option to purchase; that thereupon plaintiff made inquiry of one Scheller, an officer of the hardware company, as to whether the acts of the Nuevo Land Company were had and taken pursuant to a lease of the land, or by virtue of any authority from the grantor, and was informed by Scheller that no lease had been made to the Nuevo Land Company, and that the acts of the latter in occupying and cultivating the land were without knowledge on the part of the hardware company and wholly unauthorized by it; that, relying upon such statements, plaintiff completed the purchase; that the Nuevo Land Company, without plaintiff's consent, harvested crops of the value of $4,000, and refused to account to plaintiff for the same or any part thereof, claiming that its acts in entering upon the land and the use thereof in growing and harvesting the crops was under and by virtue of authority so to do granted to it by said hardware company. It is then alleged that "by reason of the conflicting claims of the defendants, to wit, the claim by the Nuevo Land Company that it had a lease of said land from the Union Hardware & Metal Company, and the claim of said Union Hardware & Metal Company, that it had no such lease, plaintiff is unable to determine the facts with respect thereto, and therefore joins said defendants in this action in order that the court may determine said matter and render such judgment as is meet and proper in the premises." The prayer is for judgment against both defendants in the sum of $4,000, the alleged value of the crops harvested. It does not appear that the hardware company was ever served with process or that it ever appeared in the action.

It is apparent from the allegations of the complaint that the action is brought upon the theory that plaintiff has sustained damages by reason of the wrongful acts of one or the other, but not both, of said defendants, and not knowing which of the two is the guilty party impleads both in a proceeding that fails to state a cause of action against either, and asks the court to fix the liability. We know of no principle authorizing such a procedure. Respondent asserts that such action clearly comes within sections 379 and 389 of the Code of Civil Procedure, the first of which sections provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." It is contended that the hardware company "has and claims an interest in the controversy adverse to plaintiff," and is therefore "a necessary party to a complete determination or settlement of the question involved therein." Assuming that a cause of action is stated against the Nuevo Land Company for wrongful conversion of the crop, we are unable to perceive what adverse or other interest the hardware company can have therein, or how it is a necessary party to a determination of plaintiff's rights against such defendant. Conversely, upon like assumption that a cause of action is stated against the hardware company for the breach of an implied covenant of the deed, the Nuevo Land Company has no interest in the determination of the question. Neither is such action justified by the provisions of section 389 of the Code of Civil Procedure for a complete determination of the rights of plaintiff against either defendant may be had without the presence of the other. In the one case plaintiff's action is based upon a breach of the implied covenants of the grant, while in the other it is for the conversion of the crops grown on the land. The two actions, not only as to parties, but also as to subject-matter, are entirely independent and distinct one from the other. Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254. Respondent cites a number of authorities sustaining the right of a defendant to file a bill of interpleader when the same debt or duty is claimed by two or more persons, and he is in doubt as to which of the claimants he should render the debt or duty, and the court is asked to determine the rights of such claimants in order that, when the debt is paid or the duty performed, he shall be absolved from further liability thereon. These cases cannot be regarded as authority for the converse of such rule. So far as we are advised, the law recognizes no procedure in the nature of a counterpart of the bill of interpleader.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The rule is that where an action is brought against two defendants, one of whom resides in the county where the action is commenced and the other a nonresident thereof, the latter is entitled to have the place of trial changed to the county of his residence, unless the resident defendant be a necessary party. Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; Bailey v. Cox, 102 Cal. 333, 36 Pac. 650. Where it appears that both resident and nonresident defendants are necessary parties, an order granting a change of place of trial will not be made upon demand of the nonresident defendant, unless the former joins in the demand. McKenzie v. Barling, 101 Cal. 460, 36 Pac. 8. The question as to who are necessary parties must be determined from the complaint alone unaided by the affidavits. Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034. In Read v. San Diego Union Co., 65 Pac. 568,[1] it is said: "The joinder of resident parties as defendants against whom no cause of action is stated does not deprive the real defendant of his right to have the cause transferred." To the same effects is Sayward v. Houghton, supra, where it is said: "If the complaint states no cause of action against the corporation defendant, the right of Houghton to have the place of trial changed is not affected by making said corporation a defendant in the action." Says the Supreme Court in Hellman v. Logan, 148 Cal. 60, 82 Pac. 849: "The test is to be made by ascertaining who are necessary parties to the action as it is set forth in the complaint, and what parties are necessary in order to enable the plaintiffs to obtain all the relief which is properly included in the prayer for relief made therein"—citing Greenleaf v. Jacks, 133 Cal. 506, 65 Pac. 1039, and Quint v. Dimond, supra.

As we view the complaint, it fails to state a cause of action against the Nuevo Land Company for the reason that it contains nothing whereby it is made to appear that its possession and use of the land (as to which plaintiff had notice when he acquired the same) was not authorized by or held under and by virtue of a lease from plaintiff's grantor; hence, as no cause of action is stated against said Nuevo Land Company, it is not a necessary or proper party. On the other hand, it does not appear from the complaint that such possession and use by the Nuevo Land Company was under or by virtue of any lease made or authority granted by the Union Hardware & Metal Company, or that there has been any breach of covenant on its part; hence no cause of action is stated against it. It thus appears that if necessary parties are to be determined from the complaint alone, and those only are necessary parties against whom a cause of action is stated, the complaint here presents a case where neither the resident nor nonresident defendant is a necessary party. The defendants occupy the same relative position to each other that they would if both were necessary parties, and hence, respective rights as to a change of place of trial should be controlled by the converse of the rule applicable to such cases, and which denies the right of a change to the nonresident where both the latter and resident defendant are necessary parties. McKenzie v. Barling, supra. Conceding that no cause of action is stated against either of said defendants, no good reason can, in our judgment, be assigned for depriving the defendant Union Hardware & Metal Company from having the action disposed of, as against it, in the county wherein commenced, rather than to have the place of trial transferred to another county upon demand of a defendant against whom no cause of action is stated and who likewise is an unnecessary party.

There is no merit in appellants' contention that the action is for the determination of an estate or interest in real property lying wholly within Riverside county. It does not appear that either defendant at the time of instituting the action claimed any interest in the land, or that either was in the possession thereof.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 133 Cal. xx.

MEMORANDUM DECISIONS

SOUTHERN PAC. R. CO. v. ARNOLD et al. (L. A. 2,255.) (Supreme Court of California. Dec. 1, 1910.) In Bank. Action by the Southern Pacific Railroad Company against George L. Arnold and others. On motion to vacate the order of submission and to set the cause for rehearing and further argument. Motion granted. Wm. Singer, Jr., D. V. Cowden, and J. E. Alexander, for appellant. Anderson & Anderson, for respondents.

PER CURIAM. Good cause appearing therefor, it is hearby ordered that the order of submission in the above-entitled case be vacated, and the cause set down for rehearing and for further argument upon the propositions hereinafter set forth, such argument to be oral or upon briefs, as counsel may agree. The propositions upon which the court desires further enlightenment are the following: (1) For the perfection of plaintiff's selection of the indemnity lands, under its main line grant, the approval of the Secretary of the Interior is necessary. Conceding that the Secretary had no arbitrary right to reject such selection (Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166), was not the restoration by the Secretary of the land so selected to the public domain the equivalent of a rejection and withholding of his approval of the selection; and, if this rejection was arbitrarily or mistakenly made, should not plaintiff take direct steps against the Secretary to correct the error? (2) If the Secretary has the power to approve such selection in part and to reject it in part, is not the issuance of the patent to defendant to the land here in question the legal equivalent to a rejection of the selection, so far as it covers the land here in controversy; and, unless plaintiff shows that it has taken direct steps to correct the Secretary's alleged error, or that the time for taking such direct step has not expired, is it not a final determination that patent shall not issue to plaintiff? (3) What facts establish that the action of the Secretary of the Interior, restoring the selected land to the public domain, was erroneously and mistakenly taken?

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15 Cal. App. 7

BONETTI v. RUIZ. (Civ. 832.)

(Court of Appeal, Second District, California. Dec. 13, 1910.)

1. Appeal and Error (§ 1011*)—Review—Findings—Conflicting Evidence.

A finding of the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Appeal and Error (§ 1050*)—Review—Harmless Error—Objections to Testimony.

The overruling of an objection to a question that it was a repetition of what the witness had already testified to without objection, if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

3. Waters and Water Courses (§ 107*)—Percolating Waters—Highways—Injunction.

Injunction lies where one by means of a well in the highway wrongfully diverts percolating water from an abutting owner of the fee.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

4. Injunction (§ 12*)—Subjects of Protection—When Issued.

Where wrongful acts may ripen into a right, equity will in proper cases give relief by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

5. Waters and Water Courses (§ 107*)—Percolating Waters—Injunction.

An injunction will lie to restrain a threatened permanent interference with the rights of an owner of the fee with respect to percolating water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 116, 117; Dec. Dig. § 107.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by J. B. Bonetti against A. M. Ruiz, administrator of the estate of Mary Tyler, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

C. U. Armstrong and Richards & Carrier, for appellant. B. F. Thomas, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment upon a bill of exceptions.

It was found by the trial court that plaintiff was the owner in fee of the premises described in the complaint, subject to an easement in the public for a road. Plaintiff's premises abutted upon said road on either side. The board of supervisors of Santa Barbara county granted defendant permission to sink a well in said road and extract and carry therefrom any water developed. Plaintiff already had a well on his premises adjoining said road; the water therefrom being used on his said premises. It was found by the court that the water taken from this well in said road was percolating water in plaintiff's land over which said road ran; that the extraction of said water would work a great injury to plaintiff's lands and depreciate their value. The court by its order restrained defendant from further extracting or from conducting the water from plaintiff's land.

Appellant challenges the sufficiency of the evidence to support the issue as to plaintiff's ownership in the tract as described in the complaint upon which defendant's well was constructed. The evidence in the bill of exceptions is somewhat confusing as to this matter; but we find some evidence tending to show that the well constructed by defendant was upon the premises described. The trial court, after hearing the witnesses and having before it the maps and exhibits, and after considering the conflicting testimony, found in plaintiff's favor. Under the rule, we do not feel warranted in disturbing this finding. Plaintiff had testified that a certain fence between his land and that of another rancho had existed in its present location since 1889; that he had owned the property since 1901; that ever since his ownership the premises had been cultivated up to the fence by plaintiff. He was then asked: "What, if anything, has been accepted and acted upon as the true division line between your land and Mr. Tognazzini's?" An objection to this question was overruled, and this is assigned as error. The answer to the question was but a repetition of what the witness had formerly testified to without objection, and we can see no prejudice which could have resulted from the ruling, even were the improper character of the question assumed. Aside from this, there was evidence tending to show that this fence was the true line of division.

Appellant further insists that, under the pleadings and findings, a writ of injunction should not issue; that ejectment was the proper remedy, and cites as authority Coburn v. Ames, 52 Cal. 385, 28 Am. Rep. 634; Weyl v. Sonoma Valley R. R. Co., 69 Cal. 202, 10 Pac. 510. Those cases, however, have to do with parties who enter upon and use for improper purposes the surface of the ground which constitutes the extent of the easement. In the case before us, the defendant is shown to be removing and carrying away percolating water which is a part of the fee and which is wholly disconnected from the easement, outside of the right which the proper authorities might possess to extract sufficient water for proper maintenance and care of the road. No order was made, nor was any asked, which would affect the nuisance occasioned by the obstruction of the road, or on account of its unauthorized use. That defendant's acts are wrongful cannot be questioned, and, when wrongful acts may ripen into a right, courts of equity have uniformly assumed jurisdiction and in proper cases given relief through injunction. An injunction always lies to restrain threatened permanent interference with water rights (Angell on Water Courses, § 445), and there should be no distinction in this regard between the rights of the owner of the fee in the percolating water and that of the riparian owner along the stream.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We find no prejudicial error in the record, and the judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

14 Cal. App. 728

BENNETT v. RED CLOUD MINING CO. et al. (Civ. 892.)

(Court of Appeal, Second District, California. Dec. 2, 1910. Rehearing Denied by Supreme Court Jan. 31, 1911.)

1. MINES AND MINERALS (§ 105*)—MINING CORPORATIONS — MORTGAGES — POWER OF DIRECTORS.

Under St. 1880, c. 118, as amended by St. 1897, c. 92, prohibiting the directors of any mining corporation from mortgaging any mining ground, unless ratified by the holders of two-thirds of the outstanding stock, which ratification may be made either in writing or by resolution, the directors of a mining corporation have no power to mortgage the mining ground without the consent of the holders of two-thirds of the stock given in the manner prescribed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229; Dec. Dig. § 105.*]

2. MINES AND MINERALS (§ 105*)—CORPORATIONS—WANT OF AUTHORITY OF DIRECTORS —RIGHT TO QUESTION.

The want of authority of the directors of a mining corporation to mortgage mining ground without the ratification of the stockholders, as required by St. 1880, c. 118, as amended by St. 1897, c. 92, may be raised by any one who connects himself with the title of the corporation, as well as by the stockholders thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229; Dec. Dig. § 105.*]

3. MINES AND MINERALS (§ 105*)—CORPORATIONS—POWERS—CONSENT OF STOCKHOLDERS.

The consent of the stockholders of a mining corporation to a mortgage of mining ground executed by the officers thereof, required by St. 1880, c. 118, as amended by St. 1897, c. 92, cannot be presumed from the mere fact of the conveyance, whether under the corporate seal or not, for under the statute the ratification may be after the deed is executed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229; Dec. Dig. § 105.*]

4. MINES AND MINERALS (§ 105*)—CORPORATIONS—MORTGAGES—POWER TO EXECUTE—RIGHT TO QUESTION.

A mortgagee of mining ground of a mining corporation who does not show a ratification by the stockholders of the mortgage, as required by St. 1880, c. 118, as amended by St. 1897, c. 92, fails to connect himself with the title to the property, and fails to show any interest therein, and he may not question the validity of another mortgage on the ground that the stockholders did not consent thereto.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229; Dec. Dig. § 105.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Mrs. M. T. Bennett against the Red Cloud Mining Company and others. There was a judgment for plaintiff, and from an order denying a new trial, defendant the Merchants' Trust Company appeals. Affirmed.

John W. Shenk, Glen Behymer, and William Freeman, for appellant. George L. Sanders, L. O. Hatch (Woodruff & McClure, of counsel), for respondent.

SHAW, J. Appeal from an order denying motion made by defendant Merchants' Trust Company for a new trial. The action was to foreclose a mortgage upon certain missing grounds and personal property alleged to have been made, executed and delivered to plaintiff on January 5, 1904, by the Red Cloud Mining Company, which was a mining corporation. The complaint was in the usual form, and, among other things, alleged that defendant Merchants' Trust Company claimed an interest in the mortgaged property by virtue of a second mortgage thereon, but that said "claim of the said Merchants' Trust Company, by virtue of said mortgage or otherwise, is subject to lien of plaintiff's mortgage, but plaintiff is informed and believes, and therefore avers, that the said mortgage in favor of the said Merchants' Trust Company is not an incumbrance or lien upon the said property," it being further alleged that it had never been ratified by the stockholders of the mining company.

The defendant Red Cloud Mining Company demurred to the action, but, upon the same being overruled, interposed no further defense thereto and suffered its default to be entered.

The Merchants' Trust Company filed an answer whereby it denied the execution and delivery to plaintiff of the note and mortgage described in the complaint; admitted that it claimed an interest in the mortgaged property by virtue of a mortgage made, executed and delivered to it by defendant Red Cloud Mining Company on the 26th of February, 1906, which mortgage it was alleged was prior to plaintiff's mortgage and constituted a first lien and incumbrance upon the property. It also filed a cross-complaint setting out its alleged mortgage and, by appropriate allegations, prayed for a foreclosure thereof as against plaintiff and its codefendant. The answer to the cross-complaint merely reiterates the allegations of the complaint in regard to the due execution of plaintiff's mortgage and its alleged priority as a lien over that claimed by appellant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the trial plaintiff testified that she sold and conveyed certain mining claims, and water rights in connection therewith, to defendant the Red Cloud Mining Company, and in payment therefor said corporation delivered to her the note and mortgage set out in the complaint, and which was executed on the part of the corporation by H. C. Allen, as president, and C. D. Martin, as secretary, and to which the corporate seal was affixed. The note and mortgage were then offered in evidence, to the admission of which defendant appealing interposed an objection upon the ground that due execution had not been shown, in that the ratification of the mortgage by two-thirds of the stockholders had not been proved, as required by the statute. The objection was overruled and the evidence admitted. This ruling is assigned as error. It is also contended that the evidence is insufficient to support the finding to the effect that the Red Cloud Mining Company duly made, executed and delivered to plaintiff the mortgage set forth in her complaint, for the reason that no evidence was offered tending to prove the ratification of said mortgage as required by statute. A consideration of these alleged errors will suffice in the disposal of the appeal.

The statute entitled "An act for the further protection of stockholders in mining companies" (St. 1880, p. 131), as amended in 1897 (St. 1897, p. 96), provides that "it shall not be lawful for the directors of any mining corporation to * * * mortgage * * * the whole or any part of the mining ground owned or held by such corporation, * * * unless such act be ratified by the holders of at least two-thirds of the stock of such corporation then outstanding. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution, duly passed at any regularly called stockholders' meeting." In the case of McShane v. Carter, 80 Cal. 310, 22 Pac. 178, in discussing this statute in connection with a deed to mining ground given in the absence of ratification by the stockholders, the court says: "We think that the provision of said act goes to the power or authority of the directors. * * * In our opinion, the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two-thirds of the stock, given as prescribed by the act. And it follows without such consent the title does not pass. And if this be so, the question can be raised by any one who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof. Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under the corporate seal or not, for such consent or 'ratification' may be after the deed is executed, and hence is not necessarily or presumptively involved in the execution of such deed." In the case of Pekin Mining, etc., Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679, in considering a like question of a conveyance of mining ground without the consent of stockholders, the court says: "But the title * * * seems still to be in the Oro Fino Mining & Milling Company. This result comes from the fact that no evidence was offered to prove that the deed from the corporation to plaintiff was ratified by two-thirds of its stockholders, as provided in section 1 of the act concerning mining corporations. * * * In McShane v. Carter, 80 Cal. 310, 22 Pac. 178, a majority of this court held that under said statute a deed of a mining corporation of any part of its mine, not shown to have been so ratified, does not pass the title." In the case of Williams v. Gold Hill Mining Co. (C. C.) 96 Fed. 454, Judge Morrow, in discussing the validity of a mortgage given upon mining ground without the ratification prescribed in the statute, and citing the cases above referred to with approval, holds that a mortgage not ratified by the stockholders as prescribed by the statute was void, at the suit of holders of subsequent liens upon the property.

It was not alleged in the complaint that the mortgage had been ratified by stockholders holding the required number of shares of stock; nor was there any evidence whatsoever introduced tending to prove such ratification. It is upon this condition of the record, supported by the above cases, that appellant contends that the court erred in admitting the mortgage in evidence, and upon which it is insisted that the evidence is insufficient to support the findings.

The title of the act, namely, "An act for the better protection of stockholders in mining companies," would indicate that it was intended for the benefit alone of the stockholders of such corporation, who should be accorded the right, at their option, to avoid such transactions. Indeed, such an interpretation is supported by no less authority than Justice Harlan, who, in Hervey v. Railway Co. (C. C.) 28 Fed. 169, in discussing the effect of a similar act upon a mortgage attacked by the holders of a junior mortgage for want of ratification by stockholders, says: "The provision in the act * * * making the assent of a given number of stockholders essential to the validity of a mortgage, is primarily, if not exclusively, for the benefit of the stockholders." The question, however, is not an open one in this state, for the cases of McShane v. Carter, Mining Co. v. Kennedy, and Williams v. Gold Hill Mining Co., supra, all constitute authority in support of the right of any one who connects himself with the title to the property, or shows himself possessed of an interest therein by virtue of a mortgage or other lien, to raise the question of want of ratification. The question, then, presented is whether or not appellant, conceding the alleged errors, is in a position to avail itself of the want of ratification by the stockholders of plaintiff's mortgage. It is not made to appear, either by the answer or cross-complaint filed by appellant, that its alleged mortgage, under and by virtue of which it claims a lien upon the mortgaged property, had been ratified by the stockholders of the mining company. Indeed, it does not deny the allegation of the complaint wherein it is alleged that such mortgage had not been so ratified. It offered no evidence whatsoever at the trial touching the question of ratification, or in support of any allegation of its answer or cross-complaint. Therefore, appellant not only fails to connect itself with the title to the mortgaged property, but likewise fails to show that it has any interest in the mortgaged premises by virtue of being a judgment creditor or holder of any mortgage thereon; and, hence, as disclosed by the record, is in the position of an entire stranger without any interest in the transaction. We are, therefore, of the opinion that, under the facts here presented, appellant is not in a position which entitles it to question any of the rulings of the trial court.

The order appealed from is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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15 Cal. App. 1

HETTINGER v. THIELE. (Civ. 767.)

(Court of Appeal, First District, California. Dec. 13, 1910. Rehearing Denied by Supreme Court Feb. 9, 1911.)

1. CONTRACTS (§ 215*)—BUILDING CONTRACT.

Where a building contract provided that in case the work be destroyed by earthquake, the owner should lose what he had paid to that time or what might be due under a clause of the contract requiring the owner to pay 75 per cent. of the compensation as the work progressed, on certificate of the architect, and the contractor to lose for the unfinished work for which no payment was due, a termination of the contract on the destruction of the building was contemplated, and the contractor was not required to rebuild the structure.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 996–1010; Dec. Dig. § 215.*]

2. CONTRACTS (§ 288*)—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE.

A provision requiring an architect's certificate of progress as a condition to the liability of the owner for payments to be made as the work progressed applied to construction of the building during the life of the contract, and not to a case where the contract was terminated by the destruction of the building by earthquake before completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1308–1317; Dec. Dig. § 288.*]

3. APPEAL AND ERROR (§ 1151*)—MODIFICATION OF JUDGMENT—BUILDING CONTRACTS.

Where the complaint and evidence showed that the amount due was less than the amount of the verdict, the judgment will be modified accordingly and affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4504; Dec. Dig. § 1151.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by E. A. Hettinger against F. C. Thiele. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

S. F. Leib and W. H. H. Hart, for appellant. B. A. Herrington and W. H. Johnson, for respondent.

COOPER, P. J. This action was brought to recover the amount claimed to be due to the contractor under the terms of a contract for a building which was in the course of construction and uncompleted on the 18th day of April, 1906, at which time it was wholly destroyed by the great earthquake. The case was tried with a jury, to whom special issues were submitted, and upon the verdict as to such special issues judgment was entered in favor of the plaintiff.

No serious question is raised as to the sufficiency of the evidence to justify the finding of the jury upon any question submitted to it. Some questions of law are discussed, particularly as to instructions given to the jury, or offered by the defendant and refused by the court, but they all depend upon the main question as to the construction to be placed upon the contract; and as the case turns upon such construction we will discuss that and nothing more. The contract was one by which the plaintiff agreed to build for defendant a building therein described in the town of Palo Alto for the price of $21,965. It undertook to provide for the apportionment of the loss as between the owner and the contractor in case the building, during its progress and before completion, should be destroyed by earthquake; and it is the construction of its provisions upon this question that we are called upon to decide. The only provisions of the contract bearing upon the question are the fifth and twelfth clauses, which are as follows:

"Fifth. The owner agrees, in consideration of the performance of this agreement by the contractor, to pay or cause to be paid to the contractor, his legal representatives or assigns, the sum of twenty-one thousand nine hundred and sixty-five (21,965) dollars in United States gold coin, at the times and in the manner following, to wit: Seventy-five per cent. of the said twenty-one thousand nine hundred and sixty-five dollars as the work progresses, twenty-five per cent. of the said twenty-one thousand nine hundred and sixty-five dollars thirty-five days after the acceptance of the building. Provided, That when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from said C. E. Branson, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said C. E. Branson shall at said times deliver said certificates under his hand to the contractor, or, in lieu of such certificates, shall deliver to the contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or, in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate shall, at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand. In case the architect delivers the writing aforesaid in lieu of the certificates, then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificate."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Twelfth. In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake or other act of God which the contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, *or that may be due under the fifth clause of this contract;* and the loss occasioned thereby and to be sustained by the contractor shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract. * * *"

It was intended that as the work was performed by the contractor he should be entitled to 75 per cent. of the value of the work so performed measured by the contract price; that is, for example, when the contractor had placed materials and labor in the building in accordance with the plans and specifications of the value of $1,000, he should be entitled to a payment of $750, and so on from time to time. As the work progressed, and as fast as it progressed and from day to day, the contractor was entitled to 75 per cent. of its value. Of course it would have been unreasonable for the contractor to have claimed and demanded the amount due from day to day, and insisted upon the architect giving him a certificate from day to day as to the amount that had become due. It must be presumed that the parties intended the contract to be reasonably construed, and that with such view the contractor would only require payment to be made at reasonable intervals as the work progressed, so as to enable him to pay for his materials, and to pay the wages of carpenters and artisans employed by him. In fact this must have been the course pursued, because no question appears to have been made as to the payment of installments up to the time of the earthquake, which payments amounted to $8,800. The twelfth clause of the contract makes provision for loss in case the building should be wholly destroyed by earthquake. It was evidently in the mind of the parties that in such case the contract would end; that the contractor would not be required to commence again and build an entire new building, nor would the owner be required to pay for a new building. The provision as to the loss shows that in case the building should before completion be wholly destroyed, the parties intended that the owner should lose all payments that he had made to the contractor and all the sums that had become due under the contract. On the other hand, the contractor was to lose all sums that had not become due for the uncompleted portions of the work. If the parties had in mind that they should, after adjusting their losses in accordance with the contract, be bound by the same contract to rebuild, on the same terms as under the original contract which had ended for the building which had been destroyed, and to contract as to such building, they could easily have said so; but they seem ex industria to have made no such provision. There are many reasons why they did not do this. The owner of the building after his losses may not have been able to pay for another building of the same cost. The contractor may have been unable to rebuild on the same terms. The ground on which the building was located may have been so changed as to its surface, or the immediate vicinity in which the building was being erected so changed as a business location, that it would be an absolute loss to the owner to have paid for another building. We therefore conclude that the contract provides a rule as to the loss that was to be borne by each party by reason of the earthquake, and that it does not contemplate any rebuilding by the contractor.

This appears to us to be the reasonable, logical, and just construction to be given to the contract. The twelfth clause of the contract provides that the owner shall lose the payments he has already made and the payments that "may be due under the fifth clause of this contract." The owner had paid $8,800, and there is no question as to that being his loss under the terms of the contract. Then we must turn to the twelfth clause of the contract to see what was due under it. It makes 75 per cent. of the money payable "as the work progresses." It also provides that, when each payment or installment shall become due, certificates in writing shall be obtained from the architect, stating that the payment or installment "is due or work completed as the case may be"; and "In the event of the failure of the architect to deliver said certificates or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand." It is insisted by appellant that under this clause nothing could be due until after the contractor had fully complied with the provisions of the contract and obtained the architect's certificate, or made the proper demand in writing for such certificate. Such evidently would be held to be the law during the life of the contract and before it had been ended by the destruction of the building; but we cannot hold that the contract contemplated that the contractor could not recover the amount that had become due at the time of the earthquake simply because he had not obtained the architect's certificate. If such were the law the contractor would have had to lose the whole amount, provided it had not been paid and no architect's certificate obtained at the time the building was destroyed. The provision of the contract as to obtaining an architect's certificate was only a means of informing the owner that certain work had been done and the amount due therefor so that he could intelligently make payments during the progress of the work. It was a method of having an expert of his own selection pass upon and state the amount that had become due. Such amount was due without obtaining such certificate, although during the life of the contract, while the building was in course of construction, it would have been necessary to obtain such certificate, or at least to have complied with the provisions of the contract as to demanding it before suit could be brought. The twelfth clause of the contract bears out this construction, for it provides that the owner shall not only lose all that he has paid already, but "all that may be due under the fifth clause of this contract"; and the loss to the contractor shall be for the uncompleted portion "for which no payment is yet due under said fifth clause."

Now, the fifth clause makes 75 per cent. of the value of the work and labor performed due and payable as the work progresses. The work had progressed up to the time of the earthquake, and 75 per cent. of the value of such work, measured by the contract estimates, and taking into consideration the moneys paid out by the contractor, was due to the contractor, less the amounts that had already been paid. The jury found that the value of the work and materials done and furnished by the contractor, and actually used in the construction of the building up to the time it was destroyed, was $16,473.75. Taking 75 per cent. of this we have $12,355.31¼; then deducting the payments that had already been made—$8,800.00—leaves $3,555.31¼, being the amount of the general verdict of the jury.

The finding of the jury that the value of the work done and material furnished up to the time of the earthquake was $16,473.75 is contrary to the express declaration in the pleading, and also contrary to the evidence. The complaint alleges that such value was $15,664.75, and the plaintiff testified: "Up to April 18, 1906, I had furnished materials and performed work and labor in the construction of the building mentioned in the contract to the extent of $15,664.75. This is the amount of materials furnished for the building and work done thereon up to April 18, 1906. The defendant has paid $8,800.00 on account of the contract." The verdict is therefore excessive to the extent of $606.65. The judgment should therefore be modified by deducting said amount therefrom, and should be entered for the sum of $2,948.56, and entered as of the date of its former entry.

The court below is directed to modify said judgment accordingly, and as so modified it is affirmed.

The order denying a new trial is also affirmed, the appellant to recover his costs on this appeal.

We concur: KERRIGAN, J.; HALL, J.

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14 Cal. App. 750

SCURICH v. RYAN. (Civ. 846.)

(Court of Appeal, First District, California. Dec. 5, 1910. Rehearing Denied by Supreme Court Feb. 2, 1911.)

1. Landlord and Tenant (§ 180*)—Eviction—Damages—Attorney's Fees.

Where a tenant has been evicted, attorney's fees are not a proper element of his damages in an action for the violation of the covenants of his lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 723–727; Dec. Dig. § 180.*]

2. Landlord and Tenant (§ 180*)—Eviction—Action for Damages—Amount of Recovery—Evidence.

Evidence *held* insufficient to sustain a verdict for plaintiff in an action by a tenant for eviction from an apple orchard.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 722; Dec. Dig. § 180.*]

3. Landlord and Tenant (§ 180*)—Eviction—Action for Damages—Exemplary Damages.

Where a landlord in evicting a tenant does not act from any motives of oppression or malice, the tenant can recover only compensatory damages for the breach of the covenants of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 723–727; Dec. Dig. § 180.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Antone Scurich against John M. Ryan. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

A. W. Sans and Edward J. Kelly, for appellant. James A. Hall, for respondent.

KERRIGAN, J. This is an appeal from an order denying a motion for a new trial in action for damages for the violation of the covenants of a lease.

The plaintiff leased from the defendant an orchard in Santa Cruz county of about 13 acres, for a term of 4 years, commencing January 3, 1907, at an annual rental of $750. One of the terms of the lease was that plaintiff was to carefully prune, cultivate, spray, and care for said orchard in the manner that orchards are cultivated, sprayed, and cared for in the vicinity. On August 3, 1908, the defendant, claiming that plaintiff had broken that covenant of the lease, served a notice on him purporting to terminate the tenancy, and on the next day closed and locked one of the two gates leading to said premises, and for two days excluded plaintiff and his employés from entering the orchard through said gate. Entrance through the other gate, according to the testimony of plaintiff, was "impracticable." The plaintiff did not reside on the premises in question. The jury returned a verdict for the plaintiff for the sum of $750, and judgment was entered accordingly.

The defendant contends that the evidence is insufficient to sustain the verdict of the jury as to the amount of the damages suffered by the plaintiff, and we are of the opinion that this contention should be sustained. Plaintiff testified that the fruit in the orchard was damaged to the value of $250, and that "for time and labor in hauling props and time lost" he was damaged in the further sum of $250. On cross-examination he testified as follows: "Q. Now you have placed the damage done you by this gate being locked at $500—$250 for the crop and $250 otherwise? A. I said damage to the crop $250 and $250 expense of hiring an attorney. Q. In what way were the apples damaged to the extent of $250? A. I cannot tell exactly. That is what I guessed that he damaged it, $250. Q. In what way were they damaged? A. Well, I claim losing time, not allowing boxes and one thing and another to go in there, the gate was locked, and I could not get in to haul them back. Q. Did he go to the gate while it was locked with boxes? A. No; I would if the gate was open. Q. How was the apple crop damaged, in what manner? You might as well answer that. We will keep on asking it until you do. A. The crop was heavy for the limbs; fall into one another with the weight. It would break the limbs. He would not let me go in and put up these sticks to keep them up so they would not fall onto the other limbs. Q. How many limbs were broken while the gate was locked? A. Three or four, but I cannot tell exactly, because I did not go all through the orchard. Q. Were those large or small limbs? A. About the thickness of my wrist. Q. Is that all the damage done to the crop? A. When I put those sticks up it kept the limbs from bruising one another, the apples would not get bruised up. Q. Is that all the damage done to the crop? A. That is all. Q. What are the items of the other $250 damages? A. For hauling those props twice. Q. How much was that? A. I hauled them twice. Q. How much was that, how much money did you allow for that? A. Between $10 and $20. Q. Each load? A. Yes, sir. Q. Do you mean $40 altogether for the two loads? A. Yes, sir. Q. Do you mean that is the price of the props, or that is what you are charging for the time spent? A. To haul them out to the ranch and leave them on the truck, the hire of the truck, I left them four or five days, everything all combined was $40. Q. Any other damages? A. Attorney's fees. Q. You are counting attorney's fees in also? A. I went for his advice, I suppose, I don't know. Q. Is there anything else besides attorney's fees? A. About $5, I was ready to haul them, the gate was locked, expense for loading them, one thing and another about $5. Q. Did you lose the boxes? A. No; I mean the labor. Q. Labor in making them? A. No; loading them up and taking them off the truck. Q. Why did you load those on the truck? A. Well, I had the idea of taking the boxes up there. I did not take any out. Q. Did you load them up and take them out there? A. No. Q. Then you are charging $5 because your idea was not carried out? Is that it? A. Well, that is what I said. Q. Did you say that you made up the boxes to take out there? A. No, sir. I said the boxes were going, you know, to be made up. I had an idea to haul them up there. I did not haul them up there. I think I am that much loser, about $5 expense by not hauling them out. Q. How long was it from the time the gate was opened after being locked until you hauled the boxes out there? * * * A. I don't know. I think it was about 10 days."

Another witness testified as follows: "The damage to the crop by reason of the plaintiff being prohibited from attending to it was about $250. At that time the apples needed special attention in propping and other matters. He was damaged at least $100 by reason of his hired men not being allowed to take the props into the orchard by reason of loss of time for these men. In my opinion the total damage for the time the gate was locked and the plaintiff prohibited from entering was easily $500. I include in this other things besides injury of crop and loss of time." On cross-examination this witness testified that the damage to the crop was $350, and that the plaintiff was entitled to $150 as an attorney's fee; but, upon being pressed to detail the damages to the fruit, he said that the only thing he knew about was the breaking of one limb, which was the size of a man's wrist. As to the hiring of a team for two days, for which the plaintiff said $40 would be a reasonable charge, this witness, who was the owner of the team, said that $20 would be ample. No evidence was introduced to show how many boxes of fruit, if any, were lost in the two days that the gate was locked.

When the defendant took the stand, he attempted to justify his eviction of the plaintiff on the ground that he was not taking proper care of the orchard, and that limbs were breaking. To meet this the plaintiff, in rebuttal, and several witnesses in his behalf, testified that the broken limbs were rotten and could not have been saved even if propped, and that they were of no value. The testimony in behalf of plaintiff as to the damage sustained by him was most general and unsatisfactory in character. But conceding that he is entitled to a judgment, and leaving out attorney's fees, which are not a proper element of damages (Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485; Sanger v. Ryan, 122 Cal. 52, 54 Pac. 522), it must be held that the verdict is excessive. The plaintiff, in order to recover damages, must show facts and figures by which his damages may be legally and correctly ascertained. If limbs on the fruit trees were broken because plaintiff was prevented from entering the orchard to prop them, it seems that the number of limbs so broken could have been stated, and an estimate made of the value of the fruit thus destroyed. If plaintiff had to haul extra loads of props, it should be shown why it became necessary to do so, and also the expense and cost of such hauling. A verdict cannot be based upon a mere general statement, consisting partly of imagination and partly of opinion.

It is suggested by plaintiff that any excess in the verdict over the actual damages proven may be regarded as punitive damages. It is true that the complaint was framed to cover damages of this character; but the act of the defendant complained of was not inherently malicious or oppressive, and no evidence was introduced to show that it was so in fact; and, as no instruction on the subject of exemplary damages was either requested or given by the court, it would appear that the plaintiff abandoned any theory that he may have entertained that the defendant, in seeking to evict him, was guilty of fraud, oppression, or malice. There is an abundance of evidence in the case which, if true, tends to support the defendant's theory that the plaintiff had so neglected the property as to entitle the defendant to cancel the lease and retake possession; and there is nothing in the record inconsistent with the idea that the defendant supposed in good faith that he was acting within his rights. Although the defendant invaded a right of plaintiff, the record failing to show, as it does, that he acted with any motive of malice or oppression, the case is one for compensatory damages only.

The order is reversed and the cause remanded for a new trial.

We concur: COOPER, P. J.; HALL, J.

14 Cal. App. 747

MORGAN v. NESBITT, Sheriff. (Civ. 838.)

(Court of Appeal, First District, California. Dec. 5, 1910.)

TRIAL (§ 365*)—GENERAL VERDICT—SPECIAL FINDINGS—CONSTRUCTION.

Answers to special questions submitted to the jury must be construed together so as to harmonize with the general verdict, if possible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871–874; Dec. Dig. § 365.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by E. R. Morgan against W. J. Nesbitt as Sheriff of the County of Monterey. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Dougherty & Lacey, for appellant. Sargent & Bardin and P. E. Zabala, for respondent.

KERRIGAN, J. This is an action to recover damages for the conversion by defendant of certain personal property, upon which the plaintiff held mortgages. The case was tried by a jury, and a general verdict was rendered in favor of plaintiff for the sum of $449.90; but by reason of a special finding of the jury the trial court held that the general verdict was overcome, and judgment was entered for defendant.

The defendant is the sheriff of Monterey county, and the alleged conversion arose in the manner following: Prior to and on January 15, 1907, D. T. Van Lue was the owner of a number of horses upon which Worthington Parsons held a mortgage, and upon which there was due the sum of $449.90 and on the last-named date by agreement with the said Van Lue, the plaintiff advanced that sum of money and satisfied Parsons mortgage, and plaintiff accepted from Van Lue a new mortgage for the sum of $1,000. According to the testimony of the plaintiff and Van Lue, this mortgage was to secure the payment of the amount advanced in liquidation of the Parsons mortgage, also an indebtedness of $115 owing by Van Lue to plaintiff for goods sold and delivered, and for money advanced in the sum of $40. Their testimony also shows that at the time of the execution of this mortgage Van Lue was indebted to Parsons upon a note in a further sum of $250, given in payment for a racing horse, and that it was agreed that plaintiff was to advance this amount to Van Lue to enable the latter to take up this note should Parsons press for its payment. Further sums were also to be advanced by plaintiff to Van Lue with which to purchase hay for his stock. On August 21, 1908, Van Lue executed to plaintiff a second mortgage to cover future advances to Van Lue, to be made for the purpose of enabling the latter to defray the expenses of training the race horse above mentioned. In October following the Wahrlich-Cornett Company commenced an action in the superior court of Monterey county against Van Lue for the sum of $1,836.73, and attached the property described in said mortgages. Judgment was obtained in that action in favor of said company, and a writ of execution was issued, under which the sheriff levied upon and eventually sold the property, on the theory that the mortgages were not made in good faith, but with the intent to hinder, delay, and defraud creditors of Van Lue, and consequently void as to them.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On the trial of the present action plaintiff asked judgment for the sum of $604.90, consisting of the $449.90 paid to satisfy the Parsons mortgage, the sum of $115 due for merchandise, and the $40, money advanced, waiving judgment for any further amount under the first mortgage and for any amount that might be due under the second mortgage. The one fact upon which all parties seem to agree is that plaintiff did pay off the Parsons mortgage. Parsons himself testified that plaintiff gave him a check on the Bank of Palo Alto for $449.90 about a year and a half before the commencement of this action. The general manager of the attaching creditor also testified that the Parsons mortgage was not a fraudulent one. The jury, in answer to certain special issues, rejected the items of $40 and $115, and in answer to another special issue and by their general verdict found that the plaintiff was entitled to recover $449.90. One of the special issues, which is negative in character, standing alone, lends color to the contention of appellant that it is inconsistent with the general verdict; but when all the special issues and the general verdict are read and construed together—as they should be—it is clear that the jury intended to find that the plaintiff had a valid lien on the mortgaged property to the extent of $449.90. If we were to accept the construction placed upon the special and general verdicts contended for by the defendant, the question would be presented whether or not a mortgage would be void as to creditors where only the good faith of the mortgagee was called in question. We think, however, that when the answer to the special issue and the general verdict are construed together, the inconsistency claimed by defendant does not exist. Under the evidence and admissions in the case, the jury could not have intended that the plaintiff should have a verdict for any less amount than $449.90; and, as the plaintiff will be satisfied with a judgment for that amount, we think the general verdict should be allowed to stand.

The judgment and order are reversed, with directions to the trial court to enter judgment in favor of plaintiff upon the general verdict.

We concur: COOPER, P. J.; HALL, J.

14 Cal. App. 674

POTOMAC OIL CO. et al. v. DYE et al.

(Civ. 661.)

(Court of Appeal, Second District, California. Nov. 26, 1910. Rehearing Denied by Supreme Court Jan. 25, 1911.)

1. Mandamus (§ 168*)—Compelling Delivery of Books and Papers of Corporations—Burden of Proof.

In mandamus to compel the delivery of the seal, books, papers, and records of a corporation, the petitioner has the burden of showing that he is the legally appointed secretary of the corporation, and is entitled to such delivery.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 372; Dec. Dig. § 168.*]

2. Corporations (§ 668*) — Actions—Jurisdiction.

Stockholders of an Arizona corporation having no place of business or office or property or business in the territory began mandamus proceedings in the district court of the territory to compel the corporation and its officers to call a stockholders' meeting. An alternative writ was issued directing the corporation and its officers to call a meeting or to show cause, and the writ was served on the corporation through service on a resident agent within the county, and service on the individual members of the board of directors was made by mailing copies of the writ to their place of residence in a sister state. The corporation acknowledged in writing the receipt of the writ, and all parties made default at the time and place to show cause. *Held*, that the district court of the territory acquired jurisdiction through the service of the alternative writ on the corporation, and it was not essential in the exercise of such jurisdiction that the officers of the corporation should be served.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. § 668.*]

3. Mandamus (§ 151*) — Against Corporation—Parties — Stockholders' Meetings —Duty to Call.

The imposition of the duty on officers of a corporation to call stockholders' meetings does not relieve the corporation from the liability of causing the duty to be performed, and where the officers are not within the jurisdiction of the court in mandamus to compel the calling of a meeting, the action may be taken against the corporation to compel the performance of the corporate act.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 291; Dec. Dig. § 151.*]

4. Mandamus (§ 185*) — Corporations — Stockholders' Meetings — Enforcement of Order.

A court which has acquired jurisdiction in mandamus to compel a corporation to call a stockholders' meeting may, on the failure of the corporation to call a meeting, appoint a commissioner to do so, and a court entertaining an action has jurisdiction not only to command the performance of duties, but to enforce its commands by subsequent proceedings in the action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 419–423; Dec. Dig. § 185.*]

5. MANDAMUS (§ 185*) — STOCKHOLDERS' MEETINGS—NOTICE—PRESUMPTIONS.

Where the court in mandamus to compel a corporation to call a stockholders' meeting appointed a commissioner to call the meeting and give the required notice, it will be presumed in the absence of anything to the contrary that the commissioner notified all the stockholders, as required by the order, so that an election held pursuant to the notice given by the commissioner was legal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 423; Dec. Dig. § 185.*]

6. APPEAL AND ERROR (§ 481*)—STAY OF PROCEEDINGS—STATUTE.

Under Civ. Code Ariz. 1901, par. 1512, authorizing the court from whose judgment an appeal or writ of error is taken to stay the execution of the judgment on the application of appellant or plaintiff in error executing an undertaking, an order of the court staying proceedings is essential to complete a stay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2258; Dec. Dig. § 481.*]

7. MANDAMUS (§ 187*)—APPEAL—SUPERSEDEAS—STOCKHOLDERS' MEETINGS—IRREGULARITIES.

Where the essential duties of a commissioner, appointed by the court in mandamus to compel a corporation to call a stockholders' meeting, to call a meeting of the stockholders and to give the required notice thereof for the election of a board of directors were performed before the filing of a petition in error from the judgment awarding relief and appointing the commissioner, and of the bond, and the stockholders pursuant to notice had convened before that time, the subsequent proceedings of the stockholders proceeding to elect a board of directors were not void, though in contempt of court on the ground that the petition and bond were effectual as a stay, and the election of a new board at such meeting could not be set aside in a collateral proceeding.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 434; Dec. Dig. § 187.*]

8. CORPORATIONS (§ 289*)—"DE FACTO OFFICER."

A person to be a "de facto officer" of a corporation must hold the office under some appearance or color of right.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1240–1245; Dec. Dig. § 289.*

For other definitions, see Words and Phrases, vol. 2, pp. 1845–1851; vol. 8, p. 7627.]

9. CORPORATIONS (§ 289*) — OFFICERS DE FACTO.

The authority of the board of directors of a corporation ceases on the election of a new board, and the members of the former board possess thereafter no right in the control of corporate affairs as against the corporation, and their attempt to subsequently elect a secretary is futile, and the secretary so selected does not acquire even a color of right to the office or an appearance of right to retain the books or papers of the corporation as a de facto officer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1240–1245; Dec. Dig. § 289.*]

10. MANDAMUS (§ 141*)—CORPORATIONS—OFFICERS—JURISDICTION.

Where, in mandamus to compel the delivery to a corporation of its books and records, the court issued its alternative writ and caused the same to be served on the individual who was then the custodian of the books and papers, and directed him to turn the same over to the corporation or show cause, the court acquired jurisdiction not only over the person of the individual but over the books and papers in his possession constituting the subject of the controversy, and the individual could not thereafter by dispossessing himself of the property deprive the court of its control over the same or over himself, and a third person, who with knowledge of the facts takes possession of the property, could acquire no right thereto, but he only holds the same for the individual whose duty it was to retain the possession until the final disposition of the case.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 276–278; Dec. Dig. § 141.*]

Petition for writ of mandamus by the Potomac Oil Company and another against J. M. Dye and Winfield Scott. Peremptory writ issued, and judgment awarded against defendants for costs. Hearing in Supreme Court denied in 113 Pac. 130.

J. R. Wilder, Hunsaker & Britt, for petitioners. C. E. Arnold and J. W. P. Laird, for respondents.

ALLEN, P. J. The material matters set forth in the petitioners' application for this writ are fully stated in Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 Pac. 677. Upon that hearing there was involved the sufficiency of the petition, the jurisdiction of this court to grant relief by mandate, and its appropriate character to compel a person claiming to act as secretary of the corporation to deliver up to the corporation its seal, books, papers, records, etc., all of which matters were determined in favor of petitioner, and require no further consideration or discussion upon this hearing.

In the single issue presented by the amended answer as to the official character of petitioner is involved practically all of the questions presented for determination upon this hearing. The burden is cast upon petitioner to show that he is the legally appointed secretary of the corporation and entitled to the books, papers, and seal of such corporation. The facts connected with the establishment of such official relation of petitioner are before the court in the report of a referee heretofore appointed to take testimony, and in certain depositions and exhibits on file. From all of these it is made to appear that the Potomac Oil Company was organized in 1901 under the laws of the territory of Arizona, having a capital stock of $2,850,000, divided into 2,850,000 shares of the par value of $1 each; that by the articles and by-laws the affairs of the corporation were to be conducted by a board of five directors, the first thereof to be elected upon the first Monday in August, 1902, and annual elections to be thereafter held upon the corresponding date of each succeeding year; that in 1904 a stockholders' meeting was held at which five persons were elected directors, and that no election has been held between that date and the 29th of December, 1908, when a new board was sought to be elected under proceedings hereinafter to be noticed. The directors elected in 1904, or their successors appointed by the board to fill vacancies, elected respondent Dye secretary, and as such secretary he took charge of and has had in his custody all of the books, papers and seal of the corporation, which he removed to and has ever since kept within the state of California, and within this district. The corporation, while organized in the territory of Arizona, had no place of business in that territory, maintained no office, owned no property, and conducted no business in said territory, all of its property and business being within the state of California and within which state all of its directors, including the secretary, were residents. Stockholders whose holdings aggregated about 1,000,000 shares of the stock, becoming dissatisfied with the management of the corporation, demanded of the officers of the corporation, in September, 1908, that they call a meeting of the stockholders for the purpose of electing a board of directors. This the officers of the corporation refused to do, and have endeavored through such refusal to permanently keep and maintain the control of the corporation and its property. Basing their action upon such refusal, shareholders in their own behalf and in behalf of other dissatisfied stockholders, commenced proceedings in mandamus in the district court for the Third judicial district of Arizona, praying that the court command and direct the defendant corporation and its officers to call a meeting of the stockholders, as by the articles of association and by-laws required, for the election of a board of directors. An alternative writ was issued directing said corporation and its officers so to proceed, or show cause, which writ was served upon the corporation through a service upon a resident agent of said corporation within the county and territory where the proceedings were commenced, and service upon the individual members of the board by mailing copies of the alternative writ to their postoffice address and place of residence in California. The corporation duly acknowledged in writing the receipt of the writ, and all parties having made default at the time and place to show cause designated in the alternative writ, a peremptory writ was issued by the court, by which writ they were commanded, on or before the 21st day of November, 1908, to call a meeting of the stockholders and to give the notice required by the by-laws for the election of a board of directors, which said peremptory writ was served in the same manner as was the alternative writ. The Potomac Oil Company and its officers, having failed and refused to observe the mandate of the court, upon petition and affidavit showing such facts to the court granting the peremptory writ, an order was made on November 21, 1908, appointing a special officer and commissioner to do and perform the acts and things which the said respondents were by said writ directed and commanded to do and perform. On the 28th of December, 1908, a petition in error to the Supreme Court of the territory of Arizona was filed by the respondents in the mandamus proceedings, and on the same day a bond, with the sureties approved by a judge of the district court of Arizona, was filed with the clerk of the district court for the Third judicial district; and on the 29th day of December, 1908, a summons in error was served upon petitioner. No order staying proceedings, however, appears to have been made by the lower court. On the 28th of December, that being the day fixed in the call for a meeting of the stockholders by the special officer and commissioner theretofore appointed, stockholders owning or representing 1,878,132 shares of the capital stock of the corporation met at the time and place by the commissioner designated and, after electing one of their number chairman and another secretary, proceeded to the election of a board of five directors for the corporation. These directors thereafter met and appointed petitioner herein as secretary of the corporation. Thereafter, the proceedings in error in the supreme court of the territory of Arizona were dismissed.

Due demand was made by petitioner upon respondent Dye for the books, papers and seal of the corporation, delivery of which was refused. After the commencement of these proceedings, and when the referee appointed by this court was taking testimony pursuant to order of the court, a subpœna duces tecum was issued and served upon respondent Dye, requiring his appearance before the referee, and to bring with him the books and papers of the corporation. Tender was made of the fee provided by law, which respondent refused to accept and failed to observe the subpœna. Thereafter, on June 7, 1910, respondent Dye presented a resignation to the individuals composing the board which originally appointed him, and such persons, assuming to be directors of the corporation, made an order appointing one Scott secretary, and thereupon Dye turned the books, papers, and seal here in controversy over to Scott, who is now in possession thereof. These facts coming to the attention of petitioner, a supplemental petition was filed setting forth those facts and asking that Scott be made an additional respondent, which was done, and he appeared and answered.

It is respondent's contention that the district court of Arizona never acquired jurisdiction to compel the holding of the stockholders' meeting. In our opinion, through the service of the alternative writ upon the corporation, the district court of Arizona acquired jurisdiction in the premises. Having acquired such jurisdiction over the corporation, it was not essential in its exercise that the officers and agents of the corporation should be served with process. While it is made the duty of certain officers of the corporation to call a stockholders' meeting, "the imposition of a duty upon the officers best qualified to perform it does not relieve the corporation from the liability of causing the duty to be performed. * * * No doubt, if such officers had been within the jurisdiction, and service upon them had been possible, they would have been made parties. But not being within reach of process, the action was taken against the corporation of which they were officers to compel the performance of a statutory duty, which was a corporate act, to be performed, of course, through certain officers of the corporation." Bay State Gas Co. v. State, 4 Pennewill (Del.) 502, 56 Atl. 1121. To say otherwise would be to say that the principal is helpless in the hands of insubordinate agents, and that it is the policy of the law that the creature of the corporation is higher than the corporation itself, a proposition to which we cannot subscribe. The district court of Arizona, then, having acquired jurisdiction in the proceeding in mandamus, and the corporation having failed and refused to require its officers, or other agents by it appointed, to perform a plain statutory duty, it was competent for that court, having acquired jurisdiction and having made a valid order in the premises, to command performance of the duty. "The court entertaining the action has jurisdiction not only to command the performance of duties, but to enforce its commands by subsequent proceedings in the action. * * * If complete relief is not given by the order of the court, to avoid other actions, other orders will be made until that end is attained." Palmer v. Jones, 49 Iowa, 408. This authority is plainly expressed in section 187, Code of Civil Procedure. The commissioner, then, being appointed by authority, performed the duties which should have been performed by corporate agents in the first instance, and in the performance of these duties the stockholders were assembled. Nothing to the contrary appearing, it will be presumed that all were notified as by the order required. A large majority thereof met and elected a board of directors whose duty it should be to manage the affairs of the corporation.

Respondent contends, however, that the petition in error and bond filed, ipso facto, operated as a stay of all proceedings from the date of the filing of such bond. Whatever may be the effect of a bond so filed on appeal, or in proceedings in error, in other jurisdictions, it would seem from a reading of paragraph 1512 of the Civil Code of Arizona of 1901 that whenever a writ of error is sued out of the Supreme Court, the court or judge thereof from whose judgment or order the appeal or writ of error is taken, shall, upon application of appellant, or plaintiff in error, stay the execution of such judgment or order, thereby indicating that an order of the court staying proceedings is essential in that jurisdiction in order to complete the stay. In addition to this, however, all of the essential duties of the commissioner appointed by the court had been performed before the bond and petition in error were filed. The stockholders, pursuant to a notice theretofore given, had convened, and were it to be assumed that the bond when filed was effectual as a stay, and that such subsequent proceedings were in contempt of the order of court, nevertheless, their proceedings were not void and cannot be set aside in this collateral proceeding. "Irregularities in the sale of lands on execution can only be corrected by the court from which the process issues, and when such court is not called upon by the defendant in execution to set such proceedings aside, they cannot be disturbed by any one else in a collateral proceeding." Oakes v. Williams, 107 Ill. 159.

Respondent Scott contends that he is the de facto secretary and as such entitled to hold the books and papers of the corporation. "In order to constitute a person an officer de facto, he must hold the office under some appearance or color of right." Olson v. Board of Commissioners, 8 Kan. App. 414, 54 Pac. 805. The old board of directors who assumed to act and appointed Scott had ceased to be such board upon the election of their successors. In their original election they became, at the instance of the corporation, the governing board to control the business affairs of the corporation under the statute. The corporation thus designating them as the governing board in the first instance vacated such appointment and selection, and substituted a new board. The authority of the old board then ceased as between the individuals constituting such old board and the corporation. Such individuals thereafter possessed no rights in the management and control of the corporate affairs as against the corporation. Their attempt to elect a secretary after they had ceased to be a board of directors was futile, and Scott did not acquire even a color of right to the office, or an appearance of right to retain the books or papers of the corporation.

When this court issued its alternative writ and caused the same to be served upon Dye, who was then the custodian of the books and papers, and directed him to turn the same over to petitioner, or show cause, it thereby acquired jurisdiction, not only over the person of Dye, but over the books and papers in his possession the subject of controversy; and Dye could not by thereafter dispossessing himself of the property deprive this court of its control over such property, or over himself as the respondent. Scott, with full knowledge of the circumstances, taking possession of the property acquired no right thereto, did not and does not hold the same as secretary, or in any other official capacity, but holds the same for Dye, whose duty it was to retain the possession until the final disposition of this case.

We are of opinion that satisfactory evidence is presented establishing all of the material allegations of the original petition and the supplemental petition.

It is ordered that a peremptory writ issue, and judgment is awarded against respondent Dye for costs, and also against respondent Scott for costs accruing since June 7, 1910.

We concur: SHAW, J.; JAMES, J.

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14 Cal. App. 674

POTOMAC OIL CO. et al. v. DYE et al.

(L. A. 2,839.)

(Supreme Court of California. Jan. 28, 1911.)

In Bank. Petition by the Potomac Oil Company and another for a writ of mandamus against J. M. Dye and Winfield Scott. Writ granted (113 Pac. 126), and defendant applied for a rehearing. Rehearing denied.

J. R. Wilder and Hunsaker & Britt, for petitioners. C. E. Arnold and J. W. P. Laird, for respondents.

PER CURIAM. Rehearing denied.

BEATTY, C. J. (dissenting). I dissent from the order denying a rehearing of this cause. Assuming that this court has the power to review the judgment of the District Court of Appeal in an original proceeding (a matter as to which I have no doubt) we must consider whether the facts stated in its opinion as grounds for issuing a peremptory writ of mandate, are sufficient to justify the order.

In this case persons claiming to be directors of an Arizona corporation ask a California court to compel the delivery of its books and records to a person appointed by them as secretary. The case shows very clearly that it is necessary in the first place to decide that the persons invoking the remedy are directors of the corporation, their title to the office being in dispute and unadjudicated by the courts of Arizona. All that appears is that a court of that territory, by its commissioner, called and held a stockholders' election, and that the commissioner filed a report, which is not found to have been confirmed. The result is that in a mandamus proceeding to enforce a duty not imposed certainly by any California law, we must try the title to the offices of a foreign corporation. Mandamus does not lie to try the title to an office.

In the next place, if the title to the offices was undisputed, and the duty of the respondent to deliver the books to his successor clearly imposed by the laws of Arizona, can the courts of this state enforce the performance of that duty by mandamus? I do not think they can. No doubt the newly elected secretary, if by the law of Arizona he is entitled to the custody of the books, could maintain an action in this state in the nature of replevin to recover the possession —an action in which he could prove his title to his office—but in such an action the District Court of Appeal would have no original jurisdiction.

The nature of the remedy available in such a case is therefore a matter of prime importance—for it determines the jurisdiction. If the courts of this state cannot try title to Arizona offices in mandamus, or if they cannot enforce by mandate the performance of duties enjoined by Arizona laws, the District Court of Appeal has rendered judgment in a case not within its jurisdiction.

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159 Cal. 161

In re CHEVALLIER'S ESTATE.

HARTUNG v. HOLMES et al.

(L. A. 2,525.)

(Supreme Court of California. Jan. 6, 1911.)

1. WILLS (§ 326*) — CONTEST — TRIAL—JUDGMENT OF NONSUIT.

Under Code Civ. Proc. § 1313, providing that, after a jury is impaneled in a will contest, the trial must proceed according to the provisions of part 2, tit. 8, c. 4, a nonsuit may be granted in a proper case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 771; Dec. Dig. § 326.*]

2. TRIAL (§ 159*)—NONSUIT—PROPRIETY.

Where a plaintiff adduces evidence which, if uncontradicted, would sustain a verdict for him, no amount of contradictory evidence will authorize a nonsuit, but if plaintiff's evidence, viewed in the light most favorable to him, would not support a verdict for him, a nonsuit is properly granted, though the mere failure of the jury to properly weigh the evidence when it is sufficient to take the case to them does not authorize a nonsuit; the remedy being by motion for new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 359–367; Dec. Dig. § 159.*]

3. WILLS (§ 38*)—VALIDITY—INSANITY—MONOMANIA.

The will of one who, by reason of insanity, is incapable of making a valid testamentary disposition, is invalid, but mere insanity on some particular subject would not necessarily invalidate it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78–81; Dec. Dig. § 38.*]

4. WILLS (§ 38*) — VALIDITY—INSANITY—DELUSION.

In order to make a will invalid because of delusions held by testator, the will itself must be the product of such hallucination, and be caused directly thereby.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78–81; Dec. Dig. § 38.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. WILLS (§ 55*) — CONTEST — INSANITY—SUICIDE.

Suicide by testator is not of itself sufficient to establish testamentary incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 151; Dec. Dig. § 55.*]

6. APPEAL AND ERROR (§ 927*) — REVIEW — NONSUIT.

In determining on appeal the propriety of a nonsuit, plaintiff's testimony must be given the fullest weight to which it is entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.*]

7. WILLS (§ 55*)—WILL CONTEST—SUFFICIENCY OF EVIDENCE—INSANITY.

Evidence in a will contest *held* not to show such insanity of testator, who committed suicide, as to destroy her testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 151; Dec. Dig. § 55.*]

8. WILLS (§ 130*)—OLOGRAPHIC WILL—DATE —SUFFICIENCY.

The dating of an olographic will by using figures, to wit, "4–14–07," is sufficient under Civ. Code, § 1277, requiring an olographic will to be dated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 336; Dec. Dig. § 130.*]

9. WILLS (§ 54*)—WILL CONTEST—ADMISSION OF EVIDENCE—PURPOSE.

In a will contest, testatrix's declarations are admissible to show her mental condition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131–134; Dec. Dig. § 54.*]

10. WILLS (§ 54*)—WILL CONTEST—ADMISSION OF EVIDENCE—MATERIALITY.

Where in a will contest in which it appeared that testatrix committed suicide after having been charged with theft by her employer and discharged, and the only issue was her mental capacity, evidence of the exact amount stolen was immaterial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131–134; Dec. Dig. § 54.*]

11. WILLS (§ 384*)—CONTEST—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE—ADMITTED FACTS.

Where, in a will contest, it was not disputed that testatrix committed suicide by poison, the exclusion of evidence as to a statement to a witness by testatrix's sister as to the cause of her death could not have injured contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 858; Dec. Dig. § 384.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Munroe, Judge.

Proceedings by Louise Holmes and another, administrators with the will annexed of Alice L. Chevallier, for the probate of a will, which are contested by Marie Hartung. From a judgment of nonsuit, contestant appeals. Affirmed.

Edwin A. Meserve, for appellant. Lawler, Allen, Van Dyke & Jutten, for respondents.

HENSHAW, J. This is a contest of a will after probate. The ground of contest is that at the time of the making of the will the testatrix lacked testamentary capacity by reason of insanity. The contestant is Mary Hartung, a sister of the deceased. The contestee is Louise Holmes, another sister of deceased, and the principal beneficiary under the will. The contest was heard before a jury, and at the conclusion of the contestant's case the court granted a nonsuit.

It appeared from the testimony that Alice L. Chevallier at the time of her death was between 30 and 35 years of age and unmarried. For the 12 years immediately preceding the 30th of March, 1907, she had been in the employ of the Ville de Paris, a large store in the city of Los Angeles. She had proved trustworthy and competent, and had been advanced to the responsible position of collecting the moneys from the cash registers of the store, with their accompanying tags, and turning them in to the treasurer. About 6 o'clock in the afternoon of the 30th of March she was called before certain of the directors and officers of the establishment, and was accused of having misappropriated funds which she had collected. She was specifically charged with having taken from $250 to $400 a day for "several days." She replied coolly and indifferently that she had none of their money, and that, if they did not believe it, they could search her. She was discharged and returned to the home of her sister, Mrs. Holmes, with whom she was and had been living for several years. She told her sister that she had been accused of theft and discharged. Her sister asked her if she meant to fight the charge, and she replied, "How can I?" Mrs. Holmes then said she could fight heaven and hell if she were innocent, and Miss Chevallier merely smiled. Miss Chevallier remained at home for about a week after this, and then went to a neighboring seaside resort, from which she returned on the evening of April 12th. Mrs. Holmes told her that she had talked with the officials at the store, who had explained to her that Miss Chevallier had been seen to tear up checks and stubs and other vouchers and throw them away, and that the investigations disclosed that she had been taking about $200 a day. Miss Chevallier replied: "I have not got their money. They have not given me a fair chance." The next morning Mrs. Holmes resumed the conversation with her sister, telling her that the story of her peculations and discharge had spread all over the city; that it was but right that the third sister, Mrs. Hartung, who lived in the neighboring town of Anaheim, should be told; that for the sake of the family and for their dead mother's sake they must do what was right. Miss Chevallier said: "All right, if you think it is right you do what you think is right." Mrs. Holmes replied: "I do think it is right, and I will go to Anaheim if you do not." April 14th was Sunday. The two sisters remained at home and saw each other frequently. Miss Chevallier informed her sister that Mr. Durand, the treasurer of the Ville de Paris, was to call and see her during the afternoon, but he did not come. Late in the afternoon Miss Chevallier left the house for a short time, went in the direction of a drug store, was gone about 15 minutes, and returned with a package wrapped in a white paper. On the morning of the 15th Mrs. Holmes carried Miss Chevallier's breakfast to her. She was in bed, and Mrs. Holmes informed her that she was going to Anaheim to tell Mrs. Hartung. She did go to Anaheim. She returned early in the afternoon. Miss Chevallier was still in her room. She talked to her through the door, though she did not see her. She was asked to deliver a message to Mr. Durand, making an appointment with him for 6 o'clock that afternoon. Mrs. Holmes delivered the message, and later in the afternoon went to her sister's door and called to her, saying that it was 10 minutes after 5, and, if she meant to keep the appointment at 6 o'clock, it was time for her to dress. Miss Chevallier replied: "All right, I will get right up and be down on time." Miss Chevallier not appearing, the sister again went to the door and called to her. Receiving no response and finding the door locked, she unlocked it, and discovered Miss Chevallier kneeling over the bathtub, breathing but unconscious. She had drunk chloroform, and possibly had taken laudanum as well. Physicians and trained nurses were immediately called. All the resources of medical science were promptly and continuously employed, but Miss Chevallier never recovered consciousness, and died on the 17th of April. Upon the table by her bed, held down by a paperweight, was the following, wholly in the handwriting of the deceased: "4–14–07. Louise Dear: In the safe you will find money enough to cover my burial expenses, you will also find with this note directions for opening same. I would like you to give Grace my black watch & pin also my bracelet, all my other effects, personal and otherwise, I leave to you and you alone to keep or dispose of, as you see fit, all my papers are in the German-American Bank vault and in the safe; my accounts are in the Security Savings, American Savings, & 1st Nat'l Banks. Alice L. Chevallier." This is the instrument which was admitted to probate as a will and over which this contest is waged. The estate which Miss Chevallier left consisted wholly of personal property of the estimated value of $20,000. The contestant, Mrs. Hartung, had always been on friendly terms with her deceased sister, but it was with the principal beneficiary under the will, Mrs. Holmes, that Miss Chevallier resided and most intimately associated. Mrs. Hartung's family consisted, beside herself, of her husband and grown son. Her husband was vice president of one bank, her son a clerk in another. There is no dispute but that the "Louise Dear" of the testamentary document refers to Mrs. Holmes.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

From the evidence it appears that Miss Chevallier was a well-developed, well-nourished woman, whose health, until the latter years of her life, had been extremely good. In 1903 she went to a hospital, where was performed an abdominal operation, doubtless for the removal of a diseased ovary. She returned to her work in due course after the operation, though some time after she again complained of pains in her back, frequently took medicines, declared that she was suffering physically from an affection of the other ovary, and was preparing to undergo another operation for the removal of that ovary, or a cyst upon it. Such was her physical condition at the time of her dismissal from the store. But by all the testimony this physical condition neither affected her personal appearance nor her mental characteristics. She continued to do her work efficiently and well. The theory of the contestant is that the history of the case thus set forth is sufficient to establish the lack of testamentary capacity which the law requires. The argument addressed to the evidence is that probably by reason of her ovarian troubles and the taking of drugs and medicines her mind became affected; that as evidence of this disordered mind were her peculations of moneys from the firm of which she had been an honest and trusted employé for many years; that no reason, since she was worth $20,000, is shown why she should have been tempted to take the money; that, her thefts having been discovered, the brooding remorse of an already unbalanced mind impelled her to suicide; and that immediately before destroying herself, and under these circumstances, she wrote the testamentary document from which the law will withhold its approval. In support of this theory, the contestant introduced the expert opinion of one alienist who, in answer to a hypothetical question purporting to embody the facts in evidence, declared his belief that Miss Chevallier at the time of the making of the will was insane.

Such being the evidence, appellant contends (1) that a motion for a nonsuit is not permissible in a contest over the probate of a will; and (2) that, if permissible, still there was such evidence on behalf of the contestant as to make it error for the court to withdraw the case from the consideration of the jury. As to the first proposition, the Code itself declares that after the impanelment of a jury in the contest of a will the trial "must be conducted in accordance with the provisions of part two, title eight, chapter four of this Code." Code Civ. Proc. § 1313. These provisions contemplate the granting of a nonsuit in proper cases. In Estate of Morey, 147 Cal. 495, 82 Pac. 57, it was declared, in a case where a jury had been impaneled in a contest for the revocation of a will, that, as the evidence produced by the contestant was not sufficient to justify a verdict in their favor, it was proper for the court in effect to grant a nonsuit by refusing to submit special issues to the jury and ordering the jury discharged. And in Estate of Dole, 147 Cal. 188, 81 Pac. 534, in a like action, and contesting a will after probate, seeking a revocation of the probate, it was held that the nonsuit there granted was proper, since the evidence adduced by the contestants was wholly insufficient.

The second proposition, namely, that the evidence was such as to have demanded of the trial court that it deny the motion for a nonsuit and submit the cause to the determination of the jury, presents a more serious question. We approach its consideration with the following declaration of what we regard to be the true rule governing the conduct of a trial judge. The difference between the duties of a judge in granting a nonsuit or directing a verdict is learnedly and historically discussed by Justice Lurton in Mt. Adams, etc., Ry. Co. v. Lowery, 74 Fed. 463, 20 C. C. A. 596. A reference to that case avoids the necessity of elaborate presentation. It will suffice here to say that, quoting the language of Mr. Justice Barry in Railroad Co. v. Slattery, 3 App. Cas. 1155, the guide of the trial court in granting or refusing to grant a motion for a nonsuit, is this: "When once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury." If there be sufficient evidence to justify the presentation of the case to the jury and the jury fall into an error in weighing and deciding upon the evidence, the remedy then is by motion for a new trial. The distinction is pointed out in Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642, as follows: "If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict of the plaintiff. It is enough that there was evidence upon the subject proper to be left to the consideration of the jury. If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. This part of the case was argued as if such a motion was before us. The rules of law which would be applicable in that event are very different from those which apply as the case is presented." See, also, Byrnes v. Moore, 93 Cal. 393, 29 Pac. 70; Archibald's Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723.

The matter for consideration thus resolves itself into this: Would the evidence offered by contestant, if presented to the jury, have warranted a verdict in her favor. If so, the court erred in granting the nonsuit, since it was contestant's right in the first instance to have the jury pass upon the issues. If, however, the evidence presented by contestant, viewed in the most favorable light which could logically and legally be brought to bear upon it, would not have supported a verdict in her favor, the court performed its duty in refusing to submit it to the jury.

In considering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld. Thus the wills of aged and infirm people, of people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. It would thus not be sufficient, to avoid a will, to show that the testator believed that the moon was made of green cheese, but if it should be established, in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief, he would not have done, a case is presented where the abnormality of mind has a direct influence upon the testamentary act.

Considering the evidence here in the light of these elementary principles, it may be conceded that the testatrix was unquestionably in great distress and agony of mind at the time she wrote her will, and that it was written in contemplation of self-destruction. It may be conceded, moreover, that it was abnormal for a trusted employé, in the circumstances of this testatrix, to have suddenly begun a series of thefts upon so large a scale that discovery could not long be postponed. It may be conceded, further, that the testatrix's ovarian troubles may have affected her mind, and, finally, it may be conceded that in the generality of cases, at least, the normal mind is repelled by the thought of suicide. But all this having been conceded—and no more may be—the evidence still falls far short of showing that the testamentary act was affected in the slightest degree by any or by all of these abnormalities. The positive evidence of a sound and disposing mind is overwhelming. The conduct, manner, actions of the deceased, the language of the will itself, all afford high and uncontradicted evidence of full capacity for the testamentary disposition of property. Nor is it made to appear that, to the slightest degree, the will was the product of any diseased mind or imaginings. She remembers one sister by a gift of a personal memento and to the other, evidently the favored sister with whom for years she had been living, she leaves the rest of her estate. Such disposition, so far from giving evidence of testamentary incapacity, was not even unnatural. There is not in the evidence the slightest suggestion that the disposition of her property would have been otherwise if no question of her mental capacity had ever arisen. The fact that the testator is a suicide may be given in evidence as tending to establish insanity, but there must be much more than the mere fact of suicide to show that the insanity was so complete as to destroy testamentary capacity, or that it was of such a nature as to have exercised a direct influence and bearing upon the testamentary act, and no word of such evidence appears in this case. We are herein not unmindful of the testimony of the physician who declares, under the promptings of a hypothetical question too long to be repeated, his belief that the deceased was insane. But his testimony goes no further than this. This court recently, in Estate of Dolbeer, 149 Cal. 227, 86 Pac. 695, was called upon to discuss the value of expert opinion evidence given under such circumstances, and declared it to be "in the eye of the law of steadily decreasing value." But giving to the evidence under the circumstances of the nonsuit, as we must, the fullest weight to which it is entitled, it is but a declaration of the belief of the physician that from a medical standpoint she was insane. It is not accompanied nor followed by any evidence showing the extent or nature of the insanity, and, as hereinbefore pointed out, the insanity which the physician believed he had found could have well coexisted with full testamentary capacity.

That the document admitted to probate as a will was of a testamentary character sufficient to entitle it to probate is beyond the need of argument. Appellant urges, however, that, being olographic in character, it lacks an essential to a complete olographic will, in that it was not dated. Civ. Code, § 1277. It will be noted that the date is given as follows "4–14–07." In Estate of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96, an olographic will bearing the date "New York, Nov. 22, 97," was involved. In holding that the instrument was sufficiently dated within the meaning of the statute, this court said: "The object of writing is merely to express the thought or intention of the writer; and this may be as effectually done by abbreviations or words or other conventional signs, if commonly used and generally recognized, as by words fully written or spoken. * * * And under the head of abbreviations are to be included all conventional expressions or arbitrary signs that have passed into common use." In this language we think the rule is fully and justly expressed, and within it come the numerals here employed. Were the date actually written by the testator in a foreign language, it would undoubtedly be good, though it would call for translation and interpretation. By growing usage and custom the method here employed of designating the month, day, and year is so common that it would be difficult to find one at all versed in business or practical affairs who would not readily construe these numerals to mean April 14, 1907.

It is contended that the court erred in its rulings upon the reception and rejection of evidence. We have examined each specification with care. They do not require separate discussion. As to some, it is sufficient to say that the court very properly ruled, since the sole question was her capacity to make a will by reason of unsoundness of mind, that the declarations of the testatrix should be received and regarded, not as evidence of the truth of the statements therein contained, but merely as showing her state of mind and mental condition. No doubt can be entertained of the soundness of this ruling. Estate of McKenna, 143 Cal. 580, 77 Pac. 461. The refusal to allow Mr. Durand to testify to the amount of the thefts which an examination of the firm's books and vouchers established was without injury. The only facts pertinent were those which had a bearing upon the condition of the testatrix's mind, and those were that she was charged with the theft of from $200 to $400 a day for several days prior to her discharge, and was discharged because of these alleged thefts. No issue was made over the truth or falsity of the charge, and the exact amount of the alleged peculations was unimportant. A witness, Mr. Barry, who was a visitor at the house of Mrs. Holmes after the testatrix had attempted suicide, but while she was still alive, though unconscious, was not allowed to testify to what Mrs. Holmes told him as to the cause of her sister's condition. The evidence might well have been admitted, but its rejection could have worked no possible injury. The cause and manner of the testatrix's death were not in dispute. Mrs. Holmes had testified to it. This witness was admitted to the sick room where the testatrix lay dying, and it is avowed by appellant that the evidence which she sought to elicit was that Mrs. Holmes had said that her sister had committed suicide by taking poison, a fact over which throughout the whole contest there was not the slightest question.

No other matters demand specific consideration, and for the foregoing reasons the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(159 Cal. 155)

SILLIMAN v. CARR. (L. A. 2,543.)

(Supreme Court of California. Jan. 5, 1911.)

1. Arbitration and Award (§ 84*)—Submission—Making Submission Rule of Court.

Where parties to a pending suit agree to arbitrate, it will be presumed, though the agreement for arbitration stipulates or provides that the award be made a rule of court, that the parties intended the submission to be entered as a rule of court, as required by Code Civ. Proc. § 1283, so that the judgment entered on the award is not void because the agreement to arbitrate does not expressly require the submission to be made a rule of court.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 466–483; Dec. Dig. § 84.*]

2. Arbitration and Award (§ 46*)—Harmless Error—Rulings on Questions to Witness—Witness Not Sworn.

While it is irregular for arbitrators to receive evidence without swearing the witnesses, a party, who was present and made no objection to that fact or to their unsworn statements, cannot complain of this irregularity as a ground for vacating the award under Code Civ. Proc. § 1287.

[Ed. Note.—For other cases, see Arbitration & Award, Cent. Dig. §§ 230–243; Dec. Dig. § 46.*]

3. Appeal and Error (§ 1030*)—Harmless Error—Irregularity in Procedure.

Where the clerk of court enters a submission and award in a pending suit under the title of the suit, and thereafter makes new entries showing separate arbitration proceedings as contemplated by statute, the irregularity, if any, is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4037; Dec. Dig. § 1030.*]

4. Arbitration and Award (§ 31*) — Conduct of Hearing — Refusal to Reopen Hearing.

Where arbitrators under the terms of a submission were to make their award in 10 days, their refusal to reopen the cause for further hearing on the last day, on the ground that it would make it impossible for them to return their award in time, is proper.

[Ed. Note.—For other cases, see Arbitration and Award, Dec. Dig. § 31.*]

5. Arbitration and Award (§ 67*)—Ratification.

Where one of the parties to an arbitration has asked and received a part of the stock on a range, under the terms of the award, and the other party, his tenant, has surrendered possession of the premises and rented another place, this acceptance of benefits under the award is a ratification thereof by the first party, so that he cannot vacate the award under Code Civ. Proc. § 1287.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 341, 342; Dec. Dig. § 67.*]

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Charles H. Silliman against Charles H. Carr, pending which an agreement to submit to arbitration was made. From the judgment entered on the award, plaintiff appeals. Affirmed.

Noland & Birkhauser, for appellant. Conkling & Brown, for respondent.

HENSHAW, J. Appellant had commenced an action against respondent who had been the former's tenant for a cancellation of the lease and an accounting of the property. While the action was pending, the parties entered into an agreement to arbitrate. The agreement recited that Silliman had canceled his lease and agreement and intended to take possession of the leased property, that Carr was willing that he should do so on proper compensation being made to him, wherefore, "to avoid a recourse to a suit in the courts," the parties submitted to arbitration "the whole matter of settlement and adjustment of said lease and agreement and of the rights of the parties therein," and "all matters in dispute between said parties shall be included in said arbitration, to wit, all notes, accounts, and dealings of every kind and character between the parties hereto, including all rights and claims to damages and compensation for crops and improvements under said lease and subsequent agreement above referred to." The parties further agreed "that the award of such arbitrators shall be made an order of the superior court in and for the county of Imperial, state of California, and that such award shall be made within 10 days from the date hereof." This submission was filed with the clerk of the superior court, but entered in his books under the title of the case pending between the parties. In due time the award was made, and this, in turn, was filed with the clerk of the court who noted it, as he had done the submission, under the title of the pending case. Appellant thereafter filed with the clerk his motion to vacate the award under section 1287, Code Civ. Proc. The motion was denied. Subsequently he moved the court to stay the entry of judgment on the ground that it had not been made in the statutory form because the agreement of arbitration provided that the award and not the submission should be made an order of the court. This motion was also denied. Thereafter the clerk made new entries of all the proceedings relating to the arbitration in his register of actions under the title independent of the pending action and showing separate arbitration proceedings. Having made all the statutory entries required by the Code, the clerk on May 28th entered the award in his judgment book as a judgment, and Silliman appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the appeal he first insists that the judgment is void in that the arbitration agreement does not provide that the submission be entered as an order of the superior court as contemplated by section 1283 of the Code of Civil Procedure. Such cases as Ryan v. Dougherty, 30 Cal. 218, Fairchild v. Doten, 42 Cal. 125, and Pieratt v. Kennedy, 43 Cal. 393, are relied on to support appellant's contention. They differ from the case at bar, however, in the following important respect. In all of these cases the agreement to arbitrate arose and was entered into independent of any litigation or court proceedings. In the case at bar the arbitration agreement was entered into after suit brought and while the action was pending between the parties, and one of its avowed purposes was to relieve the parties from the necessity of having their differences determined by the court and to substitute for the judgment of the court the award which arbitrators of their own selection might decree. It is well settled that in such a case, even where the arbitrators' agreement is silent upon the matter, it will be presumed that it is the intent of the parties that the submission be entered as a rule of court. Thus in Buckman v. Davis, 28 Pa. 211, the parties did not stipulate to make the submission a rule of court, but says the court: "This has been held in several to be immaterial where there is an action pending." Again in McAdams' Executors v. Stilwell, 13 Pa. 90, it is said: "The courts have, therefore, refused to listen to merely formal objections, whether directed against the submission itself or addressed to the award. Herman v. Freeman, 8 Serg. & R. [Pa.] 9. It was accordingly long ago settled that the insertion of a formal agreement to make the submission a rule of court is not necessary to its efficiency whenever an action is pending. * * * Such consent will be implied whenever the intent of the parties is apparent." In Zehner v. Lehigh Coal & Navigation Co., 187 Pa. 487, 41 Atl. 464, 67 Am. St. Rep. 586, it is said: "There is no force in the suggestion that the agreement above quoted was not filed until after the attempted revocation of the submission. Where the latter is in a pending action, it is treated as under a rule of court, and it is unnecessary to so stipulate in the agreement."

As to the alleged misconduct of the arbitrators in receiving certain evidence without first swearing the witnesses, it is shown by way of answer that the appellant was present, made no objection to the fact that witnesses were not sworn, and took no exception to their unsworn statements. On the authority of In re Connor, 128 Cal. 279, 60 Pac. 862, he may not be heard to complain of this irregularity. As to the mere statement in the affidavit of one of the arbitrators that the arbitrators "considered and deliberated upon matters extraneous and dehors the submission to arbitration, in this, that said arbitrators took into consideration the lands and premises, as also the crop growing thereon, known as the Blanche C. Silliman ranch," it is sufficient to say that the growing crop upon this ranch which had been leased by appellant to the respondent was clearly one of the matters covered by the arbitration agreement which in its terms embraced "all matters in dispute between said parties."

We express no opinion upon the question as to whether it was an irregularity for the clerk in the first instance to have entered the submission and award under the title of the action pending between the parties. Suffice it to say that, if it was an irregularity, it was an irregularity without injury and amounted to no more than a clerical misprision, and was corrected by full and complete entries, as contemplated by the statute, in the appropriate book and under an appropriate title.

The refusal of the arbitrators at the request of the appellant to reopen the cause for further hearing was fully justified by the facts. By the terms of the submission they were to make their award within 10 days. At noon of the tenth day, having assembled for the purpose of preparing their report, they were asked by appellant in the absence of Carr to reopen the cause for the taking of further testimony. They refused on the ground that to reopen the case under such circumstances would make it impossible for them to return their award within the time contemplated by the agreement. There was no error in this refusal. 3 Cyc. 348.

Finally, it may be said that it stands uncontradicted that, after the award of the arbitrators had been made, the appellant came to the respondent and asked that the stock given to him under the award be turned over and placed in his care. This was done, and the appellant ever since has had the custody and control of the stock and has taken a large portion of it away from the ranch to places unknown. Further, that, in consequence of this affirmative action on the part of Silliman in recognizing the award and in accepting the fruits thereof, Carr had surrendered possession of the premises and rented another place. Appellant's protest against the award, the benefits of which he has at least in part accepted, cannot be heard.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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159 Cal. 175

PERRY et al. v. CALKINS et al.

(Sac. 1,848.)

(Supreme Court of California. Jan. 6, 1911.)

1. Waters and Water Courses (§ 138*)—Riparian Proprietors — Prescription — Adverse Character of Claim.

The use of water diverted from a stream at a point below the land of a riparian proprietor, though under an adverse claim of paramount right, is not ordinarily adverse to him, unless his use is interfered with by the alleged adverse use below.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

2. Waters and Water Courses (§ 138*)—Right to Water—Prescriptive Right.

No right to water in a stream can be acquired by prescription, where the lower riparian proprietor has taken the water out of the stream at a point on his own land, and uses only such water as the upper riparian proprietor has permitted to pass down to the lower owner; such use not being adverse in the sense required to give a right by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

3. Waters and Water Courses (§ 138*) — Riparian Proprietors — Suit by Lower Proprietor—Prescription.

Where a lower riparian proprietor diverts on his own land only such water as the upper proprietor permits to flow down to him, the nonuser of water by the upper proprietor is not available to strengthen a claim of appropriation by the lower riparian proprietor by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

4. Waters and Water Courses (§ 132*) — Appropriators—Effect—Prescription.

Nonuser by an upper proprietor or appropriator of water is not available to strengthen a lower appropriator's claim by prescription, where such lower appropriator is not a riparian owner, but takes the water for use on nonriparian lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 132.*]

5. Waters and Water Courses (§ 137*)—Diversion—Prescriptive Rights.

Diversion of water from a water course by means of a submerged dam built above plaintiffs' ditch, begun less than five years before suit brought, had not existed for a sufficient length of time to confer prescriptive rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 149; Dec. Dig. § 137.*]

6. Waters and Water Courses (§ 152*)—Diversion—Subterraneous Flow—Evidence—Finding.

A finding that a city's diversion of water of a stream by means of a submerged dam, the water being taken from the underflow at the surface of bed rock, did not affect the surface flow to which plaintiffs had a superior right, *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

Department 1. Appeal from Superior Court, Siskiyou County; Charles M. Head, Judge.

Action by Manuel W. Perry and others against Charles S. Calkins and others. From an order denying plaintiffs' motion for a new trial, they appeal. Reversed and judgment vacated in part, and remanded for a new trial on specified issues.

Chas. W. Strother and Willard G. Cram, for appellants. B. K. Collier and L. F. Coburn, for respondents.

SHAW, J. This is an appeal by plaintiffs from an order denying their motion for a new trial.

The action involves a determination of the separate rights of several persons to the waters of Greenhorn creek in Siskiyou county. The plaintiffs challenge the decision only so far as it declares the respective rights of the defendant Charles H. Calkins, Andrew S. Calkins, and the city of Yreka.

The plaintiffs own about 500 acres of land known as the "Quinn Place," situated on or near Greenhorn creek and a ditch known as the "Lower Greenhorn ditch," through and by means of which they and their predecessors in interest have been for many years conducting the waters of the creek to said land for use thereon in irrigation and mining. The defendants, Charles H. Calkins and Andrew S. Calkins, each owns lands bordering upon said creek situated above the point where the plaintiffs' ditch takes water therefrom and above the lands of the plaintiffs. The city of Yreka claims the right to divert water from said creek by means of a drain at a point half a mile above, and also by a submerged dam two miles above, the head of the plaintiffs' ditch, and to conduct the same to said city for the use of its inhabitants. The court found that Charles H. Calkins owns 120 acres of land, and that Andrew S. Calkins owns 79 acres; that both tracts are situated on Greenhorn creek; that they and their predecessors in interest, ever since the year 1882, have used upon the said lands, adversely and under a claim of right, for mining, irrigation, and domestic use, a flow of water from the creek equal to 45 inches measured under a 4-inch pressure, each using one-half thereof, and that said water is necessary for said uses; that plaintiffs own the lands as alleged in the complaint and the Lower Greenhorn ditch, but that they have not used the water of said creek upon their lands under a claim of right or otherwise, except such as came down to them in said creek after the several defendants had taken the quantity so found to have been used by them, respectively, and that the use of the plaintiffs was not adverse to that of defendants; and that the defendants have the right to take and use said water without plaintiffs' consent, and thereby prevent the same from entering said Lower Greenhorn ditch. It is claimed that these findings are contrary to the evidence.

With respect to the Calkins' land, all doubts as to the superior rights of the owners thereof to the use of the waters of the creek thereon would seem to be settled by the fact, appearing throughout the evidence and not disputed, that these lands are riparian to the stream, and are situated above the point of diversion of the plaintiffs. The complaint states that the plaintiffs' right to the water is a right acquired by adverse use or prescription, and not as a riparian right. Even if they were also riparian owners, they show no injury, since they do not allege that the Calkins' lands use more than a fair share of the water. The use of water diverted from the stream at a point below the land of a riparian owner is not ordinarily adverse to him. No right against him is obtained by such use, although under an adverse claim of paramount right, unless his own use has been interfered with by the adverse use below, a thing which can seldom occur. "As the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his rights, and he was not called upon to protest against it." Hargrave v. Cook, 108 Cal. 79, 41 Pac. 20, 30 L. R. A. 390. In such a case the upper user "could not complain, and title by prescription cannot be acquired unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom the acts are performed." Lakeside Ditch Co. v. Crane, 80 Cal. 183, 22 Pac. 76; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 192, 30 Pac. 623. "It is equally well settled that no right to water can be acquired by prescription where the lower riparian proprietor has taken the water out of the stream at a point on his own land and has used such water only as the upper riparian proprietor permitted to pass down through his land to the lower owner. Such use by the latter is not adverse in the sense required to give a right by prescription. Nor can the nonuser of water by the upper riparian owner of land be invoked to strengthen the claim of the appropriation by prescription by the lower riparian owner under like circumstances." Bathgate v. Irvine, 126 Cal. 140, 58 Pac. 444, 77 Am. St. Rep. 158. The same rule applies where the lower appropriator or user is not a riparian owner and takes the water for use on lands not riparian. Cave v. Tyler, 133 Cal. 567, 65 Pac. 1089. There was no evidence that the use of the water by the plaintiffs had actually interfered with or prevented its use on the Calkins' land for a sufficient length of time to give plaintiffs title by prescription against the said defendants as riparian owners.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

If the case is viewed simply as one of rival claimants by appropriation or prescription, we think the evidence was sufficient to support the findings of continuous adverse use on the Calkins' land and a prescriptive right in the owners thereof to such use. The trial seems to have been conducted on the theory that such proof was necessary. While there was some evidence of interference by plaintiffs and their predecessors with the use on the Calkins' land, it was merely temporary, and did not divest the prescriptive right previously acquired. The finding of a prescriptive right to the 45 inches of water assigned to those lands by the judgment is supported by the evidence. It is unnecessary to relate the evidence on the point.

With regard to the city of Yreka, the court found that it was entitled to take and use water of the creek to the extent of 50 inches, miner's measurement, through the Scheld drain. It is not seriously contended that this finding is not sustained. The city has been diverting and using that quantity for many years, taking it from a point about half a mile above the plaintiffs' ditch by means of the tunnels or drains known as the "Scheld drain." Its right to take it is established, both by proof of continuous adverse use for more than five years and by judgment against plaintiffs' predecessors in interest in favor of the city's predecessors in interest. The fact that less than 50 inches was taken sometimes during the summer seasons because the full amount of 50 inches was not then flowing in the creek is immaterial, since the evidence also shows that at such times the city took it all and the plaintiffs could not obtain any water from the creek.

The court also found that the city has the right to take 35 inches of the water of the creek by means of a submerged dam built by it at a point about 2 miles above the plaintiffs' ditch. This dam was built and this diversion was begun in 1903, less than five years before this action was begun. No prescriptive right thereto has been acquired by the city. The judgment gives it this right in addition to the 50 inches taken by the Scheld drain. The plaintiffs claim that this finding is contrary to the evidence. If this 35 inches was claimed as a part of the 50 inches which the city had acquired the right to divert by means of the Scheld drain, it would be a mere change of the place of diversion which the city might make if it caused no injury to plaintiffs. Barton v. Riverside Water Co., 155 Cal. 517, 101 Pac. 790, 23 L. R. A. (N. S.) 331. We cannot see how this alone could injure the plaintiffs. But it is adjudged to the city as an additional right. If it is permitted, the city will have the right to divert from the waters of the creek 85 inches of water, instead of only 50 inches as before. If this additional diversion will materially diminish the quantity flowing down the creek and into plaintiffs' ditch, it will constitute an injury to their property rights which they would have a right to enjoin, since the evidence clearly shows that they have claimed and used for many years a flow of 45 inches, taken from the surface stream, or as much thereof as would reach their ditch, and have acquired a right thereto, subject only to the prior rights of the parties above.

It is claimed on behalf of the city that this 35 inches consists wholly of the underflow, and that, as the plaintiffs take only from the surface flow, the two sources are distinct, and plaintiffs will be deprived of no water to which they have a legal right. This proposition cannot be maintained. It is admitted by the pleadings that the creek bed is composed of boulders and coarse gravel from 6 to 12 feet deep, through which water very readily sinks to the grooves and channels of the bedrock. All the evidence shows that this is the condition from the submerged dam down to and including the site of the plaintiffs' ditch. Antone Castro, one of the plaintiffs, testified that, when the subsurface waters are taken from the bedrock, it takes that much more of the surface water to fill up the gravel, and that, if the subsurface water is taken out of the creek above the head of their ditch, the surface flow would sink through the gravel and would not reach their headgate, and that they claimed the subsurface water as a support for the surface stream. William Calkins testified that there would be no surface flow until the gravel was full of water from the bedrock to the surface. With a creek bed as porous as this is conceded to be, no evidence is necessary to establish the fact that the taking of a substantial part of the underflow from the channel at any point on the stream would cause a corresponding diminution in the surface stream below. The law of gravitation would raise a presumption that it would operate to that effect. One who would establish the contrary would have the burden of proving conditions which would prevent such diminution. There is no evidence to the contrary. Two of the city trustees testified that the building of the cement dam did not seem to diminish the flow of water in the Scheld drain. That drain took water underground from bedrock and to the extent of only 50 inches. The fact that there still remained that quantity of underflow after deducting the 35 inches taken at the submerged dam would not prove that the taking of the latter amount did not diminish the flow on the surface at plaintiffs' ditch. Of course, when the creek was so low that no water would rise to the surface into their ditch if the 35 inches were not taken out above, that diversion would cause plaintiffs no injury. At such times the city might be permitted to take it. But inevitably the continuous taking away of 35 inches of either the surface flow or underflow above would cause the surface flow at plaintiffs' ditch to fail sooner than if such diversion were not made at all. As soon as the flow diminished so that it would all pass through the sand and gravel, none would appear on the surface. It is plain, for these reasons, that the finding that the city has the right to take this 35 inches is not sustained.

The court found that plaintiffs had no right to take any of said water as against the city of Yreka. This finding was evidently based on the idea that the city's diversion of additional water by means of a dam was not an infringement on any right which the plaintiffs might have to take water from the surface of the stream two miles below. We think the court mistook the law upon this subject, or, what amounts to the same thing, that it failed to perceive the necessary effect of the diversion of the underground water from a porous stream bed upon the surface stream below. The finding is to this extent contrary to the evidence. A new trial with respect to the issues between the city of Yreka and the plaintiffs should have been granted.

The plaintiffs complain of a ruling of the court excluding a certain lease made by C. H. Calkins to some Chinamen in 1896 purporting to lease to them the right to use the 45 inches of water claimed by Calkins except for two days and two nights each week. This evidence was offered by plaintiffs in rebuttal of Calkins' statement that he used the water for irrigating during the whole of each week. While it might tend to contradict his testimony in that respect, we do not think it was material to the plaintiffs' case. Calkins, as we have seen, was a riparian owner, and was entitled to use the water on his land whether he claimed a right to it or not. If we consider him in the aspect of one claiming only by appropriation, such right could be acquired only by continuous adverse use. This right would be as much supported by a showing that he used it through his lessees as by showing that he used it himself all the time. The effect of the use by the Chinamen would not impair the prescriptive right of Calkins, but, on the contrary, would strengthen and support it.

There is no serious conflict in the evidence or dispute concerning essential facts, or any good cause for a new trial, except upon the issues regarding the right of the city to divert water in addition to the 50 inches which it has long had the right to take through the Scheld drain.

The order denying a new trial is reversed, and the judgment vacated only so far as the issues between plaintiffs and the city of Yreka relating to alleged taking of water by means of the submerged dam are concerned, and the cause is remanded for a new trial of those issues alone. As to all other issues the order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

159 Cal. 206

McKEE v. TITLE INS. & TRUST CO. et al.

(L. A. 2,571.)

(Supreme Court of California. Jan. 9, 1911. Rehearing Denied Feb. 8, 1911.)

1. Corporations (§ 471*)—Bonds—Consideration.

A hotel corporation agreed in writing with its agent that the latter should sell 2,600 shares of capital stock at par, fully paid-up stock, the agent to receive for its services bonds of the corporation of the face value of $275,000 and $15,000 of fully paid capital stock. The real agreement, however, was that the agent's services were to be gratuitous, and that the bonds and stock issued to the agent should be used by it in paying bonuses to the purchasers of the stock, as that was the only method by which the stock could be sold at par. The subscription contracts recited that the subscribers agreed to pay for the stock at par, and that, as additional consideration for the subscription, the agent "for itself only" would pay to each subscriber an amount of the bonds equal in face value to 105 per cent. of the amount of the subscription, and shares of stock of the hotel company at par value equal to 5 per cent. of the subscription. *Held*, that the bonds were issued to the subscribers for a valuable consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1836; Dec. Dig. § 471.*]

2. Corporations (§ 542*)—Bonds—Issuance—Fraud as to Creditors.

That a hotel corporation was unable to pay its debts as they became due when bonds issued by it and given to subscribers of its stock at par as a bonus to secure the subscriptions did not make the issuance of the bonds fraudulent as to creditors, under Civ. Code, § 3442, providing that a voluntary transfer or incumbrance of property without valuable consideration by one while insolvent, or in contemplation of insolvency, shall be fraudulent as to existing creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. § 542.*]

3. Corporations (§ 542*)—Delaying Creditors—Issuance of Corporate Bonds—"Fraudulent."

The issuance of the bonds was not fraudulent within Civ. Code, § 3439, making every transfer of property, or charge thereon, with intent to delay or defraud creditors, void, where the purpose of the transaction was to procure funds to operate the corporate business, though there was such fraud in the issuance to such subscribers of bonus stock to the amount of 5 per cent. of their subscriptions in addition to the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. § 542.*

For other definitions, see Words and Phrases, vol. 3, pp. 2955–2957.]

4. Corporations (§ 472*)—Fiscal Management—Corporate Bonds—Validity—Bonus Bonds—"Corporate Assets."

Neither Civ. Code, § 359, prohibiting the issuance of corporate stock or bonds except for money paid, labor done, or property actually received, and making any fictitious increase of indebtedness void, nor Const. art. 12, § 11, containing the same provision, nor any rule of public policy, prohibits the sale of corporate bonds at a discount, nor does the "trust fund" doctrine apply to corporate bonds; they not being corporate assets within the meaning of that doctrine.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1841; Dec. Dig. § 472.*]

5. Corporations (§ 471*)—Corporate Bonds—Increase—Validity—Noncompliance with Statute.

Civ. Code, § 359, permitting every corporation to increase or create a bonded indebtedness by the consent of two-thirds of the stockholders, provided that certificates of the increase be filed in the county clerk's office, and in the office of the Secretary of State, does not make such bonds void at the option of creditors or their representatives.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1838; Dec. Dig. § 471.*]

6. Appeal and Error (§ 854*)—Review—Correct Judgment Based on Erroneous Reasoning.

The Supreme Court is not bound by the trial court's opinion as to the effect of the facts found or its reasoning in reaching its conclusion of law, but will affirm irrespective of erroneous reasoning where the correct result is reached.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 854.*]

7. Corporations (§ 469*)—Strict Construction of Statute—Infringing Contract Rights.

Const. art. 12, § 11, prohibiting an increase of corporate stock and bonded indebtedness except at a meeting called upon 60 days' notice, being a restriction on the inherent right to freely contract, its meaning will not be unnecessarily extended.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. § 469.*]

8. Corporations (§ 469*)—Corporate Bonds—"Increase"—Application of Statutes.

Such constitutional provision as well as Civ. Code, § 359, subd. 5, relating to an "increase" of stocks or bonds, does not apply to an original issue of corporate bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. § 469.*

For other definitions, see Words and Phrases, vol. 4, pp. 3515–3518; vol. 8, p. 7685.]

9. Corporations (§ 388*)—Corporate Bonds—Validity—Estoppel to Deny Validity.

Civ. Code, § 359, permits every corporation to create or increase a bonded indebtedness by consent of two-thirds of the stockholders, provided certificates of such increase be filed in the offices of the county clerk and the Secretary of State. *Held*, that corporate creditors and the assignee in insolvency of the corporation were estopped from claiming that corporate bonds issued as a bonus to subscribers for increase of capital stock were invalid and ultra vires because issued without complying with the statute, where the corporation had received the money paid for the stock and had applied it to paying its debts and in the operation of its business, which would otherwise have been practically worthless.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556–1567; Dec. Dig. § 388.*]

10. Corporations (§ 672*)—Admission of Corporate Existence—Conclusiveness.

An admission in the answer of an allegation in the complaint as to the due incorporation of a corporation under the laws of another state is conclusive, and cannot be controverted by the evidence or findings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2646; Dec. Dig. § 672.*]

11. Corporations (§ 29*)—Corporate Organization—Validity—Collateral Attack.

The validity of the organization of a corporation, incorporated under Arizona laws, cannot be collaterally attacked in an action by the assignee of the corporation in insolvency to cancel corporate bonds as invalid, on the ground that the incorporators meant to organize the corporation in this state and held no meetings in Arizona, as that question can only be raised in direct proceedings to test the validity of the corporate organization brought by the territory of Arizona.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77–79; Dec. Dig. § 29.*]

12. CORPORATIONS (§ 471*) — CORPORATE BONDS — VALIDITY — NONCOMPLIANCE WITH STATUTE.

The statute of the territory under which a corporation was incorporated provided that an amendment of the articles of incorporation increasing its capital stock should not be valid unless recorded and published as the original articles are required to be, and permitted the corporation to commence business as soon as the original articles were filed in the county recorder's office and in the office of the territorial Auditor. When corporate bonds were issued, a copy of the amended articles, increasing the capital stock to an amount which would make the bonds legal, had not been filed in the office of the territorial Auditor, but such statutory provisions were afterwards complied with. *Held* that, even if the bonds were invalid before the filing of a copy of the amended articles in the office of the territorial Auditor, they would not be held void at the instance of corporate creditors after they had been sold for value and delivered to the purchasers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1838; Dec. Dig. § 471.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Munroe, Judge.

Action by Henry S. McKee, assignee in insolvency of the Wentworth Hotel Company, against the Title Insurance & Trust Company and others. From a judgment for plaintiff and an order denying a motion for a new trial, defendant named and others appeal. Reversed.

W. S. Wright, Gray, Barker & Bowen, Oscar A. Trippett, J. M. & H. L. Rothchild, Lee C. Gates, and Chas. L. Batcheller, for appellants. Jeff P. Chandler and Jonathan R. Scott, for respondent. W. S. Wright and Gray, Barker & Bowen, for respondent Oak Knoll Co.

SHAW, J. Appeals are presented from the judgment and from an order denying the appellants' motion for a new trial. So far as the judgment is in favor of the Oak Knoll Company, there is no appeal, and, as that part of it was not attacked by the motion for a new trial, it has become final as to that defendant.

The Wentworth Hotel Company claims to be a corporation organized under the laws of Arizona. It was adjudged an insolvent under the insolvency law of California on July 12, 1907, upon a petition by certain creditors filed on May 24, 1907. Henry S. McKee was duly appointed as the assignee in insolvency of said company. It was incorporated in April, 1906, with a capital stock of $350,000 in shares of $100 each. Its articles empowered it to build and operate hotels. Its principal business was the erection and operation of a large hotel at Oak Knoll, near Pasadena. Stock was issued and fully paid up to the amount of $320,120. The hotel was begun, and in November, 1906, was not yet completed. Its first estimated cost was $600,000. Its actual cost when completed in February, 1907, including furnishings, was near $1,000,000. It had in November, 1906, expended all its funds and had incurred debts to the amount, as was supposed, of $326,000, afterwards found to be $350,000. The debts were pressing and further expense was necessary to complete the hotel and put it in operation. Some of the creditors had consented to an extension, and with this relief it was estimated that $260,000 would suffice to pay the pressing claims and complete and furnish the hotel. To obtain this sum the Hotel Company increased its authorized capital stock to $600,000, and authorized a bonded debt of $350,000 to be evidenced by 350 bonds of $1,000 each. This was done on December 7, 1906. The bonds were secured by a mortgage on all of its property, executed to the Title Insurance & Trust Company, as trustee. Two hundred and seventy-five of them, amounting to $275,000, were issued and are now held by the appellants, other than Rogers, Macomber, May, and said trustee. The object of this action is to cancel said 275 bonds, and declare said mortgage, to that extent, void. The court below gave judgment for the plaintiff.

The plaintiff bases his claim that the bonds are invalid upon the following grounds: (1) That they were issued and delivered to said appellants as a gift, and without consideration. (2) That the transaction whereby they were issued and delivered to said appellants was fraudulent and void as to creditors. (3) That the bonds were not issued in compliance with section 359 of the Civil Code of this state. (4) That they were not issued in compliance with the laws of Arizona.

It is unnecessary to consider the sufficiency of the complaint on these points. The facts are set forth in more detail in the findings. Many of them are admitted to be correct, and all the important points are involved in the consideration of the sufficiency of the findings to support the judgment and the sufficiency of the evidence to sustain the findings challenged.

1. Assuming, for the present, that the officers of the Wentworth Hotel Company were empowered to execute the mortgage and bonds, we take up the question of their consideration. The following facts show upon what consideration the appellants obtained the bonds. The Hotel Company made a written agreement with the William R. Staats Company, a corporation, to the effect that the Staats Company, as agent for the Hotel

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Company, should sell 2,600 shares of the capital stock of the Hotel Company of the par value of $260,000, at par, to be issued to the purchasers as full paid stock, when sold and paid for, for which services as its agent the Hotel Company agreed to issue and deliver to the Staats Company bonds of the Hotel Company of the face value of $275,000 and $15,000 in its full paid capital stock. Bonds were issued, the stock sold, and the $260,000 was received and used by the Hotel Company. The Staats Company itself subscribed and paid $15,000 of the $260,000, receiving therefor the agreed amount of stock and bonds. As the stock was sold, the Staats Company delivered therewith to each purchaser bonds to the amount of 105 per cent. upon the par value of the stock sold to him, and stock to the amount of 105 per cent. of the quantity subscribed, making in all $273,000 in bonds at face value and $273,000 of stock at par. The court found, in effect, that it was never intended that the aforesaid written agreement should be the real agreement; that it was understood between the Hotel Company and the Staats Company that the latter should receive the bonds and the $15,000 of stock mentioned therein, to be used in securing the sale of the $260,000 of stock, and that the stock "was to be subscribed for and paid for at its par value"; that the Staats Company never expected to receive the bonds and the $15,000 of stock for its own use or as compensation for its services in selling the stock; that the agreement was made for the purpose of selling the stock and having it paid for in full, so that the buyers might avoid assessments and receive the bonds without any consideration; that the buyers paid for the stock in full and received the bonds "without any consideration being paid therefor at all, as shown by their subscription"; that it was agreed by the Hotel Company and the Staats Company that the Staats Company never had and never was intended to have any interest in or claim to any of said bonds on its own account, but was to act merely as agent or intermediary for the transfer of said bonds by the Hotel Company to the purchasers of said $260,000 of stock; that it was this actual agreement that was actually performed and carried out; and that the Staats Company never acquired any interest on its own account in any of said bonds except such as it obtained by becoming a buyer of a part of said stock. As between the Hotel Company and the buyers of said stock the court found that the understanding was that all the money and consideration paid by the buyers to or for the use of the Hotel Company was to be paid and applied exclusively in payment for said stock, and it was so exclusively paid and applied; the purpose being to make it fully paid-up stock. Although not expressly so stated, the necessary conclusion from the findings is that the Staats Company, notwithstanding the written agreement, did not in fact charge anything for its services in selling the stock, but performed that service gratuitously.

It is claimed by the appellants that these findings are contrary to the evidence. The oral testimony showed, without conflict, that this written agreement between the Hotel Company and the Staats Company was not the real agreement, that the Staats Company did not intend to charge, and did not in fact charge or receive, for its services in selling the stock anything more than two of the bonds and twenty shares of the stock, and that the 273 bonds and the 130 shares of stock which were transferred to stock buyers were placed in the hands of the Staats Company to be offered and transferred to the buyers as a bonus, to induce them to buy the 2,600 shares of stock. In other words, the purpose was to enable the Staats Company to sell the stock and bonds at the rate of 210 shares of stock, par value $21,000, and 21 bonds, face value, $21,000, for $20,000 in money, being a price equal to the par value of 200 shares of stock. The reason for the giving of this bonus was that it was impossible to sell the stock or the bonds upon better terms or to raise $260,000 for the Hotel Company in any other way, and it was absolutely necessary to obtain that amount of money immediately in order to pay the pressing debts of the company and save it from utter financial ruin and bankruptcy, and carry on the building and furnishing of its hotel to completion so that it could be occupied. The evidence also shows that the officers of the Hotel Company and the Staats Company who managed the affair all believed that, if the stock was sold for less than par, the holders could be made to pay the difference for the benefit of creditors, that the fact was that buyers could not be induced to assume such liability, and that this plan and agreement were contrived so that on the books of the Hotel Company it would appear that the $2,600 shares of stock had been paid for at their full par value.

In execution of this plan the Staats Company drew up a contract between itself as agent for the Hotel Company and the several buyers of the stock. Each buyer signed said contract at the time of his purchase. So far as the buyers, with two or three exceptions, are concerned, this contract represents the sum of their knowledge of the aforesaid purposes and transactions of the Hotel Company and its agent. The contract with the buyers was dated November 27, 1906, being drawn in advance of the order authorizing the increase of stock and the execution of the bonds and mortgage. It recited that the Hotel Company required $260,000 to complete its hotel so as to enable it to receive guests for the ensuing season, that it proposed to increase its capital stock to $600,000, and issue first mortgage bonds to the amount of $350,000, and that it had employed the Staats Company to sell its stock "to the amount of face value of $260,000." The agreement of sale and purchase therein was as follows: "We, the undersigned, hereby subscribe for and agree to take and pay for at par value of $100 a share the number of shares of the capital stock of the Wentworth Hotel Company here set opposite our names; and we agree to pay for the same to the said corporation, said payment to be made at the office of Wm. R. Staats Company, as follows: (Here follow the dates of payment and percentage of the respective installments, five in all, aggregating 100 per cent.) No subscriber shall be bound until subscription to the said capital stock to the amount of $260,000 face value shall be subscribed for on this plan. * * * An additional consideration for this subscription is the agreement on the part of the Wm. R. Staats Company *for itself only* as attached hereto that it will pay to each subscriber hereto and on fulfillment of the terms hereof and upon payment of each installment of said subscription price an amount of the bonds of the Wentworth Hotel Company equal in face value to 105% of the amount of said subscription installment so paid; also shares of the capital stock of said Hotel Company of par value equal to 5% upon the face value of each subscription." (Italics ours.) Following this are the signatures of the subscribers, opposite which are written the number of shares taken by each, aggregating 2,600 shares, and the amounts in dollars, aggregating $260,000. Appended is the agreement of the Staats Company that it will deliver the bonds, stocks, and certificates as provided in the subscription agreement.

This paper, upon its face, even when taken in connection with the agency agreement between the Hotel Company and the Staats Company, and the other facts found, shows that there was a valuable consideration for the bonds. It expressly states that the bonds and 5 per cent. additional stock were to be delivered as "an additional consideration for this subscription." It implies a purchase of the bonds, as well as of the particular shares of stock formally "subscribed," and all in consideration of the sums agreed to be paid. These bonds and the extra stock are, in effect, declared to be sold with the "subscribed" stock, as a bonus, or inducement for the subscription. The bonds were, in fact, the property of the Hotel Company, and were furnished by it as a part of what the purchasers bought and received for their money. They were in the nature of "boot," which is defined as something given "to make up for deficiency in value in one of the things exchanged." Webster's Dict. Even if they had been, as the contract implies, the property of the Staats Company, nevertheless, by the very terms of the contract, they would have been received by way of bargain and sale, and not as a gift. The false implication as to the ownership would not alter the legal effect of the transaction. The court found and the evidence shows that the entire block of 2,750 shares of stock and the 275 bonds combined were not worth at the time more than $260,000, and that none of the buyers would have bought or paid for any of the stock or any part thereof, without the agreed share of the bonds and extra stock. The $260,000 paid for the stock was all received by the Hotel Company, and it was thereby enabled to complete and operate the hotel. Under all these circumstances and considering the real nature of the transaction, it cannot be justly said that the $260,000 was paid for the stock alone, and that the bonds and extra stock were a gift by the Staats Company. It does appear, indeed, that the buyers desired to avoid liability to assessments for the benefit of creditors as upon stock not fully paid, and that the scheme was devised to make it appear from an inspection of the Hotel Company's books that the stock was paid up and that the bonds had been sold to the Staats Company. But, when we strip the business of these false clothes and come down to the true case, we must take it as we find it, and the truth is that the buyers insisted upon receiving all these bonds and stocks for the $260,000 paid by them, and that the entire quantity of bonds and stocks did not exceed that sum in value. Each constituted a part of the real consideration for the money paid, and they all constituted the whole of that consideration. The finding that the money paid constituted the entire value of all the stocks and bonds received in return establishes the adequacy of the consideration. If, in attempting to apportion the price paid, we reject the written agreements and regard the transaction as it really was, it is obvious that the bonds constituted the chief value of that which was paid for by the $260,000. They constituted a first lien on the entire corporate assets. Before any substantial value could be attributed to the stock, the bonds would have to be deducted from the assets. The stock would represent only the surplus, if any there was. The statement that the stock and bonds taken together were worth only $260,000, and that the buyers would not take either without the other, therefore means that there was no surplus of value in the corporate assets over and above the $273,000 of bonds and that the corporate property value was really less than the $260,000. The bonds did not mature for 10 years, and under the doctrine of Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87, and subsequent decisions following it, the personal liability of the stockholders for the principal of the debt created by the execution of the bonds would be barred before the bonds would mature and could not add anything substantial to their value. Consequently the amount which was added to the bond value by the buyers, to make up the $260,000 which they paid, must have consisted of the value of the advantage they secured by becoming stockholders, and thus acquiring a right to share in the future profits which were expected from the hotel. There is no apportionment of these respective values and no evidence concerning them. As a matter of fact, therefore, there was a valuable consideration paid by the buyers to the Hotel Company, both for the bonds and the stock. The finding that the bonds were without consideration is contrary to the evidence. The case is practically identical in this respect with Memphis, etc., R. R. v. Dow, 120 U. S. 299, 7 Sup. Ct. 482, 30 L. Ed. 595. There the corporation had exchanged its bonds of the face value of $2,600,000, and its stock of the par value of $1,300,000 for certain railroad property which, after the exchange, constituted its entire assets. The $1,300,000 in stock was issued as fully paid stock. The property received in exchange for the stock and bonds was worth only $1,300,000. It was claimed that the bonds were without consideration. The corporation was created under the laws of Arkansas. The Constitution of that state provided that no "corporation shall issue stock or bonds, except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void," which is substantially identical with section 11 of article 12 of the Constitution of California. The court said that this provision "does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear from the words used that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property or labor, upon such terms as they deem proper; provided always the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. * * * There was, consequently, no fictitious increase by appellant of its stock or indebtedness. Under these circumstances, it cannot be fairly said that the bonds secured by the mortgage were issued without any consideration whatever actually received in property." The finding that the papers were drawn with the intent to make it appear that the stock was full paid, and not subject to calls for the payment of corporate debts, does not establish want of consideration for the bonds. Its significance, if any, lies in its bearing upon the question whether the transaction was, or was not, fraudulent as to creditors.

2. There is no charge that there was any actual fraud in these transactions, and the evidence shows that the parties were all acting in the utmost good faith, with the intent and purpose to save the enterprise from failure and ruin and to pay all the debts in full, and in the expectation of realizing a profit from its operation. The decision that the bonds are invalid can be upheld only upon the theory that the transaction was either constructively fraudulent as against the creditors, or that it was against public policy, or that the bonds were issued in a manner contrary to the imperative mandate of the law and therefore not binding upon the company. The respondent claims that the sale of the bonds was made with the intent to hinder, delay, and defraud creditors, and that it was therefore fraudulent and void, under the provisions of sections 3439 and 3442 of the Civil Code. The assets of the Hotel Company were at the time sufficient, in value, to pay the existing debts, but the corporation was unable to pay its debts as they became due. It is said that the last-mentioned fact made the company insolvent. Civ. Code, § 3450; Sacry v. Lobree, 84 Cal. 49, 23 Pac. 1088. This fact alone, however, does not make the sale of the bonds fraudulent, nor raise a presumption of fraudulent intent. To make such a transfer conclusively fraudulent, under section 3442, it must be made "voluntarily, or without a valuable consideration." This, as we have seen, was not the case here. The sale does not come within the provisions of section 3442. In order to establish a fraudulent sale under section 3439, proof of an intent to hinder, delay, or defraud creditors was necessary. The evidence does not show the intent required to make a transfer fraudulent within the meaning of that section. In every case where a person who is indebted borrows less money than the sum of all his debts and secures the lender by a first mortgage on all his property, the lender intends to hinder and delay the other creditors so far as may be necessary to make his mortgage a first lien. But such hindrance and delay is legitimate and lawful, and does not constitute fraud. The purchasers of the bonds here in question were under no obligation, as such, to the creditors of the Hotel Company. It was not unlawful or fraudulent for them to loan money to that company and exact as security a mortgage upon all of its property, which would be prior and paramount to the claims of all other creditors. The whole purpose of the loan was to supply funds to pay to the other creditors and put the property in such condition that it could be operated, to the end that all debts should be paid, and the stockholders obtain dividends out of the profits. There is nothing in this to which any creditor has a right to object.

The design against the creditors, such as it was, did not have reference to the bonds, but to the stock. The buyers did not want to become owners of partly paid-up stock, because they feared that as such they could be made to pay calls for the unpaid portion of the par value. To avoid this possibility, the plan above detailed was devised to make the books show that the stock was sold at par and was fully paid for. If this was constructively fraudulent and for that reason void as to creditors of the corporation, it may be that in equity the creditors could have a judicial determination of the part of the price paid which was justly applicable to the stock, and could enforce calls for the balance of the par value. This is not the object of the present suit, and no such relief can be given here. The company has the lawful right, the same as any natural person, to sell its bonds for any price it can get, provided it acts in good faith, and mere inadequacy of price does not avoid them. The fraud, if such it be, in the sale of the stock, cannot be transferred to the bonds and made available as a foundation for their cancellation. It is available only upon an inquiry concerning the liability of the stockholders for calls as for unpaid subscriptions. We find no ground upon which the transaction can be adjudged fraudulent with respect to the bond issue.

There is no rule of public policy or law of this state which forbids a corporation from discounting its notes or bonds. It is a common custom, and it has never been held unlawful. The Code provides that no corporation shall issue stock or bonds, "except for money paid, labor done or property actually received," and that any "fictitious increase" of stock or indebtedness is void. Civ. Code, § 359. The same provision is in the Constitution. Article 12, § 11. This does not forbid the sale of bonds at a discount. It was so held with regard to stock in Stein v. Howard, 65 Cal. 616, 4 Pac. 662, and Union L. & T. Co. v. Southern C. M. R. Co. (C. C.) 51 Fed. 840. The ruling in Stein v. Howard was modified in Vermont M. Co. v. Declez, 135 Cal. 585, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, where it was held that, if stock was issued as fully paid which was in fact only one-fifth paid, the creditors could compel the levy of an assessment or call for the balance so far as necessary to pay their debts. This was put upon the ground that the corporate assets, including sums justly due for stock sold, are held by the corporation in trust for the payment of its debts, and, where the corporation is insolvent, cannot be given away, or placed beyond reach of creditors, by the device of selling it to the original subscribers at a large discount. This so-called "trust fund" doctrine has no application to bonds. They are not assets of the corporation within the meaning of this rule. The principle of Stein v. Howard is therefore fully applicable to the statutory and constitutional provision, so far as bonds are concerned. There are many cases where similar transactions have been considered, and in none of them has it been held that, in the absence of actual fraud, such sales of bonds and stock are against public policy, or constructively fraudulent against creditors. In Handley v. Stutz, 139 U. S. 430, 11 Sup. Ct. 535, 35 L. Ed. 227, involving a stock sale only, and therefore stronger against respondent than the case at bar, the court says: "So long as the transaction is bona fide, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. * * * The general rule that holders of stock in favor of creditors must respond for its par value is subject to exceptions where the transaction is not a mere cover for an illegal increase." A case substantially the same as the case at bar is Coe v. East & West R. Co., decided by the United States Circuit Court for the Northern District of Alabama, reported in 52 Fed. 531, affirmed by the United States Circuit Court of Appeals as Grant v. East & West R. Co., 54 Fed. 569, 4 C. C. A. 511. The corporation bought a railroad, paying therefor $750,000 by issuing and delivering $375,000 in stock and $375,000 in bonds. The subscription to the stock stated that the railroad was of the value of $375,000, and that the stock was to be paid for by a transfer of the railroad, but the evidence showed that the subscriber really exchanged the railroad for both the bonds and the stock. The railroad was in fact worth only $375,000. It was held that the transaction was just and lawful and not in contravention of a constitutional provision similar to that of California on the subject. See, also, Fogg v. Blair, 139 U. S. 125, 11 Sup. Ct. 476, 35 L. Ed. 104; Pollitz v. Wabash R. Co. (C. C.) 167 Fed. 160; Ziegler v. Lake St., etc., Co., 99 Fed. 114, 39 C. C. A. 431; Van Cott v. Van Brunt, 82 N. Y. 539; Dummer v. Smedley, 110 Mich. 476, 68 N. W. 260, 38 L. R. A. 490; Elyton, etc., Co. v. Birmingham, etc., Co., 92 Ala. 407, 9 South. 134, 12 L. R. A. 307, 25 Am. St. Rep. 65.

The court made a finding that the Hotel Company at the time of this transaction was a "going concern." The evidence shows that it was not then contemplating insolvency nor endeavoring to wind up its affairs, but that it raised the money for the purpose of carrying on in good faith the business mentioned in its articles of incorporation. Some decisions have made a distinction between transactions of this kind where the corporation is a going concern and those where it is an endeavor to close up its affairs and cease business, holding the latter circumstance sufficient to avoid the issue of stocks or bonds. In view of the finding, which is amply sustained by the evidence, the distinction is of no importance. The case of Vermont Marble Co. v. Declez, supra, which is relied on by the respondent, is not to be understood as declaring the broad doctrine that in every case where stock of a corporation is disposed of as paid-up stock at less than par value, the creditors can compel the payment for their benefit of the difference between the par value of the stock and the actual value of the consideration given therefor. In that case the original incorporators in making their contributions to the original capital stock agreed that they would issue the stock as full paid upon the payment of only 20 per cent. of the par value. There was no occasion or necessity for this, and it was not in any proper sense a sale of the stock at a discount, but a mere device for making the book value of the stock appear to be more than the money paid in by the incorporators. But, however the law may be in the case of stock, the decision has no bearing upon the case of a sale of bonds in good faith by a going concern, where it is necessary for the payment of debts incurred in such business and to keep the business going.

3. Section 359 of the Civil Code declares that "every corporation may create or increase its bonded indebtedness, subject to the following conditions," among which are that the indebtedness of a corporation may be created or increased by two-thirds of the stockholders, that certificates of such increase or creation must be filed in the office of the clerk of the county in which the original articles are filed, and that a copy thereof must be filed with the Secretary of State. None of these conditions have been performed. No attempt was made to comply with the section. The respondent claims that the failure to observe these requirements of the law of this state makes the bonds absolutely void. The court below, after finding facts showing that this law was not complied with, stated as a conclusion of law that section 359 did not apply to corporations of other states, doing business here, and that the failure to observe it did not invalidate the bonds. The appellants insist that the respondent is bound by this part of the decision below. We do not so understand the rule. The findings state the facts fully. The final conclusion of the trial court was that, upon all the facts stated, the plaintiff was entitled to judgment canceling the bonds. On appeal from this judgment, upon the question whether or not the judgment is sustained by the findings, all the facts are presented for our consideration. This court is not bound by the opinion of the trial court as to the effect or application of certain facts found, or as to the law relating thereto, nor by the method of reasoning by which that court reached its final conclusion that the bonds are void. If, upon considering all the facts and the law as we understand it, we are satisfied that the final conclusion of the trial court was right, the judgment will be upheld and the erroneous reasoning of the trial court will be disregarded.

Section 359 was evidently framed with a view only to its application to corporations organized under the laws of California. A foreign corporation could not literally comply with it. But we do not find it necessary to decide whether or not it could be substantially followed and enforced against foreign corporations issuing bonds in connection with business done by them in this state. Conceding, for the purpose of the argument, that it could, and under section 15, art. 12, Const., should, be so applied, the failure to observe its requirements does not make the bonds void at the option of creditors, or of one acting in their interest. We have shown that a valuable consideration was received for the bonds, and that there was no fraud in issuing them. Therefore, upon the authorities hereinbefore cited, there was a sufficient compliance with the provision in section 359, and in section 11, art. 12, Const., that bonds cannot be issued except for money paid, labor done, or property actually received. That part of our laws was not violated. A construction which would make such bonds void in the hands of a holder for value, at the instance of other creditors, would be against equity and justice, and should not be favored. The provision in section 11, art. 12, Const., declaring that the stock and bonded debt shall not be "increased," except at a meeting called upon 60 days' notice, does not purport to restrict an original bond issue. Being a restriction of the inherent right to freely contract, its meaning is not to be unnecessarily extended beyond its fair import. It has been held that it does not apply to an original issue of bonds. Union L. & T. Co. v. Southern Cal. M. R. Co. (C. C.) 51 Fed. 850. We approve that decision. Section 359 does apply to an original issue of bonds, but there is no provision that bonds not issued in conformity therewith shall be void, either in favor of creditors or at all. The only inhibitory clause is in subdivision 5, and it refers solely to an increase of stock or bonds, and, for the reasons just stated, does not forbid an original issue. The provision for a public notice was clearly not intended as a means of giving notice to existing or future creditors, for it is accompanied and supplemented in subdivision 5 by a method authorizing an original issue of bonds, without any notice or meeting, upon the written assent of the holders of two-thirds of the stock, and the unanimous action of the directors. So far as such original issue is concerned, the proceedings were evidently intended only as a protection to the stockholders against such issue without the consent of those having a two-thirds interest, and not for the protection of creditors. No stockholder is here asserting any right, or making any objection. The assignee in insolvency represents the interests of the creditors only. He is not suing on behalf of the stockholders or in their interest, and, there being no fraud, he stands in the shoes of the corporation with regard to the bonds. The corporation has received the money obtained by means of the bonds and has applied it to the payment of its debts and the completion of the hotel. The money has thus inured to the benefit of the corporation and its stockholders and of the general creditors also, since it has unquestionably given a substantial value to a structure which would otherwise be comparatively worthless. The corporation is therefore estopped to dispute the validity of the bonds and the creditors are likewise bound thereby. The real point of the objection is that the manner of issuing the bonds was so defective that the transaction was ultra vires and void, notwithstanding that the corporation received and holds the benefits thereof. In regard to a similar claim the New York Court of Appeals said: "That kind of plunder which holds onto the property, but pleads ultra vires against the obligation to pay for it, has no recognition or support in the laws of this state." Seymour v. Association, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859. The following cases declare that neither the corporation nor its creditors can, under like circumstances to those here existing and under similar provisions of the law, maintain such an attack on bonds irregularly issued, and that the provisions of such laws are for the protection of stockholders only. Anderson v. Bullock Co. Bank, 122 Ala. 275, 25 South. 523; Bishop v. Kent, 20 R. I. 685, 41 Atl. 257; Rochester Bank v. Averell, 96 N. Y. 475; Paulding v. Chrome Steel Co., 94 N. Y. 334; In re N. Y. Economical Pr. Co., 110 Fed. 519, 49 C. C. A. 133; Hervey v. Ill. Midland Ry. Co. (C. C.) 28 Fed. 174; Manhattan Hdw. Co. v. Phalen, 128 Pa. 110, 18 Atl. 428; Wood v. Corry (C. C.) 44 Fed. 150, 12 L. R. A. 168; Nelson v. Hubbard, 96 Ala. 252, 11 South. 428, 17 L. R. A. 375; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921. In Boyd v. Heron, 125 Cal. 453, 58 Pac. 64, it was a stockholder who made the objection, and it was in defense to a suit to enforce his individual liability as such stockholder. It comes clearly within the rule that the provision is for the benefit of stockholders, and it does not conflict with the cases just cited. On the contrary, it expressly avoids deciding that any one other than a stockholder could make such defense and it concedes the proposition above stated.

The complaint avers and the answers admit that the Hotel Company is, and has been ever since April 12, 1906, a corporation existing under the laws of Arizona. This is a conclusive admission, not to be controverted either by the evidence or the findings. Hence the claim that it is only a de facto corporation of California is without foundation. Moreover, our conclusion that the objection that section 359 was not observed cannot be here asserted makes this point immaterial. The objection that the proceedings for the organization of the Hotel Company as a corporation were invalid, because the incorporators met to organize in California and held no meeting in Arizona for that purpose, cannot be raised in this collateral action. Such an inquiry can be made only in a direct action for that purpose instituted by or under the authority of the territory of Arizona. Los Angeles Holiness Band v. Spires, 126 Cal. 545, 58 Pac. 1049.

4. The respondent intimates that the laws of Arizona were not complied with. That law did not allow the company to incur a debt exceeding two-thirds of its capital stock. The original stock was $350,000, and it could not issue $350,000 in bonds until its capital was increased. Amended articles raising the capital stock to $600,000 were filed in the office of the county recorder of the proper county in Arizona on December 7, 1906, but they were not filed in the office of the auditor of the territory until December 10th, and the publication required by law was not complete until December 21st. The stockholders' meeting in Arizona to authorize the bond issue was held on December 7th. The law of Arizona provides that an amendment of articles increasing the stock shall not be valid "unless recorded and published as the original articles are required to be." Original articles are to be recorded only in the office of the county recorder. The corporation may commence business as soon as its articles are filed for record in the county recorder's office and a certified copy thereof filed in the office of the territorial Auditor, and its acts shall then be valid if the required publication is made within three months from the filing in the recorder's office. Whether this would prevent the bonds from becoming valid obligations prior to the filing of a copy of the articles in the office of the territorial Auditor or not, we are satisfied that it does not make them void at the instance of other creditors when they have been actually sold and delivered for value after all these provisions have been carried out, as was the case here.

There are no other points that require notice.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

159 Cal. 121

DAVIS v. JUDSON et al. (L. A. 2,485.)

(Supreme Court of California. Dec. 31, 1910.)

1. JURY (§ 13*)—RIGHT TO—ACTION CONCERNING LAND.

Though suit be brought under Code Civ. Proc. § 738, as an equitable action to quiet title, if in reality it is to recover land and the issues are purely of a legal character, the substance must control the form, and, as section 592 gives the right to jury trial in a suit to recover land, the right cannot be defeated by any particular form which the action may take.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35–83; Dec. Dig. § 13.*]

2. JURY (§ 13*)—RIGHT TO—NATURE OF ACTION.

Whether a suit involves legal or equitable issues as affecting a right to jury trial must depend upon the facts alleged in the particular case.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 13.*]

3. JURY (§ 13*)—RIGHT TO—NATURE OF ACTION.

Plaintiff sued on the theory of an oral agreement to sell lots, execution constituting the purchaser an equitable owner entitled to a conveyance, and asked specific performance, or on the theory that, if the purchaser received a deed, he lost it, entitling plaintiff to a decree for its re-execution. Defendants denied plaintiff's allegations, set up laches, and some of them claimed the property as bona fide purchasers. *Held*, that the suit was one of an equitable nature, defeating the right of either party to demand a jury trial.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 13.*]

4. TRIAL (§ 370*)—TRIAL BY COURT—JUDICIAL DISCRETION AS TO JURY.

Whether equitable issues should be tried by a jury is within the trial court's discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 881; Dec. Dig. § 370.*]

5. EVIDENCE (§ 594*)—WEIGHT.

Generally uncontradicted testimony should be accepted as proof of the fact testified to, but the most positive testimony may be contradicted by inherent improbabilities or by circumstances in evidence in connection with the matter or by the witness' manner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

6. APPEAL AND ERROR (§ 994*)—REVIEW—WEIGHT OF EVIDENCE.

Since it is the trial court's province to determine the weight to be given testimony, the Supreme Court cannot control a conclusion denying credence, unless it appears that there are no circumstances impairing accuracy of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

7. DEEDS (§ 207*)—EXECUTION—EVIDENCE—SUFFICIENCY.

Evidence in suit to quiet title *held* to sustain a finding that a certain deed was never executed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614–624; Dec. Dig. § 207.*]

8. FRAUDS, STATUTE OF (§ 71*)—LAND CONTRACT.

An oral agreement by trustees of a university to convey lots in exchange for material is unenforceable.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 113–139; Dec. Dig. § 71.*]

9. FRAUDS, STATUTE OF (§ 129*)—AVOIDANCE—PART PERFORMANCE.

An oral contract to convey could only be taken out of the statute of frauds and enforced in equity by reason of part performance.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292; Dec. Dig. § 129.*]

10. FRAUDS, STATUTE OF (§ 129*)—AVOIDANCE—EFFECT OF PAYMENT.

Payment of the price under an oral contract to convey does not constitute part performance.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 289; Dec. Dig. § 129.*]

11. FRAUDS, STATUTE OF (§ 129*)—AVOIDANCE—PART PERFORMANCE—ESSENTIALS.

Part performance could only be asserted by showing that the purchaser took and held actual possession under the contract, or made valuable improvements on the faith of the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292; Dec. Dig. § 129.*]

12. FRAUDS, STATUTE OF (§ 129*)—AVOIDANCE—POSSESSION.

Possession under an oral contract to convey, must be actual, visible, notorious, and exclusive, manifesting the purchaser's claim of ownership inconsistent with ownership by any other person.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292; Dec. Dig. § 129.*]

13. FRAUDS, STATUTE OF (§ 158*)—POSSESSION—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to show that the purchaser under an oral contract to convey took actual possession of the land.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 376; Dec. Dig. § 158.*]

14. VENDOR AND PURCHASER (§ 239*)—SUBSEQUENT PURCHASER—NOTICE.

The purchaser under an oral contract to convey not having acquired any legal or equitable rights thereunder by deed, possession, or otherwise, a subsequent deed by the vendor to a third person vested full legal and equitable title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 586; Dec. Dig. § 239.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Suit to quiet title by W. J. Davis against W. B. Judson and others, Trustees of the University of Southern California, and others. From the judgment and from an order refusing a new trial, plaintiff and defendant W. H. Brown, L. M. Wheeler's administrator, appeal. Affirmed.

Charles Lantz and Ernest E. Wood, for appellants. Julius Lyons, Daniel M. Hammack, and Williams, Goudge & Chandler, for respondents.

LORIGAN, J. This action was brought to quiet title to lots 12 and 13, block 6, of the subdivision of certain lots in the Highland Park tract, in the county of Los Angeles.

It was alleged in the complaint that in October, 1885, one G. W. Morgan was the owner of the lots in controversy, and on that date conveyed them to the defendant trustees of the University of Southern California, a corporation, for it benefit; that in December, 1885, the said trustees entered into an oral agreement with one C. N. Wilson, whereby Wilson agreed to furnish $500 worth of lime to be used in the construction of the main

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

building of the university, and said trustees agreed, in consideration thereof, to convey to Wilson said two lots of land; that this agreement was fully executed by Wilson, who towards the end of 1886 furnished the lime to the trustees; that, by reason of the performance of the agreement on the part of Wilson, he immediately became the equitable owner of said lots, and that said trustees of the University of Southern California thereafter continuously held the title to the same in trust for him, and that plaintiff as his successor in interest is now entitled as against said trustees, and those who claim under them, to a deed of conveyance of said lots; that the trustees of the said university have never executed any deed of conveyance of said property to said Wilson or his assigns, or, if such deed was executed, the same has been lost by said Wilson; that on December 19, 1902, the said trustees of the University of Southern California executed a quitclaim deed to one S. F. McClung, who on the next day executed a similar conveyance to the defendant W. B. Judson, but that said deeds were made with full knowledge of the facts above stated and of the rights, equities, and interests of said Wilson; that said deeds were not made in good faith, nor for a consideration adequately representing the actual value of the property; that said Wilson has been seised and possessed of the said property within five years last past, and has executed a deed to plaintiff of all the title owned by him in said lots, and plaintiff is the owner of said property and has succeeded to all the rights of said Wilson, and is entitled to have and receive a conveyance of all title which is held or vested in said trustees, or defendant W. B. Judson, or any one claiming under them. Adverse interest against plaintiff, but without right, is then alleged to be asserted by said trustees and Judson and other designated defendants.

The prayer of the complaint was that plaintiff be decreed to be the equitable owner of said lots of land, and entitled to a deed of conveyance from all of the defendants, and that the court require them to make such conveyance, or, in default thereof, that a commissioner be appointed to execute the same in their names and that the title of plaintiff to said lots be quieted. The defendants answered, denying the allegations of the complaint, interposed the plea of the statute of limitations and a bar by laches. In addition, the defendants Judson and Wiley set up that they were bona fide purchasers from the trustees of the university of said lots for value, and without notice of any equities, rights, or claims of Wilson to the same, if he ever had any. The administrator of the estate of L. M. Wheeler, deceased, one of the defendants, filed an answer and cross-complaint, the latter based on the same allegations in the complaint of plaintiff as to the oral agreement between Wilson and the trustees, and its execution on the part of Wilson, an equitable ownership in the lots thereby vesting in him, and a conveyance in 1887 by Wilson to said Wheeler of lot 12. The administrator asked for a decree similar to that asked by the plaintiff, but requiring the execution of a deed of conveyance for this lot 12 to him as administrator of Wheeler's estate.

The court found that Morgan had conveyed these lots to the trustees of the university in October, 1885, the making of the oral agreement between Wilson and the trustees as alleged in the complaint, and that Wilson had performed his part of the agreement towards the end of December, 1885. The court found, however, that the trustees never executed any deed to Wilson for the lots; that Wilson never entered into or had actual physical possession of them; that for 20 years after the making of this oral contract between himself and the trustees Wilson made no claim to said lots or any right, title, or interest in them, nor demanded any deed thereto, and that no sufficient reason or excuse for his failure to do so existed; that up to December 19, 1902, the trustees continued to hold possession of said lots, claiming to be the sole owners thereof and entitled to exclusive possession; that on December 19, 1902, said trustees made a quitclaim of said lots to defendant S. F. McClung, who on December 20, 1902, also by quitclaim deed conveyed them to defendant W. D. Judson; that McClung in receiving said deed and conveying to Judson was acting solely and on behalf of the trustees of the university, who received the consideration of $275 paid by Judson to it for said lots; that this consideration represented the fair market value of the lots, considering the clouded condition of the title thereto when said deeds were made; and that the said deeds from the trustees to McClung, and from McClung to Judson, were made in good faith and without knowledge of any agreement or transaction between said Wilson and said trustees relative to said lots or either of them.

In addition, it was found that on November 9, 1887, Wilson had made a deed of lot 12 to one L. M. Wheeler; that on May 4, 1903, in an action in which Judson, the defendant here, was there plaintiff and said L. M. Wheeler there the defendant, judgment was given and made decreeing that said Judson was the owner of said lot 12 and that Wheeler was without title or interest therein; that thereafter, in March, 1909, said Judson conveyed said lot 12 to the defendant Emma M. Wiley; that prior to the commencement of this action (the evidence shows in August, 1904) Wilson made a quitclaim deed of the two lots in question to plaintiff. Other findings are made, not material for consideration.

As conclusions of law from the facts found, the court determined that neither plaintiff nor the estate of Wheeler had any title or interest in the property, but that the defendant Judson was the owner of lot 13 and defendant Emma M. Wiley was the owner of lot 12. Judgment was entered accordingly, and from said judgment and an order denying their motion for a new trial both plaintiff and the administrator of the estate of Wheeler appeal.

Several of the essential findings are assailed by defendants as not sustained by the evidence. The accuracy of certain conclusions of law is questioned by them, and it is insisted that the court committed error in certain of its rulings. As to the latter, the only one which merits any consideration is the claim of plaintiff that the refusal of the court to allow his demand for a jury trial was error, insisting that, under the authority of Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, and Newman v. Duane, 89 Cal. 597, 27 Pac. 66, he was entitled to have the issues in the case passed upon by a jury. But the rule of these cases has no application here. Undoubtedly, although an action be brought in form under section 738 of the Code of Civil Procedure, as an equitable action to quiet title to land, if, in reality, it is an action for the recovery of specific real estate and the issues made are purely of a legal character and such as are cognizable in a court of law, the substance must control the form, and, as a party is specially given the right to a trial by jury where an action is brought to recover specific real property (Code Civ. Proc. § 592), this right cannot be defeated by any particular form which the action may take. It was so held in the cases cited by appellant. In those cases in the form of the complaints, the actions were of an apparently equitable nature, simply to quiet title against alleged asserted adverse claims, but, when the issues were framed, it appeared that in reality the right to possession of specific real property was the real issue involved, and it was held that under the guise of an equitable action the right to a trial by jury accorded a party, where the action was in reality an action for possession of real property, could not be defeated. In those cases, when the issues were made, no matter what the form of the complaint was, the question for determination called only for a judgment of law. There was nothing upon which to base a decree in equity. But in the case at bar no issues of a purely legal character are involved. Whether an action involves legal issues, or issues of equitable cognizance, must depend upon the facts alleged in the particular case, and, when the facts alleged here and the issues raised are considered, it is apparent that they are strictly of an equitable nature. None of the parties to the action alleged any actual possession of the lots in question or sought to be awarded possession. The complaint was drafted on two theories: First. It was asserted that an oral agreement for the sale of these lots was made between Wilson and the trustees; that certain things were done by the parties to the agreement under which Wilson became the equitable owner of the property and entitled to a conveyance thereof; that no conveyance was made by the trustees to him; and that the court should decree specific performance of the contract in his behalf as successor to the rights of Wilson, and to compel a conveyance from the trustees and the other defendants who are alleged to have taken their conveyance from the trustees with knowledge of Wilson's equitable rights. His second theory was that, if Wilson got a deed (he does not allege that he did), he lost it, and asked for a decree requiring its re-execution. The defendants denied these allegations, asserted the bar of laches, and set up that they—the defendants Judson and Wiley—claimed the property as bona fide purchasers from the trustees, without any notice of the asserted rights or equities of Wilson, and for a valuable consideration. No issues cognizable in a court of law, and for the trial of which the parties were entitled to a jury, were presented under these pleadings. Such as were presented were equitable issues, and whether such issues should be tried by a jury or not was a matter for the discretion of the trial court. Neither party had an absolute right to demand a jury trial. Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271; Angus v. Craven, 132 Cal. 691, 64 Pac. 1091; Churchill v. Louie, 135 Cal. 608, 67 Pac. 1052.

Coming now to the merits of the appeal. Appellants insist that the finding of the court that no deed was ever executed by the trustees of the university to Wilson is not sustained by the evidence. The only evidence on the subject is that of Wilson himself, who as a witness in the case testified: "I am sure I received a deed of conveyance of the lots from the trustees of the Morgan trust." It is insisted by appellants that this testimony of Wilson stood uncontradicted, and that the court had no right arbitrarily to reject it and find to the contrary. While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy. This is a situation which cannot be said to be presented in this case. Wilson was a lawyer, and it is to be assumed had full knowledge that in order to effectually protect his rights to this property, if he had a deed, he should have recorded it. He was the grantor of plaintiff, verified the complaint in his behalf in this action, and was his witness on the trial. Whether the trustees had made a deed to Wilson or not was a material issue in the case, as all the defendants in their answers denied that such a deed was made. All that Wilson testified to as to the execution of such a deed was that he was sure he had received one. He does not state when he received it or its character or contents. Neither does he testify directly that the deed was ever lost, but simply that his documents and papers were carried away from some place where they were stored in 1899 while he was in quarantine, and leaves the possible inference that this deed was among those papers and documents. Knowing that to protect himself, if he had a deed, he should have recorded it, he failed to do so, and this failure covered a period of some 13 years after he says he secured the deed. His excuse for not recording it at once is that he wanted to exchange one of the lots with Morgan for another, which Morgan refused to do. But years elapsed after his ineffectual negotiation to that end and before he lost his papers and documents as claimed. Never having inclosed the lots or placed any improvement upon them—having no actual possession of the property—he must have known that the deed which he claimed to have received being lost, in order to clearly support his claim to the property, he should have either gotten another deed from the trustees, or have proceeded to establish his title under the lost conveyance act, and he never made any attempt to do either. Wilson in 1887 had made a deed to his sister-in-law, L. M. Wheeler, of lot 12. Some time prior to January, 1902, defendant Judson (but before he obtained his conveyance of these lots from the trustees) brought an action against said L. M. Wheeler and others to quiet his title to said lot 12 and also to lot 13. Wilson on behalf of Judson made an affidavit as to the nonresidence in California of said L. M. Wheeler for the use of Judson in obtaining an order of publication of summons against Wheeler. When his attention was called to this fact on the trial, Wilson testified that the attorney for Judson, who obtained the affidavit, did not state what property the suit related to nor explain the purpose of the action. But the court was hardly required to credit this statement, or view the circumstances in any other light than that the readiness of Wilson to assist Judson in quieting his title to one lot, 13, which Wilson himself claimed to own, and 12, which he had conveyed to his sister-in-law, was consistent only with the fact that Wilson knew that he had never acquired any deed under which either he or his grantee could assert title to either of these lots. Further, it appears that after Wilson made his deed of these lots to the plaintiff in this action, and when this suit to quiet title to them was brought, the complaint contained the allegation that "plaintiff is informed and believes, and upon such information and belief alleges, that said trustees have not executed any deed of conveyance of said property to said C. N. Wilson or his assigns; or, if such deed was executed to said Wilson, the same has been lost by said Wilson." Wilson as agent of plaintiff, who was absent from the county of Los Angeles, verified this complaint, stating, as the law requires he should, that he had read the complaint, that its contents were true to his own knowledge except as to matters stated on information or belief, and that as to them he believed it to be true. It is too clear for discussion that such an uncertain and indefinite allegation with reference to a conveyance sworn to by Wilson to be true, after reading it, is inconsistent with any testimony of Wilson given on the trial that he had in fact obtained the deed.

So that, within the rule as we have stated, while the trial court had the statement of Wilson that he was sure that he had obtained a deed from the trustees, and although there was no direct testimony impeaching him or contradicting his statement, still the conduct of Wilson, as disclosed by his other testimony and the other circumstances in evidence, was such that the court had a right to conclude that it was inconsistent with the execution of any conveyance to Wilson, and warranted the rejecting as improbable his statement that such a conveyance had been made. Blankman v. Vallejo, 15 Cal. 645; Baker v. Firemen's Fund Ins. Co., 79 Cal. 41, 21 Pac. 357; Chicago Bridge Co. v. Sacramento Tr. Co., 123 Cal. 184, 55 Pac. 780.

Appellant next questions the finding that Wilson never entered into or had actual physical possession of these lots at any time. The possession of Wilson was pertinent to two questions arising in the case—one, whether the defendant was a purchaser in good faith without notice of any right or claim of Wilson, or his grantee, Wheeler, to either of the lots; the other, whether Wilson had or took such possession of the lots immediately after he performed his part of the agreement with the trustees respecting them as would constitute part performance of the contract, entitling him, or his successors, to a decree for specific performance. On the last proposition the claim of the appellants is that, even if the trustees made no deed to Wilson, still the evidence shows that Wilson performed his part of the contract as to the purchase of these lots; that he was given and took actual possession of the lots under the contract, and that he and his grantee, Wheeler, continued and were in such possession at the time the trustees made a conveyance of these lots to Judson; that the court should have so found instead of finding to the contrary; and that a proper finding of actual possession, together with the finding of performance on Wilson's part of the contract which the court did make, would have entitled appellant to a decree of specific performance.

The contract between the trustees and Wilson relative to these lots not being in writing was within the statute of frauds and unenforceable. It could only be taken out of the statute and enforced in equity by reason of part performance. Payment of the purchase price did not of itself constitute part performance. Forrester v. Flores, 64 Cal. 24, 28 Pac. 107. Such part performance could only be asserted where it was shown that the vendee had been given and had taken actual possession of the property pursuant to the terms of the contract and continued to hold such possession, or had made valuable improvements on the land on the faith of the contract.

On the subject of possession of these lots by him, Wilson testified that, after he had furnished the lime to the trustees, he and Dr. M. M. Bouvard, then president of the university, drove out together to Highland Park "for the purpose of looking over the lots which Mr. Morgan had conveyed to aid in the construction of such university building, and for the selection by myself of the two lots which I would take in payment for the $500 worth of lime. I selected the two described in the complaint, and then went upon the lots. * * * I visited the lots referred to every year or two; and took parties out to see them in an effort to sell them. No period of time as much as five years elapsed without my entering upon the lots. * * * I did not put any fence about the lots nor make any improvements thereon." This is the only evidence in the record of any possession Wilson ever took or had of these lots, and, at best, this was a nominal or mere technical one, while possession which must be taken in order to meet the equitable requirement of part performance, and warrant specific performance of the contract, is actual possession by the vendee. The ground upon which possession as constituting part performance and authorizing specific performance is supported is that the vendee would be exposed to liability as a trespasser if he could not invoke the protection of the contract. The uniform rule, however, is that such possession must be an actual possession by the vendee. There must exist the physical fact of possession in him, a possession visible, notorious and exclusive, such as manifests definitely and clearly that the vendee is claiming, and asserting a distinctive ownership of the property which is inconsistent with the right of possession or ownership in any other person. Less than this could not constitute a vendee a trespasser, and hence this actual possession must, under the authorities, exist to constitute such part performance as warrants the equitable interposition of a court to decree specific performance. Arguello v. Edinger, 10 Cal. 150; Calanchini v. Branstetter, 84 Cal. 249, 24 Pac. 149; Foster v. Maginnis, 89 Cal. 264, 26 Pac. 828; Fulton v. Jansen, 99 Cal. 587, 34 Pac. 331; Pomeroy on Contracts (Spec. Per.) § 120 et seq.; Browne, Statute of Frauds, §§ 472, 476. This essential character of possession clearly Wilson never had.

Reaching the conclusion, therefore, as we do, that the finding of the court that Wilson never obtained any conveyance to either of these lots is sustained by the evidence, and that the finding is equally correct that he never took or had any actual possession of them at any time which entitled him or his grantees, Wheeler or the plaintiff, to a decree of specific performance, it is of no moment to consider the attack made by appellant on the further finding of the court that Judson, when he took his deed from the trustees, was not a purchaser for value and without knowledge or notice of any equitable or legal claim of Wilson, or Wheeler, or plaintiff to the lots. The deed from the trustees was executed several years before plaintiff obtained his deed from Wilson, and as Wilson never had any enforceable equitable rights to these lots when the trustees conveyed them to Judson, and had never acquired any legal title thereto and never had or took any actual possession of the property, there was no valid claim or interest to them existing in favor of Wilson of which Judson could have had any knowledge or notice. No such claim subsisting, the deed from the trustees to Judson vested him with full legal and equitable title to the lots.

As far as the claims of the administrator of Wheeler's estate are concerned, they are also disposed of under the foregoing consideration. Wheeler never acquired any legal title to lot 12 under her deed from Wilson, as he had no legal title. She never had any actual or in fact any possession of the lot described in her deed, nor any enforceable equities as to it, independent of those asserted on behalf of Wilson, and for the same reason that Judson acquired full title to lot 13 against any asserted right in favor of Wilson, so did he acquire title to lot 12 against the asserted claim of the administrator of Wheeler's estate, and his conveyance to the defendant Wiley of this lot 12 vested in her full legal and equitable title to it.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

159 Cal. 187

MORGAN v. MYERS. (L. A. 2,510.)

(Supreme Court of California. Jan. 7, 1911. Rehearing Denied Feb. 6, 1911.)

1. Appeal and Error (§ 1011*)—Findings—Conflicting Evidence.

A finding of the trial court based on conflicting evidence will not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Mines and Minerals (§ 23*)—Contiguous Claim — Assessment Work—Performance.

Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), requires $100 assessment work to be performed on mining claims located since May 10, 1872, but provides that, where claims are held in common, the expenditure may be made on any one claim, and in case of a failure to perform the same, the ground shall be open for relocation. *Held* that, where several contiguous claims are held in common, the necessary work to keep them all alive may be done on any one of them, provided the expenditure of money or labor is equal in value to that which would be required on all the claims if they were independent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51–59; Dec. Dig. § 23.*]

3. Mines and Minerals (§ 23*)—Contiguous Claim—Assessment Work.

Where mining claims were not contiguous in the sense of being attingent, but were separated by a ravine, so that work done on one of them would not naturally benefit or have a tendency to uncover minerals in the other, such work cannot be treated as a performance of the necessary assessment work on the other.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51–59; Dec. Dig. § 23.*]

4. Mines and Minerals (§ 38*)—Location Notice—Recitals—Weight—Question for Court.

In a suit to quiet title to mining claims, whether the recital in the location notice that the claims were together and touching was sufficient to overthrow the testimony of the locator to the contrary was for the trial court.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

5. Evidence (§ 471*)—Conclusion of Witness.

In a suit to quiet title to mining claims, a question asked plaintiff whether the claims had been held by him as a group was objectionable, as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

6. Trial (§ 83*)—Reception of Evidence—Objections—Sufficiency.

An objection to a question, on the ground that the objector was of the opinion that the question ought to be a different one and was improper, was not specific enough.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–210; Dec. Dig. § 83.*]

7. Evidence (§ 230*)—Declarations of Previous Owner.

In an action to quiet title to mining claims, evidence that when the prior owner held title to two of the claims he admitted that there was unoccupied and unlocated ground between them was admissible, under Code Civ. Proc. § 1849, providing that where one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title in relation to the property, is evidence against the former; such declarations applying to the limitations of the declarant's own claims, and with reference to their contiguity, though they did not apply directly to declarant's own property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835–851; Dec. Dig. § 230.*]

Department 2. Appeal from Superior Court, Riverside County; F. S. Densmore, Judge.

Action by William Morgan against G. W. Myers. Judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

Palmer & Mahan, for appellant. John G. North, for respondent.

MELVIN, J. Action to quiet title to certain mining claims in Riverside county. The answer disclaimed any interest of defendant in certain of the claims, naming them, but asserted defendant's ownership of two claims, the Red Rose and the Blue Jacket, and averred that these two claims contained within their boundaries part of the property within the limits of the Desert Quail and Comstock claims to which plaintiff asserted ownership. There was also a cross-complaint, in which G. W. Myers' ownership and possession of the Blue Jacket and the Red Rose claims were pleaded. This cross-complaint contained the usual prayer that cross-complainant's title to the property in question be quieted. There was an answer to the cross-complaint controverting the essential allegations therein, and upon the issues thus formed the case was tried. The court found for the defendant and cross-complainant upon all the matters involved. This appeal is from the order denying plaintiff's motion for a new trial.

Plaintiff's claim to the property in question is based primarily upon locations made by James B. and William L. McHaney, and asserted title thus acquired to certain claims, to wit, the Desert Queen, the Comstock, Chief of the Hills, Dry Lake Valley, Juniper, Desert Chief, and Desert Quail. Respondent depends upon locations of the two claims which he made after the Comstock and Desert Quail had, according to his contention, been abandoned. In other words, respondent's position is this: That the Red Rose and the Blue Jacket claims only encroach upon the Comstock and Desert Quail, and that when they do so, his title to the territory thus involved is good, because of plaintiff's previous abandonment of the older claims.

The first contention of appellant is that the evidence is insufficient to sustain the findings. In this we cannot agree with him. There was a sharp conflict in the testimony of surveyors and others who testified on behalf of the respective litigants, but it is not our function to reconcile this conflict if there is any evidence to support the findings. Mr. Loucks, a surveyor, testified to a measurement of the various claims involved in this discussion in accordance with the monuments indicted to him by one of the McHaney brothers, who were the original locators of the claims to which plaintiff asserted title His map which was received in evidence thoroughly agreed with the defendant's assertions with reference to the territory involved, and the defendant and other witnesses corroborated him in several particulars. Evidently the court accepted this testimony as accurate and acted upon it. Respondent also introduced evidence tending to show that the Blue Jacket and Red Rose were located by him in 1906, and that he duly performed the necessary assessment work on these claims. There was also evidence tending to show that no work had been done upon the Comstock and the Desert Quail since 1904.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The principal point of controversy in the case is this: Plaintiff and appellant contends that all of the claims mentioned in his complaint are contiguous; that they constitute a group; and that consequently work done upon one or more of them should be counted as for the benefit of all. In support of this position it was shown that very extensive operations had long been in progress on the Desert Queen claim and some others. Respondent, on the other hand, asserts that appellant's claims are not contiguous, and that in any event the work done by appellant on the Desert Queen and the Chief of the Hills was not for the benefit of the claims involved in this controversy. Section 2324 of the Revised Statutes (U. S. Comp. St. 1901, p. 1426) contains the following provision: "On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * But where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location, * * * provided that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the 1st day of January succeeding the date of location of such claim."

The rule with reference to the performance of work under the above-quoted section is well stated in Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452: "When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But, obviously, on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them."

While it may be conceded that work done even outside of contiguous claims may be credited to all of the properties, if for the benefit of all, it is necessary that that work shall at least be probably advantageous to all parts of the group. Evidently the opinion of the court in this case was that the work on the Desert Queen and Chief of the Hills had no relation to the Comstock and the Desert Quail. There was evidence of the surveyor and others that appellant's claims were not contiguous in the sense of being attingent. Joseph Toutain testified to admissions on the part of the original locators that there was unclaimed and unoccupied ground between the Comstock and the Desert Queen. The fact that they were, according to some of the evidence, separated by a ravine perhaps had some effect in leading the court to the conclusion that work upon one would not naturally benefit or have a tendency to uncover the minerals in the other. This deduction might also be reached from other testimony regarding the topography of that region.

Appellant lays great stress upon a notice of location, a purported copy of which was introduced in evidence. It is asserted that by this notice one of the original locators described the Desert Queen and the Comstock as being together and touching, but on the witness stand the writer of the original notice said, "It did not read that way." Whether the notice was sufficient to overthrow this testimony was a matter not for this court, but for the trial court. This disposes of the main point in the case. Our attention has been called, however, to certain alleged errors of law occurring at the trial.

Appellant while on the stand was asked to state whether or not these mines had been held by him as a group. Mr. North objected, upon the ground that a conclusion of the witness was called for, rather than a fact, and that the matter in issue was what work had been done there, what witness' holding or possession consisted of, and where the work was done. The court sustained this objection, and we think this ruling was correct. Whether or not the claims were held as a group was best evidenced, not by the intention of the witness, but by the location of the properties and the kind, quality, and place of the work performed. Mr. Halliday, a civil engineer, who testified on behalf of appellant, was asked the following question: "Is there any other point, or are there any other points, on the map that you are able to locate definitely from information that you received or from other points that you have, and tell what they are?" He began his answer as follows: "From the location notices and notice on the Victoria, a description of it, I was able to locate, to my own satisfaction, both the northwesterly and southwesterly corners of the Victoria and from that to determine * * *"—and at this point the objection was made that the witness should not state a conclusion from things he found on the ground. The court in sustaining this objection said: "That would substitute his judgment for that of the court." In view of the scope of the question, we think that the ruling was entirely correct. The use of the words "to my own satisfaction" by the witness indicates that he was testifying to his conclusion, rather than to any physical facts involved.

A. R. Fabun, a witness who testified on behalf of defendant, was asked whether from an examination of a map, introduced as one of defendant's exhibits, he could recognize the Desert Queen mining claim and the Comstock mining claim. To this the following objection was interposed: "I object to the question for the reason that he is asking him whether he recognizes certain mining claims, and I presume that the question ought to be a different one. I don't think that is proper." The objection was overruled, and this was assigned as error by appellant. While the question was perhaps improper, the objection was not of a kind to call the court's attention particularly to the vice of the interrogatory. In fact, there was no ground stated in the objection. It amounted to nothing more than a suggestion to the court that the question ought to be a different one. In order to be available, the objection should have specified some ground for the court's action, and, as no such reason was advanced, there was no error in the ruling.

Appellant excepted to the action of the court in permitting witness Fabun to testify that at a time when James B. McHaney held title to the Comstock and the Desert Queen he admitted that there was unoccupied and unlocated ground between these two claims. We think such evidence was clearly relevant under section 1849, Code Civ. Proc., which is as follows: "Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former." While it is true that the declaration of McHaney did not apply directly to his own property, it did apply to the limitations of his own claims and the matter of their contiguity. In that respect it was a declaration with reference to his properties.

We find no other alleged errors that require special attention.

From the foregoing discussion it follows that no material error appears, and therefore the order from which appeal is taken is sustained.

We concur: HENSHAW, J.; LORIGAN, J.

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159 Cal. 203

ROBINSON v. ROBINSON. (Sac. 1,853.)

(Supreme Court of California. Jan. 9, 1911. Rehearing Denied Feb. 6, 1911.)

1. Appeal and Error (§ 1010*)—Findings of Court—Sufficiency of Evidence to Support.

The decision of a trial court on issues of fact is conclusive on appeal so far as there is any substantial evidence tending fairly to support the decision or finding, even though the appellate court thinks that the conclusion should have been different.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1010.*]

2. Appeal and Error (§ 994*)—Discretion of Lower Court—Examination of Witnesses—"Falsus in Uno, Falsus in Omnibus."

The provisions of Code Civ. Proc. § 2061, that a witness found to be false in one part of his testimony is to be distrusted as to others has no application to an appellate court; that being a rule solely for the guidance of trial courts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

3. Divorce (§ 184*)—Review—Questions of Fact.

The question whether acts and conduct constitute such cruelty as under the circumstances will warrant the granting of a divorce is of such a nature that the conclusion of the trial court will not be disturbed on appeal, except where it is clearly without any substantial support.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 572; Dec. Dig. § 184.*]

4. Evidence (§ 474½*) — Conclusions of Witnesses — In General — Intent or Meaning.

Where the plaintiff in divorce is allowed to state the substance of what the defendant said, it is for the trial court to determine the meaning thereof from the words used and the circumstances under which they were spoken, and the plaintiff's conclusions as to the defendant's meaning are inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474½.*]

5. Evidence (§ 126*) — Competency — Res Gestæ — After Transaction or Event — Grounds of Divorce.

Evidence in a divorce action of plaintiff's statement to a third person, in the absence of the defendant, as to the cause of bruises on her arm, is no part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 372–376; Dec. Dig. § 126.*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action for divorce by May M. Robinson against J. L. Robinson. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 110 Pac. 112.

Robert W. Miller, for appellant. E. T. Cosper, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment denying her prayer for divorce, and from an order denying her motion for a new trial of the action. The alleged ground of divorce was extreme cruelty of the defendant. It is urged in support of the claim for reversal that certain findings are not sustained by the evidence, and that the court erred in certain rulings in the matter of admission and exclusion of evidence.

As to the question of sufficiency of evidence to sustain the findings of the trial court, it is not questioned by plaintiff that we are bound by the well-established rule that the decision of the trial court upon issues of fact is conclusive upon us in so far as there is any substantial evidence tending fairly to support such decision, even though we may think that a different conclusion should have been arrived at. It is suggested, however, that an analysis of the testimony of defendant as shown by the record makes it appear that some of defendant's evidence was false, and that we must therefore consider his whole evidence in the light of the rule declared by section 2061, Code Civ. Proc., that "a witness found to be false in one part of his testimony is to be distrusted in others."

If we assume this claim as to what the record shows to be well founded, it still remains that the rule relied on is one solely for the guidance of the trial court, and can have no pertinency in an appellate court. The trial court was the exclusive judge of all questions of credibility of witnesses and weight of evidence, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty as under all the circumstances shown warrants the granting of a divorce is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal.

In the light of the foregoing, it cannot be held that the material findings attacked are not sufficiently sustained by evidence. We feel that no useful purpose would be subserved by a discussion of the evidence given upon the matters embraced in the findings that are attacked by learned counsel in his brief as being without support. Suffice it to say that in our judgment findings 5, 6, 7, 8, 14, 17, 20, and 23 have sufficient legal support in the evidence, and that there is in the bill of exceptions no specification of insufficiency as to findings 15, 24, and 25.

The trial court did not err in excluding from evidence the conclusions of the plaintiff as to the meaning defendant intended to convey by certain statements made to her. She was allowed to state fully the substance of what he said, and it was for the trial court to determine the meaning thereof from the words used and the circumstances under which they were spoken.

There was no error in excluding the statement made by plaintiff to Miss Liggett, in the absence of defendant, as to the cause of certain bruises on her arm. Such statement was no part of the res gestæ, and, so far as we can see, was incompetent for any purpose.

We find nothing in the direct examination of defendant's mother to render proper cross-examination the question asked her "Do you think Mr. Robinson was jealous of her?" The ruling of the court sustaining the objection thereto was correct.

There is no other point made in the brief of counsel for appellant that requires notice here.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.

159 Cal. 225

KIMBALL v. NORTHERN ELECTRIC CO.

(Sac. 1,769.)

(Supreme Court of California. Jan. 10, 1911.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS.

A finding sustained by evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

2. WITNESSES (§ 275*)—CROSS-EXAMINATION—MATERIALITY.

In an action for injury to an electric railway employé while riding on a car, wherein it was an issue whether he was riding on company business, and he testified that he had permitted other employés in his department to use his pass, it was not error to exclude the question asked him on cross-examination as to who had used it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924–926, 967–975; Dec. Dig. § 275.*]

3. WITNESSES (§ 328*)—EXAMINATION—TESTING MEMORY—JUDICIAL DISCRETION.

A trial judge can limit the scope of questions asked to test a witness' memory.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1103; Dec. Dig. § 328.*]

4. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR — EXCLUSION OF EVIDENCE—ADMITTED FACTS.

It was not reversible error to exclude a showing that an electric railway employé suing for personal injuries used a pass when not on company business, where he admitted that fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194–4205; Dec. Dig. § 1057.*]

5. TRIAL (§ 413*)—OBJECTIONS TO EVIDENCE—WAIVER.

Any objection to refusing to permit defendant to introduce a memorandum used by plaintiff on testifying was waived, where the contents were read to the jury on defendant stating that their incorporation in the stenographer's notes was all that was desired.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 413.*]

6. Evidence (§ 558*)—Redirect Examination—Scope—Judicial Discretion.

It was not an abuse of discretion to permit plaintiff's medical experts to state on redirect examination to what extent plaintiff's injury would interfere with his running or jumping.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.*]

7. Evidence (§ 380*) — Documentary Evidence—Photographs — Preliminary Evidence.

Omission to show that medical experts were familiar with X-ray photography did not make admission of the photographs prejudicial error, especially since the experts indicated that they were familiar with the use of X-rays by stating that they examined the injury by such means, and no objection to their testimony was made for lack of qualification.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 380.*]

8. Appeal and Error (§ 1051*)—Harmless Error—Admission of Evidence.

Any error in admitting X-ray photographs of a personal injury was harmless, where the condition shown thereby was the same as that disclosed by expert testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

9. Evidence (§ 477*) — Expert Testimony—Physical Suffering.

A nurse could testify to the extent of plaintiff's suffering without qualifying as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237–2241; Dec. Dig. § 477.*]

10. Appeal and Error (§ 1052*)—Harmless Error—Admission of Evidence.

In an action for injury to an electric railway employé while riding on a car, any error in admitting evidence concerning use of his pass when off duty was harmless, where the court found that he was on duty when injured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. § 1052.*]

11. Damages (§ 43*)—Expenses Incurred—Nursing — Services of Parent — Child's Liability.

The mere relationship between one suing for personal injuries and his mother, who nursed him, does not remove the presumption of his obligation to pay for her services, as affecting the recoverable elements of his damage, where she was a professional nurse.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 242–254; Dec. Dig. § 43.*]

12. Damages (§ 132*)—Personal Injury—Adequacy.

$4,000 was not excessive recovery for personal injury to a 19 year old employé involving permanent incapacity to run, jump, or dance, take long walks, carry heavy burdens, and susceptibility to further injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385; Dec. Dig. § 132.*]

13. Appeal and Error (§ 1048*)—Harmless Error—Admission of Evidence.

In a personal injury action, any error in permitting a medical expert to be asked whether, conceding plaintiff to be sound except as to his right knee, he could pass an examination for admission to the army, was rendered harmless by the unresponsive answer, "Were I examining him for the United States army, I would have to reject him on account of the condition of that knee."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4160; Dec. Dig. § 1048.*]

Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Clarence B. Kimball, by Margaret Burgess, his guardian, against the Northern Electric Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Charles W. Slack, A. M. Seymour, and W. H. Carlin, for appellant. M. E. Sanborn, for respondent.

MELVIN, J. This is an action for damages for injuries received in a collision between two of defendant's trains. The court, sitting without a jury, gave judgment in favor of plaintiff for $4,000 and costs of suit. From this judgment and from an order denying defendant's motion for a new trial, defendant appeals.

The appellant corporation was operating an electric line between Sacramento and Chico. The cars were moved generally by an electric current introduced through a third rail; but in cities and villages the "trolley system" was used. The "trolley zone" through the village of Live Oak in Sutter county was about 2,000 feet in length. On the morning of the accident, respondent was riding in one of appellant's passenger trains which approached this "trolley zone" and passed into it from the "third rail zone." The train was moving across this space through the village of Live Oak by the momentum gained before leaving the "third rail zone," and no attempt was made to connect the trolley with the overhead wire. There were no lights on the train owing to the fact that the trolley was not connected, because on defendant's cars the same current of electricity which moves them also furnishes illumination. In the gloom of the early morning the passenger train met and collided with a freight train which was also in darkness. Both were wrecked, and plaintiff received injuries which were the basis of this action.

Appellant's first contention is that the weight of evidence is against the findings of fact made in favor of plaintiff, and that said findings ought to have been made in favor of defendant. To this we must give the usual answer that the weight of evidence was for the trial court to determine. We see no reason in this case to overturn the conclusion of the court in this regard, as there was evidence to sustain the findings.

Respondent was employed by the appellant corporation as chief clerk of its purchasing department, with headquarters at Chico, and, as his duties frequently required him to travel from place to place on the road, he was furnished with an "employé badge," which entitled him to free transportation over the defendant's lines. This, of course, was to be used by respondent for business purposes, and the principal controversy in the case was upon the question whether or not Kimball was traveling on the company's business when he was injured. The trial court, in a written opinion, upon this subject made the following analysis of the matter, which we think was fully justified by the evidence: "Some time before the 1st of November, 1907, some one in Yuba City had wrongfully taken possession of some cars of defendant here and used them for a different purpose than that intended. There seems to have been some feeling about the matter in Chico among the employés of defendant there. The matter became the question of much correspondence and consultation among the parties interested. It appears that one Ray Jones in Marysville, an employé of the company, was blamed, and to shield himself had placed the responsibility upon one Clive Kelly, another employé of the company at Marysville and Yuba City. The matter finally reached the office of the general superintendent, Mr. Dimmock. It is not denied that on the 1st day of November, 1907, Mr. Dimmock ordered Mr. Kimball to find out about the matter and report to him. He did not order the purchasing department or the store department to ascertain the facts, but he ordered Kimball to find out and report to him. It isn't denied that Kelly, who wanted to continue in the employment of the company and was desirous of exculpating himself from blame, telephoned to Kimball to come down to Yuba City to hear his side of the story on this very day. It isn't denied that Kimball came to Yuba City, where Kelly resided, on that evening, and that Kelly went to Kimball's house and discussed the matter with Kimball on the evening of November 1st Kelly said this meeting was pursuant to agreement made over the 'phone that day between him and Kimball. Van Arsdale was present and heard part of the conversation. It might be that Kimball could have attended to this business by letter or by the use of the 'phone or in some other way than by coming to Yuba City. But he chose to come to Yuba City to talk to Kelly about it and also about some other matters appertaining to the business of the company. The badge was given Kimball to use on just occasions. Unquestionably Dimmock, the general superintendent of the road, had a right to refer this matter to Kimball to attend to instead of referring it to the department in which he worked, or to the store department. The fact that Dimmock ordered him to ascertain the facts in that case, and that on the same day he arranged to meet one of the parties who knew all about those facts pursuant to a request made by that very party, and that they did so meet and talk over that transaction, coupled with the testimony of Kimball that he came here for that purpose, conclusively proves to my mind that he came here to transact the business of the company, and that at the time he met with the accident he was traveling on the business of the company and was a passenger and not a trespasser upon defendant's cars."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

During his cross-examination plaintiff testified that he allowed others in his department to use the badge during October, 1907. To the further question, "Who used the badge?" an objection was sustained, and this is assigned as error. We see no vice in this ruling. The question was not material. The important fact to be ascertained was not the use made of the badge by other persons, but respondent's own use of it.

Appellant also complains that, although he was permitted to examine the respondent concerning the use of the badge in October, 1907, he was not allowed to ask questions upon the same subject covering the month of September. If such questions were to test his memory, the court could very properly limit their scope. If they were asked for the purpose of showing the plaintiff's habit of using the pass when not on the company's business, no injury was wrought by the court's refusal to allow the questions, because Kimball readily admitted that such had been his practice.

During his cross-examination Mr. Kimball used a memorandum partly in his own handwriting and partly written by some one else. The cross-examiner sought to introduce this paper in evidence. This the court refused to allow, and of this ruling appellant complains. It is unnecessary to pass upon this question, as appellant's counsel waived any exception which he might have had in the premises. The court said: "I will refuse to give you the custody of the paper; but, if you want the memoranda, that is, the contents of the memoranda, I have no objection to that being read." To this counsel replied: "That is all we want. Let the reporter simply incorporate it in his notes." And, accordingly, the contents of the paper were read into the record.

Nor was there any error in allowing plaintiff's medical witness, Dr. Peery, to answer the question on redirect examination, "To what extent, if any, do you judge his injury will interfere with his running or jumping." While not, perhaps, strictly redirect examination, it was the sort of question proper for direct examination, and it was therefore competent for the court, in the exercise of a sound discretion, to permit it on redirect examination.

Certain X-ray photographs of the plaintiff's knee were introduced in evidence after two of the medical witnesses had been examined with reference to them. Numerous objections were offered to questions propounded to these witnesses, and many exceptions were taken by appellant. It is insisted by appellant that these objections should have been sustained, and that we are bound to reverse the judgment for such errors. Counsel for appellant contend that the proponents of the photographs failed to introduce proof of their correctness, or that either of the doctors was an expert in such matters. While, perhaps, the examination was not as minute upon this subject as one might wish, it does sufficiently appear that Dr. Peery, Dr. Barr, and others were present at Dr. Wallace Briggs' office in Sacramento when X-ray plates were made of plaintiff's knee, and that the photographs introduced in evidence were printed from these plates. While it would have been better, no doubt, to have introduced evidence of the familiarity of the physicians with the process of X-ray photography and the methods employed in preparing these particular exhibits, we cannot see that the omission so to do amounted to error necessitating the reversal of the cause. The witnesses were qualified surgeons. It is well known that the X-ray is almost universally understood and used by surgeons of the present day in examining injuries. Doubtless the court required less preliminary proof from such witnesses than would have been exacted from laymen. The surgeons had testified without objection that they had examined the injuries themselves by the use of the X-ray apparatus, and this testimony in itself was an indication that they were familiar with the uses of the Roentgen rays. When, therefore, they testified to the taking of certain X-ray pictures, or rather the making of plates, the court doubtless assumed that the ordinary methods of those familiar with such matters had been followed. While counsel for appellant objected to the testimony of the surgeons upon the ground of the failure of respondent to show their expert qualifications, no request was made of the court that these gentlemen should be preliminarily questioned upon that subject. The surgeons put initials on the plates at the time they were made, and testified that these initials appeared on the prints introduced in evidence. But, even if an error were committed in the admission of testimony relating to the photographs, it was harmless, for it is evident that the condition shown by the photographs did not differ from the circumstances disclosed by the testimony of the physicians based upon their own observations. A photograph is used like any other chart, for illustrative purposes. See People v. Loper (Crim. No. 1,546) 112 Pac. 720; People v. Durrant, 116 Cal. 213, 48 Pac. 75; People v. Crandall, 125 Cal. 133, 57 Pac. 785; People v. Mahatch, 148 Cal. 203, 82 Pac. 779. And where, as in this case, such illustrations do not mislead, no error is wrought.

The admission of the testimony of respondent's nurse upon the extent of his suffering was not erroneous. Such testimony is competent and does not require expert qualifications in the person giving it. In Kline v. Santa Barbara, etc., Ry. Co., 150 Cal. 750, 90 Pac. 129, the following language was used: "It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to any one of ordinary intelligence and experience. These witnesses had all observed her, had heard her groans and complaints, and were competent to give an opinion as to her suffering." This so clearly answers appellant's objection that further comment is unnecessary.

Appellant complains of certain rulings admitting evidence of the use by another of the railroad company's employés of Kimball's pass, on the ground that such evidence was not given in rebuttal; no estoppel having been pleaded authorizing a showing of appellant's general custom of allowing its servants to travel on passes when not on business for the corporation. It is not necessary to consider whether or not this was error, as the court based its judgment, not on the permission given Kimball to use the pass when off duty, but upon a finding that he was actually in the performance of his work and was acting under the orders of his superior when the accident occurred. We have carefully examined the objections of appellant to the amount of damages. The court allowed Mrs. Burgess $90 for her services in caring for the respondent at her home in Yuba City. Appellant's contention is that there is no evidence that Kimball had obligated himself to pay for such services. True, she was Kimball's mother, but she was a nurse of 16 years' experience, and her services, as she described them in her uncontradicted testimony, were certainly worth the amount awarded. The respondent had not been living at her home, and the mere fact of their relationship does not remove the presumption that he was bound by the acceptance of her services to pay a reasonable value for them. In discussing the extent of damage to Kimball's knee, the learned judge who tried the case said: "The weight of the testimony is that he has met with a permanent injury. That he can never run or jump, take long walks, or carry heavy burdens, or dance, that it will always be susceptible to injury, and that he will always have to favor it, is the testimony of disinterested experts. What amount of money will compensate a young man in his nineteenth year for such an injury and such a future? His occupation in life can scarcely be said to be settled at this age. By reason of such an injury many avenues to success are closed to him. It is possible that he may be able to choose one of a sedentary character in which he can succeed. But much of the spice of life, enjoyments that only come from the full use of both knees, are to him a memory. This injury befell him at the very worst period in his life, just after he had finished school and was thinking of life's career. I don't know what his plans were for life, but I do know that it was not impossible that this injury should have changed them all. There are many things that he could have chosen before that he can't choose now. Even though his knee should in time get well, the opportunities that are now open will not be available to him then. To await his complete restoration to usefulness, in the face of the testimony of the physicians, would be unwise. It isn't to be wondered at that the contemplation of these things has made him nervous and restless, and given him much mental pain and anxiety." This is a most excellent summing up of the evidence and its effect, and we cannot say that $4,000, in view of all the circumstances, must be regarded as an excessive amount in compensation for the injury sustained by respondent.

One of the questions propounded to Dr. Barr was this: "Conceding plaintiff sound in every respect except as to his right knee, could he successfully pass an examination for admission to the army?" Over the objection that the question was incompetent, irrelevant, and immaterial and not a matter of expert testimony, the witness answered: "Were I examining him for the United States army, I would have to reject him on account of the condition of that knee." While we think Kimball's eligibility for the army was a proper matter of expert testimony, as showing that one vocation was closed to him (and Dr. Barr was qualified as an expert on the examination of young men for the army of the United States), it is not necessary to consider the objection made by appellant, because the answer as given was in no wise responsive to the question. The evident purpose of the examiner was to learn whether or not the respondent was physically sound with the exception of the injured knee—as sound as an accepted recruit in the army. The answer merely told the judge of something which he must have known before if he credited the doctor's testimony, namely, that the injury was sufficient to exclude the young man from the army, because it is generally known that such a defect as a permanently injured knee would have that result. We cannot see how appellant could have been injured by the answer because it revealed in no manner the respondent's physical perfection or lack of it in parts of his body other than his knee, and did not indicate whether or not he would have been a good subject for admission to the army before the accident.

We find no other alleged errors requiring especial attention.

It follows therefore that the judgment and order must be affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

159 Cal. 197

ALLEN v. ALLEN. (Sac. 1,815.)

(Supreme Court of California. Jan. 9, 1911.)

1. Adverse Possession (§ 63*)—Acquisition of Rights by Prescription—Grantor.

A grantor may acquire title by adverse possession as against his own conveyance.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333–357; Dec. Dig. § 63.*]

2. Adverse Possession (§ 86*) — Nature — Payment of Taxes—Necessity.

For a grantor to acquire title by adverse possession against his own grant, he must show his payment of all taxes levied upon the land, or that none were levied.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 504; Dec. Dig. § 86.*]

3. Divorce (§ 249*)—Jurisdiction—Incidental Proceedings—Separate Property.

As a general rule the superior court in a divorce proceeding has no jurisdiction to deal with the separate property of the spouses.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 705; Dec. Dig. § 249.*]

4. Divorce (§ 255*) — Decree Adjusting Property Rights — Conclusiveness—Separate Property.

Where a husband and wife, in their pleadings in a divorce proceeding in the superior court, brought to the attention of the court a conveyance made by the husband to the wife, and the court made a finding that the title to the land conveyed was vested in the wife, such determination was conclusive in a subsequent suit by the former husband against the former wife to set aside the conveyance for fraud, as the question of fraud might have been litigated in the divorce suit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 722–724; Dec. Dig. § 255.*]

5. Judgment (§ 713*) — Conclusiveness — Matters Concluded—Matters Not Litigated.

A judgment is conclusive upon all matters which might have been litigated, as well as those which were actually determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by James H. Allen against Luella F. Allen. From a judgment for plaintiff and an order overruling a motion for new trial, defendant appeals. Reversed.

L. L. Dennett and J. M. Walthall, for appellant. J. B. Jennings, for respondent.

LORIGAN, J. This action was brought to set aside a deed of land executed by plaintiff to defendant, on the ground of fraud, for a decree directing a reconveyance to plaintiff and quieting his title to the land. Judgment went for plaintiff, and defendant appeals from the judgment and an order denying her motion for a new trial.

Respondent in his brief moves the court to dismiss the appeal from the judgment on the ground that it was taken too late, being more than six months after the entry of the judgment. This appearing to be the fact, the appeal from the judgment is dismissed, and the appeal from the order will alone be considered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On November 24, 1902, plaintiff and defendant were husband and wife, and on that day plaintiff conveyed to her a tract of land in Stanislaus county. In August of the next year the defendant here brought an action against the present plaintiff, in the superior court of Stanislaus county, for a divorce, in which action she alleged, as to the tract of land involved in the present litigation, that plaintiff had conveyed it to her by the deed of November 24, 1902, and had subsequently made and executed a declaration of homestead upon it. In his answer in the divorce suit plaintiff here admitted the execution of the deed to her of this property, as alleged by his wife in her complaint. He also filed a cross-complaint, in which he sought a divorce from his wife on certain grounds, and, as to the property in question, although admitting in his answer the conveyance to her, alleged that the property was community property of himself and wife. To the cross-complaint the wife filed an answer, denying that the property was community property, but, on the contrary, alleged that it was her separate property.

A divorce was denied the plaintiff, and awarded to defendant on his cross-complaint. As to the property rights of the parties, the court found that the tract of land in question had been acquired as community property by the spouses; that no other real property had ever been acquired by the husband, either as community or as separate property; that the husband on the date mentioned in the pleadings, for a good and sufficient consideration, executed the deed mentioned in the pleadings, conveying to her the fee-simple title to this tract of land; that thereafter the wife had been and was the owner of it in fee simple and entitled to possession; that the husband had no right, title, or interest in the property, and the homestead theretofore made and executed by the husband on the land was declared void. A judgment was entered accordingly on July 14, 1904, from which no appeal was ever taken.

The present action to set aside the deed of November 24, 1902, under which the court in the divorce proceeding had determined that the property described therein was the separate property of the wife, was commenced nearly four years after the entry of the judgment in the divorce case. The action was primarily to have this conveyance set aside on the ground of actual fraud. Without setting them forth in any detail, the allegations substantially were that while plaintiff and defendant were husband and wife, and without any fault on the plaintiff's part, his wife left their home in Stanislaus county and took up her residence in San Francisco. Subsequently she came back to Modesto, in said county, and sent for plaintiff. When they met she expressed her great affection for him and her desire to return home, and represented that if he would convey her this property she would return and remain, and thereafter continue to live with him as a good and faithful wife; that, believing and relying on these representations, he conveyed the property to her; that these representations made by her were false and fraudulent, and were made without any intention of keeping them, but were made by her solely to cheat and defraud him of the property; that she never returned to him or their home, but immediately upon obtaining the deed left for San Francisco where she remained, and thereafter brought an action against him for divorce.

The complaint, in addition, set up adverse possession of the property against the defendant for more than five years, including a period prior and subsequent to his deed to her. In her answer, which denied the allegations of fraudulent representations in procuring the deed, the defendant pleaded also in bar the judgment in the divorce case in her favor, to the extent that it decreed that this property was her separate property and that plaintiff had no interest in it whatever She denied also the claim of plaintiff as to adverse possession.

The court found that the deed from plaintiff to defendant was procured by actual fraud; that defendant held the legal title in trust for the plaintiff as community property, and directed a reconveyance by her, or, in default, that a commissioner make it. It found also in favor of the claim of plaintiff, that he had acquired title against defendant by adverse possession. This latter finding is not supported by the evidence, if for no other reason than that there was no showing whatever on the part of plaintiff that in support of his adverse title he had paid any taxes upon this property at any time during which he alleged he was claiming adversely to defendant. Plaintiff was not claiming under any paper title, but in hostility to his own deed, and while undoubtedly a person may acquire title by adverse possession, even as against his own conveyance, still, as an element to constitute such title, in addition to the showing of the other facts necessary to constitute it, he must prove, either that no taxes were levied and assessed upon the land or that he had paid all taxes which were levied thereon. Reynolds v. Williard, 80 Cal. 605, 22 Pac. 262; Allen v. McKay, 120 Cal. 335, 52 Pac. 528. He stood in relation to his title, asserted by adverse possession, as would any other adverse claimant, and it was necessary for him to make full proof of all the conditions required in order to constitute it.

Aside from pointing out this radical defect in the proof by plaintiff to support his claim of adverse possession, we pursue the matter no further, because counsel for respondent in discussing the effect of the decree in the divorce proceeding concedes that, if the judgment in that proceeding was res adjudicata on the question of the title to this property, then plaintiff was not entitled to recover in the action. That it was res adjudicata we think cannot be doubted.

The position of respondent against this effect of the judgment in the divorce proceeding is that in such a proceeding the superior court is only vested with such jurisdiction over the property of the spouses as is given by statute; that its jurisdiction is directed primarily to the subject of determining the status of the spouses, and, while jurisdiction is conferred on the court to determine also their rights as to community property, this is but incidental, and that no jurisdiction is at all vested in the court to pass upon the question of separate property. As supporting this proposition, he relies particularly upon Reid v. Reid, 112 Cal. 275, 44 Pac. 564. There was, however, in the case cited no dispute as to the character of property. The trial court undertook, nevertheless, to burden the conceded separate property of the wife with rights in favor of the husband, which it was held the court had no power to do. And it is no doubt true, as urged by respondent, that as a general rule the superior court in a divorce proceeding has no jurisdiction to deal with the separate property of the spouses. But the superior court in which the action for divorce must be brought is also invested with general jurisdiction to determine title to real property, whether based on legal or equitable claims, and if the parties in a divorce proceeding see fit to make the character of property held by them—whether separate or community—an issue in the proceeding, as the court is vested with jurisdiction to determine that question as fully as if the title were put in issue in a direct action brought for that purpose, the same effect must be given to its judgment as if such an action had in fact been brought. While it was not necessary that the question as to the character of the property here involved should have been an issue in the divorce proceeding between these parties, they nevertheless did make it such. Neither party objected to doing so, but both invited it. They thereby voluntarily submitted the matter to a court having general jurisdiction to pass upon the question of title under pleadings which properly raised an issue as to whether it was the community property of the spouses or the separate property of the wife, and the court having pronounced its judgment in favor of the wife upon that issue, and such judgment having become final, it is res adjudicata and conclusive upon both parties with respect to any further litigation on the subject.

It is claimed, however, by respondent that the judgment does not operate as res adjudicata to the present action, because it cannot be said that the title was litigated in the divorce suit in the same right that it is sought to be litigated in the present action. This point is untenable. While the present action is, it is true, an equitable one to set aside the deed to his wife on the ground of fraud, the judicial action actually sought is to have it decreed that the legal title to the property is in plaintiff here as community property. But the title to the property, whether community or the separate property of the wife, was a direct issue voluntarily submitted in the divorce proceeding. While somewhat beside the question, the plaintiff knew before, and at the time of the divorce proceeding, all the facts constituting fraud which he relies on now to set aside the conveyances to his wife. When litigating this question of title in the divorce proceeding he could have presented all the matters he presents now both by pleading and evidence. If he did not see fit to do so, it was his own fault, and the conclusiveness of the judgment cannot be affected by the fact that he attempts to maintain such an action now. The judgment is conclusive not only on matters affecting the legal title which were actually litigated, but also upon those which might have been. As far as the record in the divorce suit is concerned, we have only before us the pleadings, findings, and judgment. We have not the evidence which was put in by the parties in the divorce proceeding to sustain their respective claims as to the character of this property, and, for aught that appears here, all claims, legal or equitable, to this property were, as they might have been, litigated in the divorce proceeding, submitted to the court, and disposed of by the judgment pleaded in bar.

The superior court should have found that the judgment in the divorce proceeding determining that this property was not community property, but was the separate property of the defendant, was res adjudicata between them on that question and a bar to the right of plaintiff here to further litigate the title in the present action.

The order denying the motion for a new trial is reversed.

We concur: MELVIN, J.; HENSHAW, J.

159 Cal. 250

HARPER v. HILL et al. (Sac. 1,726.)

(Supreme Court of California. Jan. 11, 1911.)

1. Mines and Minerals (§ 18*)—Mining Claims—Location—Original Markings of Boundary Lines.

Rev. St. § 2320 (U. S. Comp. St. 1901, p. 1424), provides that a mining claim on public land shall not exceed 1,500 feet in length along the vein or lode, nor more than 300 feet on each side of the middle of the vein at the surface. Section 2322 (page 1425) declares that locators on the public domain so long as they comply with the laws and local regulations consistent therewith shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically. Section 2334 (section 1426) requires that the locations be distinctly marked on the ground, so that the boundaries can be readily traced, and sections 2325 and 2326 (pages 1429, 1430) provide that the owner may obtain a patent from the United States by procuring the Surveyor General to survey and plat the same, filing an application in the proper land office, and giving the required notice. *Held*, that since the grant of the exclusive right to possession of the ground included within the lines of a location is a present grant, taking effect from the date of the location, a locator, having established his side lines in good faith, is protected against subsequent locators on the land included within the lines as originally located, though it may be subsequently determined by reason of an inaccuracy in the location of the vein or lode when the claim was located that the side lines at the end were more than 300 feet distant from the center thereof.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 29-36; Dec. Dig. § 18.*]

2. MINES AND MINERALS (§ 18*)—LOCATION —BOUNDARIES—SIDE LINES.

The rule that where a locator has marked his corners so that the side lines lie more than 300 feet from the apex of the vein as located at the time, or otherwise marks a claim larger than allowed by statute, he cannot claim the excess as against a subsequent locator of adjoining ground, does not apply to a case where a claim of the statutory size was originally located in good faith, but, by a mistake as to the actual location of the vein as evidenced by subsequent exploration, the side lines were not each 300 feet distant from the center thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 18.*]

3. MINES AND MINERALS (§ 17*)—LOCATION— DISCOVERY—EVIDENCE.

Evidence that there were seams of minerals on a claim located by witness without any showing as to what the minerals were was insufficient to establish a discovery of valuable minerals within the lines of the claim essential to the valid location of a mining claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24-28; Dec. Dig. § 17.*]

4. MINES AND MINERALS (§ 20*)—LOCATION— BOUNDARIES—MARKING OUT GROUND.

Where the boundaries of a mining claim were not marked on the ground, the location was invalid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40-44; Dec. Dig. § 20.*]

5. MINES AND MINERALS (§ 38*)—MINING CLAIM — ASSESSMENT WORK — FAILURE TO PERFORM—FORFEITURE—PLEADING.

Where, in an action to recover certain mining claims, the S. location was not mentioned in the pleadings of either party, but defendant claimed some rights with reference thereto, evidence showing a forfeiture of the location by a failure to perform assessment work was admissible on plaintiff's behalf without an express plea.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

6. ESTOPPEL (§ 110*)—ESTOPPEL IN PAIS— PLEADING.

The defense of estoppel in pais must be specially pleaded in order to be available.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

In Bank. Appeal from Superior Court, Eldorado County; N. D. Arnot, Judge.

Action by H. A. Harper against Seymour Hill and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

W. J. McGee, Wm. E. Colby, and Geo. H. Thompson, for appellants. Chas. A. Swisler, for respondent.

SHAW, J. The defendants have appealed from the judgment and also from an order denying their motion for a new trial.

The plaintiff sued to recover possession of a mining claim known as the "Santa Ynez gold mine." The principal controversy is in regard to the respective rights of the plaintiff and defendants to the southerly part of said Santa Ynez claim which overlaps the northerly part of a mining claim located by the defendants known as the "Lookout quartz claim." The defendants also claim practically the whole of the surface of the Santa Ynez gold mine by virtue of a certain alleged mining location known as the "Mountain View quartz claim." These claims of defendants were asserted in a cross-complaint. It is also claimed that defendants had a right to the ground under a location in 1896 of a claim called the "Success" mine. The court found that the locations of the Mountain View quartz claim and the Success claim were invalid and that the plaintiff was entitled to the ground within the Santa Ynez gold mine which overlapped the Lookout quartz claim, and gave judgment accordingly. All the claims in question were located upon public lands of the United States.

We will first consider the respective rights to the ground within the overlapping limits of the Lookout and Santa Ynez claims. The Lookout claim was located and marked on the ground in 1889 by the defendants, and ever since that time they have claimed possession of it and have done the work required by law. The Santa Ynez was located and marked by the plaintiff on September 21, 1904. His claim of right to include in it a part of the ground covered by the Lookout claim is based on the theory that the southerly line of the latter is situated more than 300 feet from the actual line of the apex of the Lookout lode or vein. The facts appear to be that in 1889, when the defendants made the original discovery and location of the Lookout mine, they put monuments at each end of the claim at the place where they then believed the apex of the vein to be. Corners were marked at each end at a distance of 300 feet from the end center monuments so placed, thus marking a claim 1,500 feet long and 600 feet wide, as the law provides and allows. At the trial evidence was introduced tending, as it is claimed, to prove that the monument so placed at the center of the east end of the claim had not been placed on the apex of the Lookout vein, but was located some 23 feet south of said apex. The findings describe, as the true line of the apex, a line running from the east line westerly through the claim. This line at its easterly end lies northerly of the line indicated as such by the original center end monuments. The court below was of the opinion that the actual line of the apex as disclosed by the evidence at the trial should control the boundaries of the claim, that the defendants had the right to only three hundred feet south of that line on the surface, and that, as the original southerly line was located more than that distance from the true line of the apex of the vein, such original line must be drawn in and the excess given to the plaintiff under his later location. The main question is whether the surface location and boundaries of a mining claim are to be determined by the position of the apex of the vein as it is ascertained and marked on the ground, in good faith, at the time the claim is originally located and marked, or by the real position of such apex as it may be subsequently proven to be, in a trial with an adjoining claimant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 2320 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 1424), so far as material to the question, is as follows: "A mining-claim located after the tenth day of May eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the vein located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. * * * The end lines of each claim shall be parallel to each other." Section 2322 (page 1425) provides that the locators of a mining location "on any mineral vein, lode, or ledge," on the public domain, so long as they comply with the laws of the United States and local regulations consistent therewith, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically" although, below the apex, such veins, lodes, or ledges may diverge beyond the side line planes, but not where they go outside the end line planes. Section 2324 (page 1426) provides that "the location must be distinctly marked on the ground so that the boundaries can be readily traced," and that all records of mining claims shall contain "the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." Sections 2325 and 2326 (pages 1429 and 1430) provide, in substance, that the owner of such mining location may obtain a patent from the United States therefor by procuring the Surveyor General to survey and plat the same, filing an application in the proper land office and giving notice as directed. It is declared in section 2325 that "a patent for any land claimed and located for valuable deposits may be obtained"; that any person "having claimed and located a piece of land" may file application for a patent therefor.

The grant of the exclusive right of possession and enjoyment of the ground included within the lines of the location is a present grant which takes effect as soon as the location is legally made. It refers to the lines as then established, and gives the right to the ground inclosed thereby. The necessary implication of the language is that the "surface included within the lines of their locations" which they have an immediate right to possess and enjoy is the surface as then "distinctly marked on the ground." The statement that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," if taken strictly and literally, might seem to refer to the actual position of the apex, rather than to the place marked as such by the locator. But the other provisions require a different interpretation.

The reference is to the vein as honestly marked by the claimant at the time as the center of the claim of which he then takes possession. There are also practical reasons which forbid such literal construction. Lodes or veins frequently do not appear upon the surface except at intervals. Sometimes they may not appear at all. The true apex or middle of the vein may not be accurately determinable except by extensive excavations. The eastern end of the vein of the Lookout mine was covered with soil at the time of the location. Its true position was only disclosed by subsequent excavations, and it is still in dispute. Such veins do not run in straight lines throughout their courses, but with many turns and angles. Detached masses projecting above the surface may be mistaken for the ledge or vein. The ore may occur in a blanket formation having no distinct apex. If the construction contended for should prevail, a mining location which the law declares shall secure an immediate right of possession to the surface within the marked lines would often be a mere float, a tentative location, to be changed and adjusted from time to time to the actual location of the vein, at the instance of adjoining claimants, as subsequent developments may indicate. It would not become fixed and permanent as against third persons, until the patent was issued. That the location, as made, may not be binding on the United States, and that in making the survey for a patent the Surveyor General may ascertain and locate the true line of the apex to fix the boundaries, may be conceded. See Howeth v. Sullenger, 113 Cal. 551, 45 Pac. 841. But it is the clear intent of the statute that in the meantime, and as against all others, the locator who has in good faith made the discovery and marked the boundaries with regard to the position of the apex as he then finds and believes it to be shall be protected in the possession of the surface thus ascertained, and that the monuments he then sets shall control the location of the claim. Any other interpretation would produce great confusion and uncertainty, and invite disputes and litigation. The object of the enactment of the statute, which evidently was to give certainty of location and security of titles to mining claims and prevent litigation over them, would be defeated.

Substantially the same effect was given to the statute by the Supreme Court of Nevada in Golden Fleece Co. v. Cable Con. Co., 12 Nev. 329, and Gleeson v. Martin White M. Co., 13 Nev. 456, Chief Justice Beatty, then of the Supreme Court of Nevada, writing the opinion. In the Golden Fleece Case the plaintiff, after locating its claim according to what it then took to be the line of the vein, discovered that the actual course of the vein was at right angles to the line located. It then undertook to swing its claim around to correspond with the true line of the vein. Others had in the meantime located the adjoining ground, and they objected to the change. After showing that under the rules of miners prior to the enactment of the statute of 1872 a claim was located by marking upon the vein alone, and that the vein was then the sole criterion of location, the court discusses the change made by that statute, saying: "Under that law (of 1872) it cannot be doubted that it (plaintiff) is bound by the lines of its surface claim in favor of a subsequent locator. It is true that the vein is the principal thing and the surface but an incident thereto; but it is also true that the mining law has provided no means of locating a vein except by defining a surface claim, including the croppings or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim. These lines are fixed by the monuments on the ground, and they cannot be changed so as to interfere with other claims subsequently located." Referring then to the part of the statute relating to the records required by local rules, the opinion proceeds: "The requirements of the law as to what the record shall show are evidently designed to fix the locus of the claim, in order to prevent floating. But the monuments defining the claim on the ground answer this purpose better than the record, and if they are to be erected in the beginning there can be but little use ever to make a record; and in fact it is not made obligatory by law. * * * All that is decided upon this point is that under the law of Congress, unaided by any supplementary miners' rules, there is no means of locating a quartz vein except by marking out surface lines, and that, when these lines have been marked, they cannot be changed so as to take in ground that has been located by others prior to such attempted change."

In the Gleeson Case this language is approved, and the court further says: "The vein is the principal thing in the sense that it is for the sake of the vein that the location is made. The surface is of no value without it. No location can be made until a vein has been discovered within its limits, and the surface must, or at least ought to, be located in conformity with the course of the vein. Rev. St. 2320. But the location is of a piece of land including the vein. * * * This section alone shows that it is a surface parallelogram not less than 50 feet in width that must be located. But the purpose of the law is more clearly indicated by the granting clause. * * * The vein originally discovered, and for the sake of which the location is made, is lumped in with other mineral deposits that may happen to exist within the limits of the surface claim, and no part of it is granted except that part the top or apex of which lies inside the surface lines extended downward vertically. This, it would seem, ought to be conclusive, but the language of section 2325 is, if possible, still more convincing: 'A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes,' may by taking the prescribed steps obtain the title upon payment of five dollars per acre for the land. Thus it appears that a location must be made by taking up 'a piece of land' to include it. No other means are provided." As to the object and policy of the statute the court says: "Before the statute he could claim no more than 400 feet of the vein, and of that he was not secure for a day. The moment he developed rich ore he was beset by trespassers, and, in order to enjoin them from stealing his property, was obliged to trace the vein between them and the location point. He was harassed with litigation, and his means often entirely consumed in the prosecution of work not necessary to the development of his mine, but essential for the vindication of his title. Under the new law this source of vexation and expense is entirely swept away. Within his surface lines the discoverer of a vein is secure. * * * Sound policy, therefore, concurs with the language of the statute in sustaining our conclusion that a vein can only be located by means of a surface claim. * * * The object of the law in requiring the location to be marked on the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated in order to make their locations upon the residue."

These observations were made with reference to the rights of subsequent locators of adjoining ground against changes in the lines attempted by the first locators. But the point of the decision is that the rights of the parties are fixed by the lines marked on the ground when the location is made. If the lines so fixed protect subsequent locators against changes afterwards sought to be made by the first locator, they must be equally potent to protect the first locator against changes sought to be made against his interest by subsequent locators. The general principle that the location as made on the ground controls the rights of the parties is stated in the following cases: Iron S. M. Co. v. Elgin, etc., Co., 118 U. S. 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; Watervale M. Co. v. Leach, 4 Ariz. 34, 33 Pac. 420; Wyoming Co. v. Champion Co. (C. C.) 63 Fed. 548; Mining Co. v. Tarbet, 98 U. S. 468, 25 L. Ed. 253; and Leadville Co. v. Fitzgerald, Fed. Cas. No. 8,158.

There are many cases which establish the doctrine that where the locator has marked his corners so that the side lines lie more than 300 feet from the apex of the vein as located by him at the time, or otherwise marks a claim larger than the limits allowed by the statute, he cannot, as against a subsequent locator of adjoining ground, claim the excess, and that a court may adjudge that his side lines shall be "drawn in" to a position not more than 300 feet from the general course of the center line. McElligott v. Krogh, 151 Cal. 132, 90 Pac. 823; Howeth v. Sullenger, 113 Cal. 551, 45 Pac. 841; Southern Cal. R. Co. v. O'Donnell, 3 Cal. App. 386, 85 Pac. 932; Thompson v. Spray, 72 Cal. 533, 14 Pac. 182; English v. Johnson, 17 Cal. 118, 76 Am. Dec. 574; Hansen v. Fletcher, 10 Utah, 266, 37 Pac. 480; Richmond v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273. These and other cases to the same effect are cited by the plaintiff in support of the proposition that the side lines will be drawn in when the court, upon evidence taken and in the light of developments subsequent to the original location, ascertains that the locator mistook the actual location of the vein where it does not show upon the surface, and that the mining claim is always subject to change of position if new evidence or discoveries demonstrate that the vein is situated elsewhere than in the position it was supposed to occupy. None of them supports the proposition. In each the court assumed that by some mistake the side line or corner had been originally located too far from the place located as the apex of the vein, and the question involved and decided was the effect of such a mistake in measuring from the center stake or monument. For example, in McElligott v. Krogh, although it is not expressly so stated in the opinion, the fact was, as the record on file shows, that the court found that the true line of the vein and the line thereof as originally located were substantially identical. The question of the effect of a difference between the actual place of the apex and the original monuments set to locate it was not presented, and nothing said in the opinion can be taken as an expression of an opinion upon that question.

Of course, we do not here consider the effect of a fraudulent or intentional mislocation of the vein. The evidence shows that at the eastern end the vein did not appear upon the surface, and that the defendants erected the center monument at that end of the Lookout claim in good faith at the point where they believed the vein extended across the end line thereof. Upon the facts found and shown by the undisputed evidence, the court erred in giving to the plaintiff the ground included within the original limits of the Lookout location and embraced in the overlap of the Santa Ynez claim. We have assumed that the evidence is sufficient to show that the vein is situated off the located line as the findings declare. The appellants earnestly contend that the findings are without support in this particular. Our conclusion that the original monuments control makes it unnecessary to consider this question of the sufficiency of the evidence.

The findings that the Mountain View and Success locations were invalid are sustained by the evidence. The record does not set forth any substantial evidence of a discovery of valuable mineral within the lines of the claim. The defendants testified that there were seams of mineral upon the claim, but they did not state of what such mineral consisted. That term is too vague and general to justify this court in reversing a finding upon the theory that the witnesses intended to declare that the mineral in question was valuable and of a character that would support a mining location under the laws of the United States. A discovery of valuable mineral within the located boundaries is an essential prerequisite to a valid mineral location upon public lands of the United States. In addition to this defect, there was evidence that the boundaries of these claims were not marked upon the ground by any monuments, or at all. As to the Success mine, there was no evidence that any work was done upon the claim after the years 1897 and 1898. Under some circumstances, it would be necessary to plead the forfeiture to take advantage of such failure. But here the claim under the Success location was not mentioned in the pleadings of either party. Evidence concerning it, if admissible at all, was so only under the general issue upon the allegation of right and title. In this condition of the pleadings, evidence showing the forfeiture was admissible on behalf of the plaintiff, without express plea. Blood v. La Serena, etc., Co., 113 Cal. 229, 41 Pac. 1017, 45 Pac. 252.

It is further claimed that plaintiff made a binding agreement in parol with the defendants, whereby he is estopped to claim against them more than a one-third interest in that part of the Santa Ynez claim not included in the Lookout overlap. He never executed any written agreement to that effect. This contention of the defendants is based entirely upon a supposed estoppel by conduct. The question is not presented by the record, and cannot be considered. The pleadings make no allusion to it whatever, and there is no finding upon it. It is a well-established rule that, if a defendant relies on an estoppel in pais as a defense to the plaintiff's action, the facts constituting the estoppel must be specially pleaded. Di Nola v. Allison, 143 Cal. 115, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; Newhall v. Hatch, 134 Cal. 273, 66 Pac. 266, 55 L. R. A. 673; Etcheborne v. Auzerais, 45 Cal. 121; Davis v. Davis, 26 Cal. 39, 85 Am. Dec. 157. We are not to be understood as intimating that the facts claimed to exist would have constituted such estoppel, even if they had been properly pleaded.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

(159 Cal. 242)

UNITED REAL ESTATE & TRUST CO. v. BARNES. (L. A. 2,457.)

(Supreme Court of California. Jan. 11, 1911.)

1. MUNICIPAL CORPORATIONS (§ 449*)—PUBLIC IMPROVEMENTS—ORDER FOR ASSESSMENT—CONCLUSIVENESS—STATUTES.

In proceedings under Act March 6, 1889 (St. 1889, c. 76), had in conformity to sections 2 to 5 inclusive, the decision of the council ordering an assessment is conclusive on a property owner who presented no objections.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1072; Dec. Dig. § 449.*]

2. EQUITY (§ 11*) — GROUNDS OF ACTION — FRAUD.

Fraud without damage is not ground for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 21; Dec. Dig. § 11.*]

3. JUDGMENT (§ 9*)—DISQUALIFICATION OF JUDGE—PERSONAL INTEREST—EFFECT.

At common law the fact that a person acting in a judicial capacity had a personal interest in the result did not make the judgment void, but it was a mere error or irregularity not going to the jurisdiction and which could be corrected on review; there being an exception in the case of inferior boards or tribunals for whose determination there was no provision for review.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 9;* Judges, Cent. Dig. §§ 237, 239.]

4. JUDGMENT (§ 9*) — DISQUALIFICATION OF JUDGE—EFFECT.

Where statutes expressly forbid persons performing judicial functions from acting where they are interested, such interest, if subsequently shown, renders the decision void.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 9;* Judges, Cent. Dig. §§ 237, 239.]

5. MUNICIPAL CORPORATIONS (§§ 488, 489*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—ESTOPPEL TO ATTACK PROCEEDINGS.

Act March 6, 1889 (St. 1889, c. 76) § 6, provides that the council shall appoint three commissioners to assess benefits and damages; the qualifications of the commissioners not being specified, and by sections 9, 10, and 13 the commissioners are required to make a written report to the council which shall give 10 days' notice to show cause why the report should not be confirmed, and, if no objection is made, the council under section 14 may confirm the report, and by section 15 a certified copy of the report as confirmed becomes the assessment roll. *Held*, that a property owner who failed to appear before the council and make objection waived the objection that the commissioners were disqualified because they owned property in the assessment district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147–1152; Dec. Dig. §§ 488, 489.*]

6. CONSTITUTIONAL LAW (§ 290*)—DUE PROCESS—ASSESSMENT PROCEEDINGS.

The constitutional mandate of due process of law is not violated by Act March 6, 1889 (St. 1889, c. 76) §§ 9, 10, 13, 14, empowering a city council to set a time for the hearing of objections to the report of commissioners in assessment proceedings, and to determine such objections.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 873; Dec. Dig. § 290.*]

7. PLEADING (§ 9*)—MATTERS OF FACT OR CONCLUSIONS — VALIDITY OF PARTICULAR ACTS.

Plaintiff, seeking to enjoin the collection of an assessment because land outside the assessment district had been assessed, alleged the assessment of the whole of a particular lot, and copied the assessment in his complaint, but did not set out the plat which by act of March 6, 1889 (St. 1889, c. 76) § 10, is made a sufficient description. *Held*, that the court on an examination of the copy set out in the complaint, and in view of the rule that the pleadings are to be taken most strongly against the pleader, would not presume an attempt to do that which the statute forbids, but would treat the allegation as a mere conclusion of law not supported by the facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the United Real Estate & Trust Company against T. L. Barnes, as Superintendent of Streets of the City of San Diego. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 108 Pac. 306.

James E. Wadham and Chas. P. Pritchard, for appellant. Ward, Wells & Ward, for respondent.

SHAW, J. This is an action against the defendant, as superintendent of streets in the city of San Diego, to enjoin the collection of a street assessment and to declare such assessment void. The court below sustained a general demurrer to the complaint, and gave judgment for the defendant, from which the plaintiff appeals. The assessment in question was made in a proceeding under the act of March 6, 1899 (St. 1889, p. 70), to raise funds for the payment of the costs, damages, and expenses of opening a part of Twenty-Eighth street in the city of San Diego. The plaintiff owns land lying within the boundaries of the district assessed. The assessment upon his land amounted to the sum of $1,080.

1. The first objection to the validity of the assessment is that the assessment district does not include all the land benefited by the opening of the street. It is alleged that a certain tract of land is situated on the side of said street opposite to that of plaintiff, and that it is as much benefited by the opening thereof as the lands of the plaintiff. The statute under which these proceedings were had provides that the city council shall pass a resolution of intention describing therein the boundaries of the district of land to be assessed to pay the damages, costs, and expenses, that notice of such resolution shall be posted and published, and that within 10 days thereafter any person interested in the extent of the assessment district may make objections thereto, and at the next meeting thereafter the council must fix the time for hearing such objections and notify the person objecting thereof by mail. At the hearing thus provided, the council must "hear the objections urged, and pass upon the same and its decision shall be final and conclusive." Sections 2, 3, 4, 5. These proceedings were had in all respects as required by law. No objections were made by the plaintiff, or by any other person, and, after the time for the objections had expired, the council ordered that the street be opened and appointed commissioners to assess the benefits and damages. The decision thus made by the council is conclusive upon the plaintiff. The case cannot be distinguished in this particular from Duncan v. Ramish, 142 Cal. 691, 696, 76 Pac. 663, 665, and the numerous cases there cited. In that case the court said with respect to a similar objection: "It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance in the proceeding prescribed by law, setting forth his reasons why the improvements should not be made. Upon this the council must decide the question, and its decision is final." In the same case, speaking of an objection with respect to the size of an assessment district, it was further said: "It must be held that the property owner, having this right, must avail himself of it, or be concluded by the decision of the council." The "right" here referred to was the right to make objections to the extent of the assessment district. This case, it is true, arose under the Vrooman act in a proceeding for paving or macadamizing a street, and not under the street opening act. But the legislative power of the state, exercised in both instances by the city council, is the same in one case as in the other. The provisions of the statute as to the proceedings in the council and the conclusive effect of its decisions are substantially the same, and the same principles must apply.

2. Another objection is that two of the commissioners appointed by the council to assess the benefits and damages were interested as owners of property lying within the district to be assessed, and that one of these two was the father of the owner of one of the parcels to be taken for the proposed street. The contention is that this interest disqualifies the commissioners to act as such, and that the assessment reported by them is consequently void. The statute provides that, after making the assessment, the commissioners shall make a written report thereof to the council, and thereupon notice is to be published for 10 days requiring "all persons interested to show cause, if any, why such report should not be confirmed before the city council," on a day to be stated in said notice. Sections 9, 10, 13. If objections are made, the time for hearing the same shall be fixed, and the objectors must be notified thereof by mail. Upon the hearing, or, if no objections are made, then upon the first meeting after the day set for showing cause, the council shall proceed to pass upon the report and may confirm, correct, or modify the assessment, or may order the commissioners to make and report a new one. Section 14. In this case the assessment was made and reported, the time was fixed for the making of objections, and the required notices were all duly given. No objections were made within the time fixed, or at all, and at the next meeting thereafter the council proceeded to pass upon the report and thereupon duly confirmed and adopted the report and the assessment.

In regard to the appointment and qualifications of the commissioners, the act merely directs that the city council, after it has acquired jurisdiction as provided in section 5, "shall appoint three commissioners to assess the benefits and damages and have general supervision of the proposed work or improvement." Section 6. There is no direction that the commissioners shall be disinterested persons nor any specification as to their qualifications. The act further provides that after the council has passed upon the report and assessment, and has confirmed it, the city clerk "shall forward to the street superintendent a certified copy of the report, assessment and plat, as finally confirmed and adopted by the city council. Such certified copy shall thereupon be the assessment roll." The assessment is then immediately due and payable and becomes a lien upon the property. Section 15. It is not alleged that the assessment upon the plaintiff's land was excessive, or that the damages allowed for the land taken was too high, or that the proceedings were in any particular unfair or unjust as a matter of fact. We are not called upon to determine what would have been the effect if there had been such allegations, nor to determine whether it is necessary to aver such injury in order to invoke the equity powers of the court. The argument that the appointment of interested persons as commissioners constituted actual fraud upon the other property owners may be answered by applying the rule that fraud without damage cannot be made the basis of an action. Redy v. Butler, 69 Cal. 580, 11 Pac. 463; Marriner v. Dennison, 78 Cal. 212, 20 Pac. 386; Holton v. Noble, 83 Cal. 9, 23 Pac. 58; London, etc., Co. v. Liebes, 105 Cal. 207, 38 Pac. 691; Morrison v. Lods, 39 Cal. 385. For the purposes of this case, we will assume that the true ground of the objection is not that the assessment by interested persons constitutes actual fraud, but that it is contrary to public policy, and that in such cases it is unnecessary to show actual injury. There are cases holding that an assessment made by persons who own land within the district and subject to the assessment will be set aside when objection is made at the proper time, although the statute does not expressly declare that such assessors shall be disinterested, or prescribe any qualification whatever. State v. Crane, 36 N. J. Law, 397; Commissioners v. Smith, 233 Ill. 423, 84 N. E. 376, 16 L. R. A. (N. S.) 292.

Upon this point, as well as upon that of the limits of the assessment district the plaintiff is concluded by the decision of the city council upon the hearing expressly provided by the statute after notice to the plaintiff giving him an opportunity to make the objection. At common law the fact that the person acting in a judicial capacity had a personal interest in the result did not make the judgment void, but was a mere error or irregularity, not going to the jurisdiction, but to be corrected only on appeal, or in some reviewing tribunal provided for that purpose. 1 Freeman on Judgments, § 145. There was an exception to this rule in the case of inferior boards or tribunals, of whose determinations no review was provided. Ibid. But, where statutes expressly forbid persons performing judicial functions from acting where they are interested, it has been held that this common-law rule was changed thereby, and that, if such interest were subsequently shown, the decision would be declared void. 1 Freeman on Judgments, § 146; Carr v. Duhme, 167 Ind. 80, 78 N. E. 322; Estate of White, 37 Cal. 190. In accordance with these principles, it has been held, and it appears to be the settled rule, that, where the determination of the interested tribunal is required to be reported to another body for correction and confirmation and opportunity is there afforded after reasonable notice to make objections on account of such interest, a failure to appear and make the objection operates as a waiver, and precludes the party from afterwards raising it or claiming that the determination is for that reason void. Commissioners v. Smith, supra, page 426 of 233 Ill., page 376 of 84 N. E., 16 L. R. A. (N. S.) 292; Ipswich v. County Commissioners, 10 Pick. (Mass.) 519; Porter v. Purdy, 29 N. Y. 108, 86 Am. Dec. 283; Pittsburg v. Cluley, 74 Pa. 264; Valparaiso v. Parker, 148 Ind. 383, 47 N. E. 330; Osborn v. Sutton, 108 Ind. 446, 9 N. E. 410; Carr v. Duhme, supra. The principle of these decisions is that as the defect is not jurisdictional, because the statute does not expressly forbid such action, the objection constitutes a mere irregularity which must be urged at the hearing provided for that purpose the same as any other objection to the regularity or fairness of the assessment. In the case at bar the commissioners fixed the damages and apportioned the same to the several tracts of land within the district as an assessment. Under the statute, this must be reported to the city council for confirmation before it is of any effect whatever. When it comes before the council, that body again takes up the matter, and, if the assessment is confirmed, it becomes a lien upon the property. But it has no force or effect whatever until it is promulgated by the council. It is, in effect, an assessment made by the council itself. Under such circumstances, the fact that one or more of the commissioners who made the preliminary report on which the assessment is based is interested is not sufficient to invalidate the assessment unless the objection is made at the hearing before the council. There is no lack of due process of law. The provision that a body such as the city council must determine such objection, and that a time must be set for the hearing thereof, of which reasonable notice must be given, sufficiently answers the mandate of the Constitution with regard to due process of law. Chase v. Trout, 146 Cal. 359, 80 Pac. 81; Lent v. Tillson, 72 Cal. 424, 431, 14 Pac. 71; Duncan v. Ramish, supra.

3. The only other objection made to the assessment is that it is irregular and void for the reason that land lying outside of the district was assessed for a portion of the benefits. The plaintiff was the owner of a tract of land in San Diego situated within what is known as Pueblo lot 1,159, and constituting the southwest quarter of said lot. The assessment district included the southwest quarter and the northwest quarter of this lot, but no other part thereof. The complaint alleges specifically that the commissioners assessed the whole of Pueblo lot 1,159, including the northeast and southeast quarters thereof. The assessment it-

self, however, is copied in the complaint and referred to in support of the allegations. We think the plaintiff has misunderstood the description as set forth in the assessment, and that, when properly construed, it does not include the portions of lot 1,159 not situated within the assessment district. The statute provides that the commissioners shall make a written report of the assessment accompanying it with a plat of the district showing the land taken for the street and the lands assessed, the relative location of each district, block, lot or portion of lot, and its dimensions. It further provides that "each block and lot, or portion of lot, taken or assessed, shall be designated and described in said plat by an appropriate number, and a reference to it by such descriptive number shall be a sufficient description of it in any suit entered to condemn, and in all respects." Section 10. The complaint does not set forth the plat nor give any data from which we can determine what portions of the district were included in the respective lots thus designated by an arbitrary number on the plat. The description in the assessment itself is as follows: "Assessment No. 3096 subdivision Pueblo lot 1,159 amount assessed $1080," and below is appended a statement that the "lands referred to as in Pueblo lot 1,159, are described with reference to the map of said addition on file in the office of the recorder of said San Diego county," and that all the property is situated in the city of San Diego, county of San Diego, state of California. The proper interpretation of this description, taken with reference to the proceedings in which it was made, is that the tract of land thereby assessed is the land designated on the plat as No. 3,096, and that it is in Pueblo lot 1,159. It should not be construed as stating that it constitutes the whole of said lot, but only that part thereof embraced within the tract designated on the plat as No. 3,096. The pleading is to be taken most strongly against the pleader. The direct allegation that land outside the district was assessed purports to be based on those portions of the assessment which are copied in the complaint and made an exhibit thereto. The particular portion of the assessment which explains what land is included within assessment No. 3,096 is not given. In view of this palpable omission and of the aforesaid provisions of section 10 of the act, we will not presume that the commissioners attempted to do that which the statute forbids them to do, and assessed the damage upon lands not within their jurisdiction, but will treat the statement that the whole of lot 1,159 was assessed as a mere conclusion of law, not supported by the facts set forth.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

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159 Cal. 233

RECLAMATION DIST. NO. 70 v. BIRKS.

(Sac. 1,784.)

(Supreme Court of California. Jan. 10, 1911. Rehearing Denied Feb. 9, 1911.)

1. Drains (§ 73*)—Reclamation Districts—Assessments—Validity.

One sued for a reclamation assessment, levied to purchase property belonging to an old district, could show that a majority of the trustees were common to both districts, and were directly and financially interested in the transaction enabling them to collect a personal debt against the old district.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

2. Drains (§ 73*)—Reclamation Districts—Trustees.

A reclamation assessment is not presumed to be illegal or unfair, merely because a majority of the trustees were trustees of an old district, and the districts had or proposed to have business dealings through their boards.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

3. Corporations (§ 318*)—Directors in Common—Presumptions.

That corporations dealing with each other have directors in common warrants no presumption of unfair action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. § 318.*]

4. Drains (§ 19*)—Reclamation Districts—Changes—Effect.

The inclusion in a new reclamation district of an old district does not affect debts of the old district for which no provision is made, they remaining a lien against the land therein.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 19.*]

5. Drains (§ 19*)—Reclamation Districts—Debts—Land Liable.

A debt against the property of a quasi municipal corporation, such as a reclamation district, payable by the owners of the property within the district according to benefits cannot be transferred to property not within the district when the debt was created, and not benefited by the work done.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 19.*]

6. Drains (§ 71*)—Reclamation Districts—Assessment—Validity.

All land within a reclamation district being conclusively presumed to be benefited by the improvement, an assessment of a whole tract at a specified rate an acre is not invalid because part of the land needs no reclamation.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 71.*]

7. Drains (§ 66*)—Reclamation Districts—Assessment—Validity.

The provision in the act creating a reclamation district (St. 1905, c. 552) that its management shall be subject to the provisions of the Political Code, gives the power of assessment according to the scheme provided by the Code.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 66.*]

Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Reclamation District No. 70 against John Birks. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Rehearing denied; Beatty, C. J., dissenting.

Arthur C. Huston, for appellant. A. H. Hewitt and A. L. Shinn, for respondent.

HENSHAW, J. This is an action by plaintiff against a property owner within the district, to collect an assessment levied for purposes of reclamation. Reclamation District No. 70 is a legislative creation. It came into existence in 1905, and embraced within its limits Swamp Land District No. 70 and other land which it is alleged was territory of Reclamation District No. 763. Judgment passed for plaintiff, and the defendant Birks appeals. Certain of the objections which he presents to the enforcement of the assessment go to asserted illegality in the creation of the district itself. These objections are satisfactorily answered by Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277, where, under a like effort to collect the same assessment, the questions came under review. They require no further discussion here. It is urged, however, that the assessment is illegal for grounds and reasons not presented in the Sherman Case, and therefore not considered by the Court of Appeal, and these merit attention.

Tarke and Summy were trustees of Swamp Land District No. 70 ("Old 70"). They were also trustees of plaintiff. Appellant undertook to show that Mr. Peck, the engineer, who presented the report and plan of the proposed reclamation operations of plaintiff, was appointed by these trustees; that part of this proposed plan was the payment of $18,000 for the rights of way and levees belonging to Old 70; that the board of supervisors having no power to reject, revise, or modify such proposed plan (Pol. Code, § 3455; Reclamation District 535 v. Clark, 155 Cal. 345, 100 Pac. 1091) were compelled to and did adopt the plan which thus embraced an assessment of $18,000 for the purchase of this property belonging to Old 70; that Messrs. Tarke and Summy were owners of warrants issued by Old 70 to the amount of many thousands of dollars; that the purpose of the provision for the purchase of the property of Old 70 for $18,000 was to enable Messrs. Tarke and Summy to secure the payments of their warrants issued by Old 70, the validity of which was in question and doubtful; that these trustees of Old 70 fixed the price at which the property of Old 70 would be sold by Old 70 to plaintiff, and that these trustees constituted a majority of the board of trustees of Old 70 which was to sell, and of plaintiff which was to purchase; that in furtherance of their design, when the assessment was levied by plaintiff, these trustees surrendered the warrants of Old 70 held by them and received therefor warrants of plaintiff, the exchange being made through their own action as trustees of plaintiff. In addition, appellant sought to show further direct and pecuniary interest upon the part of the trustees Tarke and Summy by establishing that they had deeded rights of way to the plaintiff for which rights of way they were to be paid by moneys raised under the assessment contemplated by the plan of the engineer selected and appointed by them. To much of the testimony thus sought by appellant to be introduced the court sustained objections. Appellant contends that its defense against the validity of this assessment was thus unduly restricted, and that it was denied its right to show that these trustees were disqualified from acting because of their personal interest in the matter, which personal interest was direct and pecuniary. We entertain no doubt but that the defendant should have been allowed to make this proof. Reclamation District v. Turner, 104 Cal. 334, 37 Pac. 1038. Reclamation District v. McCullah, 124 Cal. 175, 56 Pac. 887. No presumption of illegality or unfairness attaches merely from the fact that Messrs. Tarke and Summy were trustees of both districts and that these districts had, or proposed to have, business dealings with each other through their boards of trustees. No such presumption arises merely because two corporations which have certain directors in common deal with each other. San Diego v. Pacific Beach R. R. Co., 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788. The gravamen of the matter here is that it was sought to be shown that these trustees, who constituted a majority of the boards, and were the only ones who acted, were directly and financially interested in certain of these transactions, that they proposed to sell certain of their own lands to plaintiff, that they proposed that plaintiff should ostensibly buy the property of the old district of which they were trustees for a price which they would name to the end that the debt of the old district, of which they were heavy creditors, might be paid.

But this discussion need not be elaborated, for the reason that, regardless of the disqualification of the trustees in fixing the price and attempting to purchase the properties of Old 70, the assessment is invalid, because by the assessment a lien was imposed upon the lands of appellant within plaintiff district for the purpose of purchasing property which was owned by the district and could therefore not be bought. In People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, the question of the political character of these reclamation districts is discussed in the light of the former decisions of this court, and it is held that they are, in strictness, not corporations at all, but quasi corporations, "rather governmental agencies to carry out a specific purpose, the agency ceasing with the accomplishment of the purpose." Their political character and status is similar to that of school districts.

In the recent case of Pass School District v. Hollywood, 156 Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, this court was called upon to determine the ownership of the property of a school district, which by the legal annexation of certain land had passed into another school district. It was contended that the property having been paid for by the inhabitants of the school district in which it was originally situated, title to it still remained in the original district, with the right in that district of leasing or selling it. But by this court it was pointed out that school districts are like reclamation districts, quasi municipal corporations, and that, subject to such constitutional limitations as may exist, the power of the Legislature over them is plenary; that the Legislature may divide, change, or abolish them at pleasure; that the beneficial title to all the property owned by the district is in the state, and that when, by the change of boundaries this property falls within a new district, the beneficial title still remains in the state, and, in legal contemplation, the state has merely placed the legal title in the hands of other trustees to manage it. It is said: "The legislative power being full and complete over the matter, as a part of that power it may make provision for the division of the property and the apportionment of the debts of the old corporations when a portion of its territory and public property are transferred to the jurisdiction of another corporation, but in the absence of such provision the rule of the common-law obtains, and that rule leaves the property where it is found, and the debt upon the original debtor." The principle and the rule are the same in the case at bar. The Legislature in creating the plaintiff and embracing within its territorial limits all of Old 70, vested the legal title of the properties of Old 70 in the plaintiff, and upon the trustees of plaintiff devolved the future management of that property. Having made no provision for the existing debt of Old 70, that debt still remains a debt against Old 70, and the lien is a lien against the real property of Old 70. The absorption of Old 70 by plaintiff, and, to that extent, the extinguishment of the existence of Old 70 could not, of course, even if the Legislature so designed (and it is not to be supposed that it did so design) operate to impair any of the rights of the creditors of Old 70 which were in existence at the time that plaintiff was created. Nor would it be permissible for the Legislature so completely to destroy the existence of Old 70 as to render the just claims of its creditors unenforceable against it.

In the case of reclamation districts, the operation of this rule of law works no individual hardship. If the reclamation work which Old 70 did was of value before its absorption into the new district, it became of no less value by the change of management. The property owners of Old 70 are still receiving all the benefits which may follow the works of reclamation which they constructed, and it is but just that they should be called upon to do what originally they undertook to do, namely, to pay for those works. Upon the other hand, it would be most manifestly unjust, if not illegal, to impose upon all of the land of the new district the cost of the reclamation works which had been constructed by the old district. The old district forms but a part of the territory of the new district. Much of the land of the new district could not be benefited by the reclamation works of the old district, and to declare that the debt of the old district was a debt of the new, or to do, in effect the same thing as the trustees here undertook to do, by purchasing the property of the old district, would result in imposing a lien upon lands under the guise of special benefits, which lands could, in the very nature of things, receive no benefit from the work. To illustrate: Conceive the case where a reclamation district has incurred an indebtedness for reclamation works which have proved inefficient and abortive; the debt remains, and the work is entirely without benefit, even to the district which ordered it. If by the creation of a new district, embracing the territory of the old it were sought to be held that the debts of the old district, by operation of law, became the debts of the new, it would result in imposing a pro rata proportion of that debt upon land never within the scheme of reclamation when the debt was incurred—land which was not in fact benefited, and which it was never in contemplation could be benefited. Thus gross wrong would be perpetrated upon property owners, in absolute violation of the law which justifies the imposition of this species of tax burden upon their land solely upon the theory that their land will derive a commensurate amount of benefit from the work for which the assessment is levied.

There is no denial in this of the power of the Legislature to apportion indebtedness where the boundaries of municipal or quasi municipal corporations have been changed, where one has been absorbed by another, where two or more have been consolidated, or where a different class or kind of municipal corporation has been created which comprises the territory of a formerly existing corporation. 28 Cyc. 175 et seq. The principle which is here announced is simply this: That where a debt has been imposed upon the property of a quasi municipal corporation such as a reclamation district, which debt is to be paid by the owners of the property within the district in proportion to the benefits which their land receives from the work done, it is not within the power of the Legislature to transfer and impose this debt upon property not within the district at the time the original obligation was created, and which was not benefited by the work done. Thus it may be conceded that the Legislature would have the power in such a case as this to impose the obligation of the debt of Old 70 upon New 70, but this transfer of the indebtedness would not make it a lien upon all the property of New 70, and when an assessment came to be made for the extinguishment of the debt, only the property of Old 70 benefited or supposedly benefited by the work which the indebtedness represented would be legally assessable for this debt.

While what has heretofore been said results in the necessary determination that the assessment is invalid, in contemplation of another assessment or like assessments, it is proper to notice a contention made touching the invalidity of this assessment, not as a whole, but as levied upon particular tracts of land. By way of illustration, but not in accordance with the precise facts, the question may be thus stated: A. owns a tract of land of 500 acres. The assessment is levied upon his whole 500 acres at the rate of $3 an acre for the benefits to arise from the proposed work. He undertakes to show that of the 500 acres 100 acres is of high land of such character that it needs no reclamation work of any kind, and consequently cannot be benefited by any reclamation work which may be done within the district. He contends, therefore, that as all of his land has been assessed for benefits at the rate of $3 an acre, under these circumstances it necessarily results that certain of his lands, being nonassessable because deriving no special benefit, have been unlawfully assessed, and an unlawful lien imposed upon them, and, also, that the aggregate assessment imposed upon all of his lands at the rate of $3 an acre, namely, $1,500, is in excess of the amount justly chargeable, since but 400 acres should have been assessed at the same rate.

In answer to this, it may be freely said, and it is a matter much to be deplored, that inequalities and injustices in individual cases do result, and must necessarily result, from the operation of the general scheme of assessments for special benefits adopted in this state. Since the state itself can exercise this power to specially tax only, because in theory the moneys raised by the tax will be expended for a direct benefit to the land equal in value to the amount of the tax, it would logically follow that when the proposed improvement is completed and it is apparent that the property has received no benefit from it, the tax itself should fall. In some jurisdictions this is recognized so that the assessment is collected only after the work is completed and the benefits are actually demonstrated. If by inherent defect in the plan, or from similar cause, the work prove abortive and of no benefit, the state bears the burden. But under our system the collection of the assessment for works of problematical value may be enforced in advance of the work itself, and if the work should prove a failure the property owner is remediless. Many hardships have resulted, and must result, while the prevailing system is in force in this state. But in the particular matter here the subject of inquiry, the injury is apparent, rather than real. All of the land within the limits of the reclamation district created by the Legislature is conclusively presumed to be land which will be benefited by works of reclamation. In the case of street work the assessment is upon frontage regardless of the dept of the lot. Thus, a man whose lot is of 50 feet frontage and 50 feet depth, is assessed as much as the man whose lot has 50 feet frontage and 500 feet depth. So, in the present instance, in the view of the commissioners, A.'s land was benefited to the extent of $1,500. They treated this tract of land as a whole, and assessed it at $3 an acre upon 500 acres instead of assessing it for $3.75 an acre upon 400 acres. We do not think the assessment illegal because of the method adopted.

Section 2 of the act creating plaintiff (St. 1905, c. 552) provides that "the management and control of said reclamation district is hereby made subject to the provisions of the Political Code of the state of California, and other laws of this state, relative to reclamation districts formed under the provisions of said Political Code." It is said by appellant that this is the only language in the act which bears upon the question of the power to assess, and this is true. It is contended that the section quoted is not broad enough to confer upon plaintiff the power of assessment. With this we cannot agree. There is no function which a reclamation district has the power to perform, saving that of the preliminary election of its trustees. There is no work it can do. There is no management and control for it to exercise, unless it can raise money by assessment for the purpose of its creation, and upon most obvious considerations; therefore, it must be held that when the Legislature declared that the management and control should be exercised in subordination to the provisions of the Political Code, and as in that Code is found a complete scheme of assessment, which scheme was here followed, the assessment in question was in the power of the plaintiff to levy.

No other propositions seem to call for consideration.

The judgment and order appealed from are reversed and the cause remanded for further action.

We concur: MELVIN, J.; LORIGAN, J.

(159 Cal. 801)

RECLAMATION DIST. NO. 70 v. BLACKMER et al. (Sac. 1,785–1,794.)

(Supreme Court of California. Jan. 10, 1911. Rehearing Denied Feb. 9, 1911.)

Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Actions by Reclamation District No. 70 against Wesley Blackmer and others; against J. W. Browning and others; against J. W. Smith and others (two cases); against C. R. Weis and others; against Elizabeth Winship; against Oliver E. Winship and others; against Henry Wilder and others; against Charles Havens; and against Henry Sills and others. From the judgment and from an order, defendants appeal. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

Arthur C. Huston, for appellants. A. H. Hewitt and A. L. Shinn, for respondent.

PER CURIAM. It having been stipulated that decisions in the above-entitled cases should depend upon the decision in Reclamation District No. 70 v. John Birks (Sac. No. 1,784), this day decided, 113 Pac. 170, and that such judgment of this court as might be made and given in the case of Reclamation District No. 70 v. John Birks (Sac. No. 1,784) should also be given in the above-entitled cases, it is ordered as to the above-entitled cases, and each of them, that the judgment and order appealed from be reversed.

(159 Cal. 297)

GALBREATH v. HOPKINS et al. (Sac. 1,773.)

(Supreme Court of California. Jan. 12, 1911.)

1. Waters and Water Courses (§ 124*)—Surface Water—Injunction.

Where water, wrongfully collected and discharged by defendant, flowed down and spread over plaintiff's field sown to grain and actually damaged him, there was an invasion of plaintiff's property rights, authorizing the recovery of nominal damages and the granting of an injunction, and evidence of any specific amount of damage was unnecessary.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 142; Dec. Dig. § 124.*]

2. Waters and Water Courses (§ 119*)—Surface Waters—Diversion.

An owner of upper land may have the surface waters from his land flow in their natural course down on the lands below, but he may not, by the construction of ditches, turn waters, which have naturally accumulated in ponds on his land, on the land of his neighbor lower down, and, where water is thereby caused to flow on the land of another which would not naturally flow thereon, there is an invasion and injury to his right of property and a nuisance per se, the continuance of which he may restrain.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131–134; Dec. Dig. § 119.*]

3. Waters and Water Courses (§ 152*)—Surface Waters—Prescription.

Evidence *held* not to justify a finding that an owner of land acquired by prescription a right to collect surface water on his land and discharge the same on the land of another.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

4. Waters and Water Courses (§ 119*)—Surface Waters—Drainage.

An owner of land on which surface waters accumulate has a right by means of artificial ditches to redeem his land by discharging the waters only so far as he will not thereby injure his neighbor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 131; Dec. Dig. § 119.*]

5. Waters and Water Courses (§ 150*)—Surface Waters—Drainage.

Where a landowner is exercising a right of disposing of surface waters, and is doing so entirely on his own land, an adjoining landowner, who may be so situated that a disregard of his rights may cause him injury, is not bound, in order to avoid being denied relief when injury is actually done him, to commence an action to prevent possible damage.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 153; Dec. Dig. § 150.*]

6. Injunction (§ 12*)—Restraining Use of Property.

An injunction against the legitimate use of one's property will not be granted at the suit of another, unless it clearly appears that its use in the given way will necessarily cause an irreparable injury to the party complaining, and a mere possibility or anything short of a reasonable probability of injury is insufficient to warrant an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

7. Waters and Water Courses (§ 150*)—Surface Waters—Prescription.

Where one is attempting to exercise legal rights by disposing of surface waters entirely on his land, and injury to an adjoining proprietor may never result by reason thereof, it will be presumed that he will so exercise his rights that no injury will occur, and, if in the exercise of his legal rights his acts shall become injurious, it will be presumed that he will cease to further exercise his rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 150.*]

8. Waters and Water Courses (§ 164*)—Flowage—Prescription.

To acquire a prescriptive right to overflow the land of another, there must have been an uninterrupted enjoyment under claim of right for five years, and there must have been an actual occupation by the flow of water, to the knowledge of the owner of the land, and such as to occasion damage and give him a right of action, and there must have been such a use of land and such damage as will raise a presumption that he would not have submitted to it unless a right existed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 210–212; Dec. Dig. § 164.*]

Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Elizabeth Galbreath against J. P. Hopkins and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed.

W. H. Carlin, for appellant. M. E. Sanborn, for respondents.

LORIGAN, J. This action is brought to enjoin defendants from maintaining a ditch through which surface waters, accumulated in a natural lake or pond on the lands of defendants, are drained and discharged upon the land of plaintiff. A judgment was entered in favor of defendants from which, and an order denying her motion for a new trial, plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff is the owner of 360 acres of land in Sutter county, sloping in a general southerly or southeasterly direction. Commencing several miles above her land, and extending through it, is a natural depression commonly known as Live Oak Slough, which is of sufficient capacity to drain from all the land through which it flows, and in proximity to it on a higher level, the surface waters which are naturally tributary to it, including the surface waters from the lands of plaintiff. This slough is not, in legal contemplation, a water course, but is merely a natural depression into which the surface waters from the surrounding country gather in seasons of rainfall, and flow down into Feather river. The land of plaintiff is valuable agricultural land, especially adapted to the growing of grain, and the bed of the slough, on account of its moderate depression, is, except in seasons of high water, entirely capable of cultivation, and is by the plaintiff sowed to grain, and was so planted when the acts of defendants herein complained of occurred.

The lands of defendants consisted, in 1893, when the ditch hereafter mentioned was constructed, of part of a large tract owned by one Joseph Chandon, and prior to its subdivision known as the "Chandon land." Those portions of the lands of defendants through which the ditch in question was constructed lie to the north of the lands of plaintiff, and at a higher elevation, and slope down to and include part of the natural bed of Live Oak Slough, but are slightly depressed below the east bank thereof, and in ordinary seasons such lands are relieved from surface waters by their flowing into such depression and percolating into said slough. But prior to 1893, while the entire tract was owned by Chandon, in seasons of excessive rainfall, the surface waters were wont to collect upon that tract and form two shallow ponds or lakes, distant about two miles from each other. These ponds were many acres in extent and were much below the surface of the surrounding country, but higher in elevation than the land of plaintiff, and the accumulated surface waters therein, on account of numerous natural ridges, or elevations of land between them and Live Oak Slough, could not be naturally got rid of except by percolation, seepage, and evaporation, and would never reach Live Oak Slough, unless by artificial aid through the construction of ditches for that purpose. In order to accomplish this, Joseph Chandon and others, in the year 1893, dug and excavated a ditch from the lower pond situated on the lands now owned by defendants. This ditch was about 300 feet long and of sufficient width, depth, and grade to slowly but effectually carry, by connection between them, the waters from both ponds and empty them into Live Oak Slough. This ditch was constructed entirely on the lands now owned by defendants, its head being a little over two feet higher than its mouth, and it drained the waters into Live Oak Slough, upon the lands of defendants and about 40 rods north of the land of plaintiff. When constructed in 1893 the waters carried down by this ditch did no damage to the land of plaintiff. Subsequent thereto and up to the spring of 1907 but little water passed through the ditch. In 1907 a tenant of the defendants undertook to excavate the ditch to allow the water to pass from the lower pond into the slough, but was enjoined by plaintiff. No water passed through the ditch in 1908. In 1909 the lower pond, which covered about 20 acres, was, through a heavy rainfall, filled with surface water to a depth of from 1 to 12 inches, which accumulated waters were by the defendants discharged through the ditch into the slough, and they flowed down and spread over the land of plaintiff, damaging a crop of grain sown thereon, whereupon plaintiff brought this action to enjoin any further diversion of the water from the ponds through this ditch upon her land.

In their answer to the complaint defendants set up a prescriptive right to discharge the waters from this lower pond through the ditch to the Live Oak Slough and upon the land of plaintiff, acquired, they allege, under an adverse user of upwards of 16 years. The court found in favor of defendants as to said prescriptive right, and in addition found that plaintiff had suffered no serious damage to her land by the discharge of the accumulated waters from the pond upon them in March, 1909, the time it is alleged in the complaint that she was so damaged, and when this action was begun. The appellant attacks these findings, particularly the finding in favor of defendants as to their prescriptive right, on the ground that the evidence is insufficient to support them.

Little need be said about the finding of the court that no serious damage was done to the land of plaintiff by the overflow complained of. The uncontradicted evidence is that the water discharged from the pond into the slough by the defendants flowed down and spread to a large extent over her field which was sown to grain and actually damaged her. There was, it is true, no evidence of any specific amount of damage in money which she suffered thereby. But proof of this was not necessary. If the overflow of her lands by defendants was wrongful, it was an invasion of her property rights. There was at least nominal damages, and she was entitled to an injunction restraining the defendants from further overflowing her land, because their conduct, if persisted in, and permitted by her without objection for the statutory period, would ripen into a right in their favor as an easement or servitude to overflow her land. The finding of the court can only be sustained upon the theory that, having found that the defendants had acquired a prescriptive right to turn the water upon the land of plaintiff, any damage she might have sustained thereby was damnum absque injuria and could not be complained of.

This brings us to the principal finding in controversy, namely, that sustaining the prescriptive right of defendants. The theory of counsel for defendants and the trial court was that the act of defendants' predecessor in constructing the ditch and draining the water from the pond into the slough in 1893 was then an invasion of the property rights of the plaintiff and her right of action against such predecessor accrued then, and that permitting the existence of the ditch and the drainage of the water there through from the ponds into the slough for upwards of five years (in fact defendants claimed for sixteen years) barred any right of action she originally had to prevent defendants from continuing to do so.

It is, of course, clear under the law that, unless the defendants have acquired a right by prescription to discharge the water from the pond by artificial means upon the land of plaintiff, they have no right to do so at all. While the owner of upper land has the right to have the waters from his land flow in their natural course down upon the lands below, he has no right, by the construction of ditches or other artificial means, to turn waters which have naturally accumulated in ponds or depressions on his land upon the land of his neighbor lower down (Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163), and, where water is thereby caused to flow upon the land of another which would not naturally flow thereon, this is an invasion and injury to his right of property and a nuisance per se, the continuance of maintenance of which he has the right to have enjoined. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92. So, if the defendants have any right to turn the waters from the pond on their land upon the land of plaintiff by means of a ditch constructed in 1893, it must proceed from a prescriptive right to do so, or it does not exist at all.

Now as to the question whether the evidence supports the finding of the trial court in this respect: We do not think it does. There is no doubt about the construction of the ditch in 1893 to drain the waters from the ponds, which it effectually did in a short time. It is not pretended, however, that such drainage precipitated any water upon the land of plaintiff, or that any damage was occasioned it thereby. While the court finds that water from this lower pond flowed through the ditch from its construction in 1893 up to and including 1896—some four years—if this conclusion finds any support in the evidence at all; it is extremely slight. But, accepting it as sustained by the evidence, the court does not find what quantity of water flowed therein, and it is quite certain that whatever did flow therein was an extremely small quantity. As a matter of fact, it is clear from the evidence that no attention was paid to this ditch or to the flow of water in it. The ditch was allowed to gradually fill up; it was for years made the burial place for large numbers of stock which had died on the ranch, and was further a common dumping place for litter accumulating thereon. It is clear, too, that whatever water passed through this ditch was of such a small quantity that it never reached the land of plaintiff, and, if it did not percolate through the ditch itself, it sunk and disappeared at its outlet upon defendants' own land at the slough. It is probable also that this neglected condition of the ditch, and the absence of any particular flow of water in it, was attributable to the fact that there were no seasons of heavy rainfall during these intervening years after its construction, or those that occurred were of such intermittent character that the water passed off through the ditch from the pond by easy stages and lost itself in the soil at its mouth. We only discuss this condition of the ditch, and the quantity of water drained through it, to show that in whatever condition the ditch was maintained, or to what extent the water flowed through it, never at any time until 1909, when this action was brought, did waters flow down upon plaintiff's land either to her damage or at all. Although it was threatened to discharge them upon her land in 1907, the only year since 1893 when there was a heavy rainfall in that vicinity, she prevented this by an injunction, and it was not until 1909 that they actually flowed upon her land and damaged her crops, and then she immediately instituted this action for an injunction.

The theory of the defendants upon which their prescriptive right is claimed is, as we have said, that the plaintiff should have brought her action as soon as the ditch was constructed and the drainage into the slough above her lands was commenced. But this ditch was constructed through the defendants' own land by their predecessor in title, and the waters from the pond were drained through it upon their own land. No right of the plaintiff was invaded or necessarily threatened by this action. The owner of land upon which surface waters accumulate has a right, by means of artificial ditches or other measures, to redeem his land by discharging or removing these waters therefrom, legally constrained only to the extent that he shall not thereby injure his neighbor. Where a landowner is exercising a right of removing and disposing of surface waters, and is doing so entirely upon his own land, an adjoining proprietor, who may be so situated that a disregard of his rights may cause him injury, is not bound, at the peril of being denied any relief when injury is actually done him, to commence an action to prevent this possible damage. An injunction against the legitimate use of one's own property will not be granted at the suit of another unless it clearly appears that its use in a given way will necessarily entail an irreparable injury to the complainant. As said in Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54: "A mere possibility, or anything short of a reasonable probability, of injury, is insufficient to warrant an injunction against any proposed use of property by its owner." It is always to be assumed, where a party is attempting to exercise legal rights which may never necessarily injure another if properly exercised, that the party will so exercise them that no injury will occur, and, if in their exercise they shall ultimately become injurious, that he will cease to further exercise them. This principle applies here. The defendants were exercising their legal rights in draining their property, and had a right to continue doing so until their conduct showed that they would or were actually injuring plaintiff thereby. Up to the time they actually did so in 1909, if plaintiff had brought an action to enjoin a maintenance of the ditch, the ready and reasonable answer to her suit would have been: This ditch is constructed on our land, and its outfall is on our land, and we have a legal right to so use our property. There is an easy grade from the outlet point to our land on the slough; we can and will control the water flowing from the pond, so that but such a quantity shall pass to the slough depression as shall be absorbed therein. It will, instead of flowing over your land, naturally percolate beneath it, and, instead of being a damage, actually benefit it. This being true, it is obvious that the plaintiff was not called upon to commence any action to restrain defendants until there was an actual invasion of her property rights, and, as this did not occur until the overflow of 1909, her action was properly commenced at that time. In Grigsby v. Clear Lake Water Works Co., 40 Cal. 396, speaking of the evidence which was essential to establish a prescriptive right to overflow land, this court said: "To acquire this right there must have been an uninterrupted enjoyment under claim of right for the period of five years. There must have been an actual occupation by the flow of water to the knowledge of the plaintiff and such as to occasion damage and give him a right of action. There must have been such a use of the premises and such damage as will raise a presumption that plaintiff would not have submitted to it unless the defendant had acquired a right so to use it." See, also, Carson v. Hayes, 39 Or. 97, 65 Pac. 814; Woodruff v. North Bloomfield G. M. Co. (C. C.) 18 Fed. 753; Miller v. Keokuk, etc., Ry. Co., 63 Iowa, 680, 16 N. W. 567; Austin & N. Ry. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350.

We have no doubt, as the court found, that it was of great benefit and advantage to the defendants to have their lands drained; but it also appears that it would be to the great injury and detriment of the plaintiff to have them drained on her land, and, as there was nothing to show that the defendants had acquired any prescriptive right to subject her land to this burden, she had a right to an injunction preventing them from doing so.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; HENSHAW, J.

14 Cal. App. 756

MEYER et al. v. LINCOLN REALTY CO.

(Civ. 766.)

(Court of Appeal, First District, California. Dec. 6, 1910. Rehearing Denied by Supreme Court Feb. 2, 1911.)

SPECIFIC PERFORMANCE (§ 30*)—CERTAINTY OF CONTRACT.

A contract to lease for 10 years at an "average monthly rental of $845 per month to be graduated" is too vague and uncertain to be specifically performed; it not being shown how the rental is to be graduated.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 83-85; Dec. Dig. § 30.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Milton Meyer and another, copartners, against the Lincoln Realty Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

M. H. Wascerwitz, for appellants. Deamer & Stetson, for respondent.

KERRIGAN, J. This is an appeal from a judgment rendered upon the refusal of the plaintiffs to amend their complaint after the demurrer of the defendant thereto had been sustained.

After some formal allegations and a description of the property involved in this litigation, the complaint sets forth: That on September 30, 1908, the defendant agreed with the plaintiffs to let, lease, and demise to them a certain store in a certain building to be erected on Marker street in San Francisco, which said agreement is as follows: "San Francisco, Cal., Sept. 30th, 1908. Received of Fest & Meyer the sum of five hundred (500) dollars, deposit to secure lease of store No. 6, 19:5x235 from westerly wall of emporium, for a period of ten (10) years from the date of possession at an average monthly rental of $845. per month to be graduated, with cash deposit of five thousand (5,000) dollars to be paid upon the execution of lease, upon which seven per cent (7%) interest is to be allowed; both principal and interest to be returned in equal monthly installments covering a period of ten (10) years. Lease to be delivered on or before October 1st and to be executed on or before October 3rd, 1908. Lincoln Realty Co., by A. O. Stewart, Sec. [Corporation Seal.]" That upon the execution of said agreement the plaintiffs paid to the defendant $500, the sum acknowledged to have been received therein. That after the making of this agreement, to wit, on October 1, 1908, the parties agreed upon all the terms and conditions of a lease, but that the defendant, without any reason or cause therefor refused to execute it. The complaint, after further alleging, among other formal matters, the willingness and ability of the plaintiffs to perform the covenants of the lease on their part, concludes with a prayer for a decree, directing that a lease embodying the terms of the agreement be executed by the defendant, and that it be specifically enforced. The lease upon which it is alleged the parties agreed, not being signed by the defendant, is within the statute of frauds and is void.

Passing the question of whether or not the receipt, considered as a contract, contains all its essential terms expressed with such a degree of certainty as to be valid under the statute of frauds (Brown on Stat. Frauds, § 371; 2 Kent's Comm. 511), we think with the defendant that it is plainly too vague and uncertain to be capable of specific enforcement. It is a well-settled principle of law that a contract, to be susceptible of specific enforcement, must be certain and unequivocal in all its essential terms. Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657, and note; Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; 26 Am. & Eng. Ency. of Law, 21. The receipt calls for an average monthly rental of $845 per month, to be graduated, and it is manifest, therefore, that the contract, in so far as the installments of the rent and the times of payment are concerned, is incomplete and uncertain. For example, how much a month was to be paid for the first year? Was it, as claimed by the plaintiff, $600, with a credit each month of a proportion of the $5,000 to be deposited as security for the lease, or was it some other amount? This question cannot be answered from the face of the receipt standing alone. At the time of drawing this receipt the amount of rent to be paid per month was a matter to be settled at some future negotiation between the parties. The view that this receipt is too vague and uncertain to be specifically enforced is supported by the authorities.

In Morrison v. Rossignol, 5 Cal. 65, the rent was to be fixed according to the value of the property involved; and it was held that a court of equity, always being chary of its power to decree specific performance, would withhold the exercise of its jurisdiction in that regard when, as there, no certain basis for the payment of rent could be ascertained from the face of the lease. So, where a part of the purchase price of a piece of real estate was to be covered by a mortgage, and the contract of sale failed to specify how long the mortgage was to run, or what rate of interest the sum of money thereby secured was to bear, it was held that such an agreement was too uncertain to support a judgment for specific performance. Burnett v. Kullak, 76 Cal. 535, 18 Pac. 401. So in Gelston v. Sigmund, 27 Md. 334, an agreement to allow a tenant to retain possession of certain property upon paying the same rent the landlord might be able to obtain from others was held not to be such an agreement as a court of equity will enforce because it lacked certainty. See, also, Smith v. Taylor, 82 Cal. 541, 23 Pac. 217; Potts v. Whitehead, 20 N. J. Eq. 55; Huff v. Shephard, 58 Mo. 242; Fry, Spec. Perf. § 1601, p. 670.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

14 Cal. App. 765

CALIFORNIA NAT. BANK v. WELDON.

(Civ. 766.)

(Court of Appeal, Third District, California. Dec. 8, 1910. Rehearing Denied by Supreme Court Feb. 6, 1911.)

1. EVIDENCE (§ 183*)—SECONDARY EVIDENCE—SUFFICIENCY OF PREDICATE.

Where secondary evidence of the contents of a lost instrument is sought to be introduced by a party, he must show that he has exhausted in a reasonable degree all accessible sources of information and means of discovery of the instrument, and he must show a diligent and bona fide search for the instrument in the place where it belongs, or is most likely to be found.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605–637; Dec. Dig. § 183.*]

2. EVIDENCE (§ 187*)—APPEAL AND ERROR (§ 970*)—SECONDARY EVIDENCE—SUFFICIENCY OF PREDICATE.

The sufficiency of the proof of loss of an instrument to admit secondary evidence of its execution and contents is left to the discretion of the trial judge, and his ruling in admitting secondary evidence will not be disturbed, unless the proof is manifestly insufficient to warrant secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 674, 675; Dec. Dig. § 187;* Appeal and Error, Cent. Dig. § 3850; Dec. Dig. § 970.*]

3. APPEAL AND ERROR (§ 992*)—REVIEW—QUESTION OF FACTS—SECONDARY EVIDENCE—SUFFICIENCY OF PREDICATE.

Where there is some evidence tending to show the loss of an instrument so as to permit secondary evidence of its execution and contents, the court on appeal will not review its sufficiency in the absence of the slightest evidence to contradict the fact of loss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3850; Dec. Dig. § 992.*]

4. BILLS AND NOTES (§ 526*)—LOSS OF CHECK—EVIDENCE.

The rule governing the sufficiency of the evidence of the loss of a check to excuse presentment and notice of dishonor, if they may be excused, is the same as the rule governing the admission of secondary evidence to prove the execution of an instrument on proof of loss.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 526.*]

5. BILLS AND NOTES (§ 397*)—CHECKS—PRESENTMENT—NOTICE OF DISHONOR—EXCUSE.

Where presentment of a check is excused, notice of dishonor is also excused.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029–1044; Dec. Dig. § 397.*]

6. BILLS AND NOTES (§ 397*)—CHECKS—PRESENTMENT—NOTICE OF DISHONOR—EXCUSE.

Under Civ. Code, §§ 3213, 3255, the drawer and indorsers of a check are exonerated by delay in presentment only to the extent of the injury suffered thereby, and the loss of a check before presentment excuses presentment and notice of dishonor, and the owner of a check which was lost before presentment to the bank on which it was drawn may on filing the indemnity bond required by section 3415 recover thereon against the drawer who suffered no injury, the bank on which the check was drawn being at all times solvent, and the drawer having money there to meet the check.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029–1044; Dec. Dig. § 397.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the California National Bank against T. J. Weldon. From a judgment for plaintiff, defendant appeals. Affirmed.

Weldon & Held, for appellant. George & Hinsdale and Mannon & Mannon, for respondent.

CHIPMAN, P. J. The action is to recover the amount of a lost check drawn by defendant upon Commercial Bank of Ukiah and payable to J. B. Melton or order for $2,000. Judgment is prayed for the said amount of $2,000, with legal interest from September 20, 1909.

A demurrer for insufficiency of facts and for uncertainty was overruled, and defendant answered, denying specifically most of the averments of the complaint, avers that he has offered to draw a duplicate check for said amount "on condition that due and proper presentation of the original thereof be made to said Commercial Bank of Ukiah," and, if not paid when thus presented, defendant will pay the same on notice of nonpayment, or will issue a duplicate check; avers also that he has not paid the amount of said check, "and he now refuses to do so and has at all times refused to do so unless assured that he will not be called upon to again pay the same, and this defendant is now unwilling and at all times has been unwilling to accept from said plaintiff any bond or indemnity conditioned as set out in plaintiff's first amended complaint."

Defendant then sets forth special defenses, covering some 75 folios of the transcript, which may be briefly summarized:

(1) That Melton, the payee of the check, made no other or further indorsement than as alleged in the complaint, and that it was the only indorsement thereon; that no notice of the alleged loss of said check was ever given by plaintiff, or other person, to the Ukiah bank, the drawee therein named, or to any other person, except that on December 26, 1907, defendant was notified that said check was lost in the mails, and no notice prior thereto was given defendant, nor was said Ukiah bank ever notified to refuse payment.

(2) "Alleges that on the 12th day of September, 1907, he (defendant) drew his check No. 730 on the Commercial Bank of Ukiah, in the county of Mendocino, state of California, for $2,000, payable to one J. B. Melton or order;" that at no time did defendant request or direct plaintiff to pay said check.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(3) Alleges the issuance of said check as last above stated; that at said time to and including November, 1907, defendant had sufficient funds in said bank to pay the same and on presentation said check would have been paid at any time since said September 12, 1907, "and up to the present time"; that said bank has at all said times been solvent and would have paid said check on presentation, but plaintiff has failed to present the same.

(4) Alleges the issuance of said check; that defendant had at all times in said bank funds to pay the same upon presentation and presentation has not been prevented by any cause whatever, but the same has never been presented for payment to said bank; that defendant has never been notified that payment was refused by said bank or has been dishonored and no notice of dishonor has been given defendant and such notice was not excused; and that defendant's residence was well known to plaintiff.

(5) Alleging the foregoing facts, defendant sets forth a further defense that about September 12, 1907, when he issued said check, the condition of the banks in the state "was such as to cause serious apprehension and alarm to the depositors therein, and this defendant, as a depositor in the Commercial Bank of Ukiah, did feel unwilling to retain therein any sum largely in excess of $2,000"; that he made inquiries of said bank during the months of September and October, 1907, and was told that said check had not been presented; that being unwilling to leave in said bank any sum in excess of $2,000, and because said check had not been presented for payment, he drew out of said bank various sums aggregating $3,000, and on October 31, 1907, deposited $1,831.03 in the California Safe Deposit & Trust Company, which, by reason of its failure, was lost to defendant.

(6) Alleges many of the foregoing facts and particularly the facts last above set forth and presenting substantially the same defense as therein set forth.

(7) A similar defense is repeated, by way of counterclaim, further alleging that said California Safe Deposit & Trust Company is insolvent and that he had lost the whole of said $1,831.03.

(8) Likewise sets forth substantially the same defense by way of cross-complaint stating further that defendant has at no time received any part of said $1,831.03, but the whole thereof has been lost to him and he has been damaged in that amount.

Defendant prays that plaintiff take nothing by its action and that he recover judgment against plaintiff for the sum of $1,831.03, with legal interest from October 31, 1907.

A motion was made to strike out all that part of the answer relating to the counterclaim and cross-complaint, on the ground that the same is redundant, irrelevant, and not pertinent to any issue presented in the complaint. Plaintiff also demurred to certain portions of the answer. These portions are designated in the motion by certain lines and pages of the answer, as filed in the action, but they are not identified by reference to folios or lines in the printed transcript. It sufficiently appears, however, that the motion is aimed at the averments touching the counterclaim and cross-complaint, while the demurrer runs to certain averments in all the several causes of defense except the first. The motion was granted and the demurrer sustained. The cause was tried by a jury and plaintiff had the verdict on which judgment was entered for the amount claimed in the complaint. Defendant appeals from this judgment and from the order denying his motion for a new trial.

Defendant was called as a witness for plaintiff and testified that he drew a check dated September 12, 1907, on Commercial Bank of Ukiah, in favor of J. B. Melton, for $2,000, and mailed it to him at Klamath Falls. The check stub identified by witness showed that the number of the check was 730, drawn in favor of J. B. Melton, and was dated September 12, 1907. Defendant, in due course of mail, received a letter from Melton, of date December 6, 1907, acknowledging receipt of the check, and stating that he cashed it on September 20, 1907, at the Klamath County Bank; also stating that he had been notified by the bank that the check was lost, adding: "Please look this matter up and let me know at once."

Witness Martin, cashier of the Klamath County Bank, testified that the bank received a check for $2,000, drawn by defendant on Commercial Bank of Ukiah, about September 20, 1907, on which the bank paid the payee, Melton, its face value. It also appeared from the testimony of this witness that this check, with two other remittances, was sent to plaintiff, and acknowledgment of its receipt by plaintiff was returned of date September 23, 1907. Assistant Cashier Brown of plaintiff bank, who had charge of all the bank correspondence and the general routine of the business, testified that upon receipt of the check plaintiff credited the Klamath County Bank on September 22d, and on September 23d, a letter of remittance was sent to the Bank of Ukiah, inclosing the check in question and two others, one for $15.50 and one for $29.37. A copy of this letter is in evidence. The witness testified: "I do not know where the check in controversy is. At the time the check was sent to the Bank of Ukiah, a letter of instructions was sent also, of which I have a copy, the original being lost in transit, and it was never heard from again, although we have endeavored to trace it and locate it." Plaintiff, hearing nothing from its remittance, sent to the Bank of Ukiah what is called a "tracer," informing the bank of the remittance of September 23d and asking for reply, to which on October 3, 1907, the bank answered "this above rem. must have gone astray, as we have not received it." Plaintiff the next day sent indemnity bonds, covering security for the three remittances and asking the bank to obtain duplicate checks from the drawers as all three remittances were lost. October 8, 1907, the Bank of Ukiah reported sending duplicate check for one of the remittances, but stating that the other parties were unknown there and asking further information. It appears that the $2,000 check was listed at plaintiff bank as having been drawn by F. H. Sheldon by mistake of the clerk in deciphering the name of the drawer. Thereupon considerable correspondence ensued between the plaintiff and the Klamath County Bank, in an effort to ascertain who the drawer was, and from Melton it was finally learned that defendant was the drawer. Witness Brown testified that, as soon as plaintiff found out that defendant was the drawer of the check, he wrote Weldon, care of Weldon & Held, a law firm of which defendant was a member, of date December 20, 1907, informing him of what he had learned from the Klamath County Bank; that the check had been lost in transit between Sacramento and Ukiah, and asking defendant's aid "in getting this matter straightened out." Weldon & Held replied December 21, 1907: "We beg to say that on September 12, 1907, T. J. Weldon drew his check No. 730 on Commercial Bank of Ukiah, for $2,000.00, in favor of J. B. Melton, and on the same day sent it to Mr. Melton at Klamath Falls, Oregon. On November 9, 1907, the last time his pass book with the Commercial Bank was balanced, this check had not been paid." Thereupon plaintiff wrote Weldon sending him an indemnity bond in the sum of $4,000, and requesting him to send plaintiff duplicate check for the amount of the original. Many letters passed between the parties on the subject, the plaintiff endeavoring to convince defendant that it was his duty to send it a duplicate check or deposit the amount in controversy in the Commercial Bank of Ukiah. Defendant steadfastly refused, and finally, January 11, 1908, wrote as follows: "Since no proof of the loss of the check has been made, I must adhere to my original views not to issue a duplicate until the proof of the loss of the check is established to my satisfaction and to such an extent as will protect me against its further presentation. For that reason, I am returning herewith your indemnity bond." Mr. Brown thereupon sent to the Bank of Ukiah an indemnity bond in favor of defendant for $4,000, and inclosing an affidavit of the cashier of the plaintiff bank to the effect that the sureties on the bond were men of wealth, and requesting the cashier of the Ukiah bank to again present the same to defendant and request his duplicate check. Defendant, in reply to the offer, was unwilling to further discuss the matter, but declined "to do anything in the matter until proof of the loss of the check was established to his satisfaction. When it was suggested that the proof was before him, he replied, 'That is their side of it.'"

On cross-examination Mr. Brown testified to the routine method pursued in the bank in managing the business of the day and the steps taken from the receipt of checks and their remittance by post to the banks where they should go. He had no independent recollection of this particular check, and his statement that it had been mailed to the Bank of Ukiah and was lost was based upon the records of the plaintiff bank; nor was he willing to testify that the Commercial Bank of Ukiah had been notified to refuse to pay the lost check.

Witness Holmes, remittance clerk of plaintiff, testified that he wrote up the remittance letters of September 23, 1907, including the one to the Bank of Ukiah. "After writing the remittance letter, I indorsed the checks and put the letter in an envelope, addressed to the Bank of Ukiah, and put it in the mail sack in which we carry all the mail from the bank to the post office after the day's work. * * * I wrote up all the remittances to the Bank of Ukiah on September 23, 1907, and in depositing the envelopes in the mail bag, I know they were properly stamped and postage prepaid." On cross-examination he testified: "My attention was first directed to the loss of this check about seven days after the remittance was sent. We generally give seven days after sending a remittance, and after that time we keep sending out tracers, and I did so in this instance. * * * I could not describe the particular check in controversy, and I have no positive knowledge myself that I mailed an envelope that contained this check. I cannot remember that far back that I mailed the letter containing this check. All the envelopes we use in the bank are stamped envelopes." He further testified that he had no independent recollection of this check or of any envelope containing it being put into the mail sack. "* * * At that time, in September, 1907, the mail bag was accessible to any one behind the railing, and the bag was usually carried to the post office about 4 or 5 o'clock, although I do not know whose duty it was to carry it, but do know it was one of the clerks in the bank." On re-examination he testified: "We sent out tracers for all the items covered in the remittance described as Defendant's Exhibit 4 (the same as alleged to have been remitted to the Ukiah bank), and none of them ever showed up, and none of the checks of that remittance were ever found. I have testified here from the records as they were made up by me on that date."

Cashier Thomas of the Bank of Ukiah testified that the check in controversy was never received by that bank. It further appeared that the check was never presented to the Commercial Bank of Ukiah. "There was a general agreement that the defendant might overdraw his account." It also appeared that the Klamath County Bank had assigned to plaintiff all its interest in said check.

Defendant excepted to the giving of certain instructions and presented 30 instructions, all of which, except numbers 14, 17, 18, and 19, the record shows were refused by the court. As to the numbers above mentioned, it does not appear whether they were given or refused, and they cannot, therefore, be made the subject of examination now. The instructions requested and refused and to which ruling defendant excepts were drawn to meet the various phases of his defense set out in the answer, but stricken out by the court.

Defendant now urges (1) that the evidence of the loss of said check is insufficient; (2) that the court erred in excluding the defenses raised by the answer, and on motion stricken therefrom. The questions involved in this part of the answer are stated by defendant to be as follows: (a) Whether presentment of the check to the drawee bank was necessary before the drawer could be held. (b) Whether notice to the drawer of the dishonor of the check was necessary before the drawer could be held. (c) Whether the damages alleged to have been suffered by defendant constituted a defense. (d) Whether such damages entitled defendant to relief.

Upon the first proposition, defendant contends that the burden of proving loss of the check is upon plaintiff, and that such loss must be proved by more than the preponderance of the evidence and beyond a reasonable doubt, and the evidence should be the same as that introduced as the foundation for secondary evidence (citing 17 Cyc. 539; 25 Cyc. 1624, 1626, 1627); that plaintiff must have exhausted in a reasonable degree all accessible sources of information and means of discovery which the nature of the case would suggest; and a diligent and bona fide search must have been made for the lost instrument in the place where it belongs or is most likely to be found (17 Cyc. 543; 1 Green. Ev. § 558, and numerous cases, among them Kenniff v. Caulfield, 140 Cal. 34, 41, 73 Pac. 803).

1. Where secondary evidence of the contents or nature of a lost instrument is sought to be introduced, the rule is as stated in Kenniff v. Caulfield, supra, and as claimed by defendant. In the case cited the question was whether the conveyance was a grant, bargain, and sale deed or a deed of gift. The proof of loss consisted of a search being made in a bureau drawer where the deed had been for seven months before it was missed, and nowhere else, and it was held sufficient to raise a presumption of its loss. The court, in discussing the rule, said: "The rigor of the common law * * * has been relaxed in this respect, and nonproduction of instruments is now excused for reasons more general and less specific, and upon grounds more broad and liberal than were formerly admitted. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its nonproduction. But, where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original—in fact, courts in such cases are extremely liberal. And the rule in questions of this character is that the trial judge is to determine the sufficiency of the proof. Under the facts and circumstances developed in the case, if they are sufficient to reasonably satisfy the mind of the court that the original is lost, and that it cannot be found after search made at the proper place, that is all that is necessary, and, the sufficiency of the proof of the search being in general left to the discretion of the trial judge, this court will not review its rulings in that respect, unless the proof is manifestly insufficient to have warranted secondary evidence." The rule, it will be seen, finds application where it is sought to introduce secondary evidence to establish the execution or nature of the instrument. But here no such question arises. The issuance of the check by defendant is admitted by him, and it is clearly shown that the payee received it and got from the Klamath County Bank its full face value, and defendant has thus discharged his obligation to the payee, whatever that was. It is shown to have been forwarded to plaintiff by that bank, and that plaintiff pursued its customary course in all such cases by writing a letter of remittance to the Commercial Bank of Ukiah, the drawee, inclosing in it the check in question and depositing the letter in the bank mail pouch to be deposited in the post office, with other mail matter of that day, postage prepaid; that all matter of the bank was sent to the post office daily about 4 or 5 o'clock p. m., and that up to the date of the trial, November, 1909, the check had not been seen or located and has never been presented to the drawee bank for payment. In the letter of remittance were two other checks, on different banks, which also went astray and have not since been found. It is true that the witnesses were unable to testify to an independent recollection concerning this particular check and testified principally from the bank records and from an unvarying custom in conducting the bank business. But it is also true that plaintiff had no interest in concealing or withholding this check; on the contrary, every consideration of self-interest would impel it to make prompt disposition of the check in the usual method and course of business, which the bank records show was done. We think it would be wholly unreasonable to hold the evidence entirely insufficient to show that the check is lost; and if there was some evidence, as there certainly was, tending to show its loss, this court is not at liberty to review its sufficiency, especially as there was not the slightest evidence tending to controvert the fact of loss. Cal.

Elec. L. Co. v. Cal. Safe Dep. & Trust Co., 145 Cal. 124, 78 Pac. 372.

2. It is also urged that presentment and notice of dishonor were necessary to recovery, notwithstanding the loss; and in this connection it is urged that the proof of loss was not sufficient to excuse presentment and dishonor. Upon this latter point, we can see no reason why the rule should be more rigid than where secondary evidence is offered to prove execution, upon proof of loss. In our opinion, if presentment and dishonor may be excused in cases of loss at all, the proof is sufficient. The question, then, is: In cases of loss must there be presentment and notice of dishonor? There can be no notice of dishonor without presentment, and it must follow that if presentment is excused so also is notice of dishonor. Defendant constructs his argument as follows: A check is a bill of exchange. Civ. Code, § 3254. The rights of the drawer of a check are the same as those of the first indorser. Id. § 3177. The first indorser of a bill of exchange, and hence the drawer of a check, can be called upon only to pay after notice of dishonor. Id. § 3116. Notice of dishonor is excused in certain cases, but loss of the instrument is no excuse. Id. § 3155. And Bank of Gilby v. Farnsworth, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843, is cited as holding, under a section identical with section 3213 of our Civil Code, that presentment is necessary where the bill has been lost; also 1 Parsons on Notes and Bills, p. 530, is cited to the effect that, as the loss of a bill can be no excuse for want of presentment and demand, so it can be none for want of notice. Same author also at pages 368 and 448, holding that, if the bill is lost, it is sufficient to make demand and presentment with a true copy. Having shown, as is contended has been done, that loss of a check does not excuse its presentment, the next step in the argument was to show the effect of such failure to present and give notice. This step is thus taken. By the provisions of section 3255, Civ. Code, the provisions of section 3213, Civ. Code, become applicable to checks required to be transmitted to another place for presentment. Section 3213 reads: "If a bill of exchange, payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for presentment, the drawer and indorsers are exonerated, unless such presentment is excused." Bearing in mind that a check is a bill of exchange, presentment of a bill of exchange is excused only in cases mentioned in section 3220, none of which exist here. Hence, failure to present was a valid defense, and, such failure being shown, defendant is exonerated.

The weakness of the argument, as we conceive it, lies in defendant's failure to give due effect to section 3255, which provides that: "A check is subject to all the provisions of this Code concerning bills of exchange, except that: (1) The drawer and indorser are exonerated by delay in presentment, only to the extent of the injury suffered thereby." Section 3213 relates to bills of exchange to the provision of which a check is subject "only to the extent of the injury which they (the drawer and indorsers) suffer thereby." Section 3255. It seems to us that this explains why the North Dakota case, supra, and the case of R. H. Herron Co. v. Mawby, 5 Cal. App. 43, 89 Pac. 872, cited by defendant, do not apply, for in each of those cases the drawer suffered injury through the negligence of plaintiff, the drawee bank, in each case, having, during the negligent delay in making presentment, closed its doors.

Aside from the statutory provision alluded to, we think the question is rightly decided in First Nat. Bank v. McConnell, 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336. The reasoning in that case is so clear and satisfactory to our minds that we think it should be decisive of the case here. It was an action on a lost check and the facts were quite similar to the facts here. We give the opinion at some length as the precise question seems not to have been heretofore decided in this jurisdiction: "Counsel relies in support of the first contention upon the elementary principle that the holder of a check upon a bank has no recourse upon the drawer thereof until he has presented it to the bank upon which it is drawn and payment has been refused; that such presentment and refusal are essential preliminaries to the right of action against him. 2 Daniel on Negotiable Instruments, 1586; Bradford v. Fox, 39 Barb. (N. Y.) 203; Farwell v. Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742. But that rule can have no application to a lost check. No rule of law with which we are familiar would require a bank without the consent of the depositor to pay out the money of its depositor upon an alleged lost check, and a demand that it do so would be fruitless. Its obligation is to pay the depositor's money to holders of checks issued by him, and its protection, and the protection of all depositors, requires that the checks be produced and surrendered before payment is made. Until the check is presented, no liability attaches to the bank. Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526; 5 Cyc. 536. Of course, liability might arise in the case of a lost check where the bank, after it had been duly notified of the issuance of the same and of its loss, permitted an insolvent depositor to withdraw all his funds against which the check was drawn. But that is not the case before us. The immediate inquiry here is whether the drawer is liable on his lost check to the owner thereof, where it was not, before the loss, presented to the bank for payment. We think there can be but one answer to this question. 'Impossibilium nulla obligatio est.' The law never requires the doing of an impossible thing (Dow v. Bank, 88 Minn. 355, 93 N. W. 121), though it often awards damages for a failure to perform express contract stipulations, where performance was rendered impossible by reason of intervening overpowering causes other than an act of God. 9 Cyc. 627. But the principle involved in cases of that kind does not apply to duties or obligations arising by implication of law. Paradine v. Jane, Aleyn 26; School District No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371. In other words, a person will be relieved from the performance of a duty imposed upon him by law, where the performance is rendered impossible by reason of causes for which he was not responsible, where he would not for similar reasons be relieved from express contract stipulations. The checks in question in the case at bar were lost without fault of plaintiff, and the rule requiring their presentment to the bank cannot be complied with. They were mailed to the Le Sueur bank for payment the day plaintiff received them, and were lost in transit. The duty to present them for payment is one imposed by law, not by express contract, and, compliance therewith being impossible, plaintiff's failure to present them is not fatal to its right to recover thereon." After meeting the point that the checks operated as an equitable assignment of the defendant's funds in the bank to the payee, the court said: "No hardship results to the drawer of a check in such a case. If it be nonnegotiable, he can, upon notice of the loss, fully protect his interests by countermanding the order and stopping payment. Canterbury v. Bank, 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845, 51 Am. St. Rep. 870, and note; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Egerton v. Bank, 43 How. Prac. (N. Y.) 216; Florence Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; Albers v. Bank, 85 Mo. 173, 55 Am. Rep. 355. If it be negotiable, and likely to reach the hands of a bona fide holder, he may insist upon indemnity before giving a new check, or otherwise paying the debt intended to be discharged by it. In the case at bar plaintiff informed defendant of the loss of the checks, demanded payment thereof, and offered to indemnify him from loss, before the action was commenced; but he refused to make payment. As a condition to plaintiff's recovery, the court ordered a properly executed indemnity bond to be filed, by which all rights of defendant are fully protected. If the checks turn up in the hands of the bona fide holders, and the Le Sueur bank is compelled to pay them, the indemnity bond will stand as security for the amount paid for any loss that defendant may suffer in the premises." See section 3415, Civ. Code. In the present case defendant suffered no injury by reason of the nonpresentment of the check, unless it be true that his loss of money deposited in the California Safe Deposit & Trust Company may be so considered, which will presently be noticed. The Commercial Bank of Ukiah was at all times solvent and defendant had money there to meet his check, and, besides, he had an arrangement with the bank by which he could overdraw his account. Plaintiff not only tendered defendant an adequate indemnity bond and brought the same into court, but offered to deliver to defendant "such other bond as the court may deem sufficient to indemnify the defendant against any lawful claim on the said check."

3. Defendant bases his other defenses and his defense upon his counterclaim and his right to recover on his cross-complaint, upon the proposition that it was plaintiff's duty to make presentment of the check. He thus states his claim: "In October, 1907, defendant being by the negligence on the part of the holder of said check, exonerated from liability thereon, performed the acts on which he now bases another ground of defense herein, and on which he relies for his counterclaim and cross-complaint, all of which were excluded by the trial court." As defendant rests his contention that the court erred in striking out these defenses upon the claim that presentment of the check was essential, and as we have held against defendant upon this proposition, we see no necessity for discussing the points raised upon this branch of the case. We are unable to see how plaintiff can, upon any principle, under the circumstances, be held liable for defendant's having voluntarily placed money in the California Safe Deposit & Trust Company.

No other alleged errors seem to require notice.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J

15 Cal. App. 11

CITY AND COUNTY OF SAN FRANCISCO v. MULCREVY et al. (Civ. 836.)

(Court of Appeal, First District, California. Dec. 13, 1910. Rehearing Denied by Supreme Court Feb. 9, 1911.)

1. CLERKS OF COURTS (§ 35*)—COMPENSATION —ACCOUNTING AS TO FEES.

Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 91), conferred exclusive jurisdiction to naturalize aliens upon certain federal courts, and upon all state courts of record having a seal, a clerk, and jurisdiction where the amount in controversy is unlimited, and provided that the clerk of any such court should retain one-half the naturalization fees collected by him in each case, the remainder to be accounted for to the Bureau of Immigration and Naturalization. Defendant was elected county clerk for the city and county of San Francisco, becoming thereby ex officio clerk of the superior court therein, and his official bond required him to perform all official duties imposed on him by law. San Francisco City Charter, art. 15, § 3, required the bond to be conditioned upon the faithful performance of all official duties imposed by law, and the surrender to the successor in office of all property, etc., coming into his possession as such officer. Section 34 made the salaries provided in this charter full compensation for all services rendered, and required every officer to pay all moneys coming into his hands as such "no matter from what source derived or received," into the treasury. Defendant's salary as county clerk was fixed by charter at $4,000 a year. Defendant collected a certain sum as clerk of the superior court in naturalization proceedings, and paid one-half thereof over to the Bureau of Immigration and Naturalization. *Held*, that it was defendant's duty to pay the remaining half of the fees into the city and county treasury, he being bound to account therefor as money coming into his hands as county clerk.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 62; Dec. Dig. § 35.*]

2. CLERKS OF COURTS (§ 74*)—LIABILITIES ON BOND—PERFORMANCE OF OFFICIAL DUTIES—FAILURE TO PERFORM.

Defendant was engaged in the performance of an official duty in discharging the duties imposed upon clerks of court by the act of Congress (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97] and receiving the naturalization fees thereunder, so that his surety was liable on his official bond for his failure to pay over such fees to the city and county; the bond being conditioned that defendant would perform all official duties then or thereafter imposed upon him by law.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 127-134; Dec. Dig. § 74.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the City and County of San Francisco against Harry I. Mulcrevy and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Jas. F. Tevlin, for appellant Mulcrevy. L. A. Redman, for appellant Surety Co. Percy V. Long and John F. English, for respondent.

COOPER, P. J. This action was brought to recover of defendant, Mulcrevy, county clerk and ex officio clerk of the superior court of the city and county of San Francisco, and his codefendant, as surety on his official bond, the sum of $2,972, with interest from certain dates as set forth in the complaint, on account of moneys received and collected by him in his official capacity as such clerk, in certain naturalization proceedings which occurred during his term of office. Upon motion of plaintiff, and after defendant had answered, the court ordered judgment for plaintiff upon the pleadings. This appeal is from the judgment, and raises only questions of law.

The facts are in substance as follows: Defendant Mulcrevy was at the November election in 1905 elected county clerk for the city and county of San Francisco for the term of two years commencing on the 8th day of January, 1906. After his election and on the 1st day of December, 1905, he made and filed his official bond, with the defendant corporation as surety, which bond was duly approved as required by law. This bond contained the provision and condition that Mulcrevy should "faithfully perform all official duties that now are or may hereafter be imposed upon or required of him by law, ordinance or the charter of the city and county of San Francisco." By his election and qualification as such clerk he became and was thereafter during his term of office ex officio clerk of the superior court of said city and county. After he had been so elected, and had so given his official bond and entered upon the discharge of his duties, and on the 29th day of June, 1906, Congress passed an act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 97]) entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." Under said act exclusive jurisdiction as to naturalization is conferred upon special federal courts and upon all courts of record in any state or territory having a seal, a clerk, and jurisdiction in law or equity in which the amount in controversy is unlimited. The duties of the clerks of the courts are set forth, as to taking declarations of intention to become citizens in triplicate, and as to sending duplicates to the Board of Immigration and Naturalization, the receiving of petitions up to the time of final report to the bureau, and other services detailed in said act.

The provisions of the act so far as material are as follows: "The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in each naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts which they are hereby required to render the Bureau of Immigration and Naturalization. Provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to such bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of said Secretary the business of such clerk warrants such allowance."

After the act went into effect Mulcrevy collected $5,944 as clerk of the superior court in naturalization proceedings, and accounted for and paid over to the Bureau of Immigration and Naturalization one-half thereof, as required by the act. The other one-half he kept himself, and has not paid over the same to the city and county of San Francisco, his contention being that it was intended by the act of Congress as pay for his extra work and clerical hire in such naturalization proceedings, and that the fees were not received by him in his official capacity, but merely as an agent designated by the act of Congress to perform certain services in naturalization proceedings.

The charter of the city and county of San Francisco under which Mulcrevy was elected, and which was in force at the time his bond was given, provides as follows: "Every bond shall contain a condition that the principal shall faithfully perform all official duties then or that may thereafter be imposed upon or required of him by law, ordinance or this charter, and that at the expiration of his term of office he will surrender to his successor all property, books, papers and documents that may come into his possession as such officer." Section 3, art. 15. "* * * The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after receipt of the same." Section 34, art. 15.

The salary of Mulcrevy as such county clerk was fixed in the charter as $4,000 per annum. He was also allowed, for the purpose of aiding him in the discharge of his official duties, a chief registrar at an annual salary of $2,400; a cashier at an annual salary of $1,800; 12 courtroom clerks at an annual salary of $1,500 each; 5 registry clerks at an annual salary of $1,800 each; 10 assistant registry clerks at an annual salary of $1,500 each; 16 copyists at an annual salary of $1,200 each; and four clerks for the police court at an annual salary of $1,500 each. The total salary list as so fixed and allowed for the office amounts to $58,600 per annum; and it would seem that it was intended to cover all services that might be required of the county clerk, and the pay of all deputies and employés that might be necessary in performing such services. Moreover, in addition to the above salaries it is expressly provided in the charter (section 35, art. 15) that when any officer, board, or department shall require additional deputies, clerks, or employés, application shall be made to the mayor therefor, and upon such application the mayor shall make investigation as to the necessity for such additional assistants, and that if he find the same necessary, he may recommend the supervisors to authorize the appointment of such additional deputies, clerks, or employés, and thereupon the board of supervisors, by an affirmative vote of not less than 14 members, may authorize such appointments and provide for the compensation of such appointees. See reference to the application of this section in Harrison v. Horton, 5 Cal. App. 415, 90 Pac. 716.

The charter having expressly provided a salary for the county clerk, and a salary for his many assistants, deputies, and copyists, states that such salary shall be "full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after receipt of the same." The money came into the hands of Mulcrevy as such clerk, although the source from which it was derived and received was the amounts paid to him as fees in naturalization proceedings as prescribed and provided for in the act of Congress; and it was his duty to pay it into the treasury of the city and county. Language could not be more explicit. It does not admit of doubt or quibble as to its meaning. "No matter from what source derived" means all the money coming into his hands by virtue of and by reason of his being such county clerk and ex officio clerk of the superior court. It was by reason of his election as county clerk and his taking office and giving his bond, and receiving a salary of $4,000 per annum, that he was enabled to receive the fees for naturalization proceedings in the superior court. He received them in his official capacity. He was ex officio clerk of the superior court in which the fees were collected under the provisions of the act of Congress. The act authorized him to retain one-half the fees collected by him; but as to what he was to do with such half so retained did not concern the United States government, but was a matter solely between himself and the city and county of San Francisco. It was his duty to receive and file complaints, answers, pleadings, petitions in probate, and to perform all services required of him, for which he received fees. It was his duty to perform all services required of him by the laws of the state at the time he took office, and all services that might be required of him by any subsequent law of the state enacted after his accession to office. Such fees were not his, but belonged to the city and county, he being in one sense the agent of the city and county in collecting such fees. It was equally his duty to perform services in naturalization proceedings after the passage of the law subsequently enacted by Congress, and to receive fees for such services, but the fees when so received belonged to the city and county of San Francisco. It was not for him to say that the services were performed under the authority of the United States, and not under the authority of the state. His bond contained the condition that he would faithfully perform all official duty that might thereafter be imposed upon him by law. The act of Congress was a law.

This case is the same in principle as In the Matter of Dodge, 135 Cal. 512, 67 Pac. 973, where it was held that the county assessor was not entitled, under the charter, to retain for his own use percentages on poll taxes collected under the state law and for the benefit of the state. It was there said, after discussing the provisions of the charter invoked here: "The provisions of the freeholders' charter under consideration, requiring city and county officials to pay into the county treasury all moneys received by them in their official capacity, is more explicit if possible than the provision of the county government act in the case of District Attorney Fay. It is clear that it was intended that the salaries should be in full for all official services of every kind whatever, and that the officer is not entitled to retain for himself any fees or perquisites for the performance of official duty. Such fees or perquisites, if any received, belong to the public corporate body that employed him."

The views herein expressed are in accord with the views of the Supreme Court of Wisconsin, as reported in Barron County v. Beckwith, 142 Wis. 519, 124 N. W. 1030, where the same question was discussed. It was there claimed, as it is claimed here, that the official duty of the clerk did not include services in naturalization proceedings under a law subsequently enacted by Congress, but the court held otherwise, saying: "The argument is ingenious; but it seems to us that the statute was intended to cover all fees and emoluments coming to the clerk in his official capacity while holding the office upon a salary basis. We think that it cannot be successfully maintained that if, during the salary term, the Legislature should increase the fee bill under the fee system as to clerks of courts, that the clerks, though on a salary basis, could retain, in addition to the salary, the extra fees provided for by legislative enactment after the salary had been fixed. * * * The courts of the state designated in the act have power to naturalize aliens, and the clerks perform services as clerks in such proceedings, and receive fees as clerks for such services; and whether such fees are fixed by act of Congress or by state law, they are fees or emoluments of the office within the meaning of chapter 411, Laws of 1901."

Our attention is called to Eldredge v. Salt Lake County, 106 Pac. 939, where the Supreme Court of Utah held that the clerk may retain such fees under the act of Congress in question. While we do not approve of the doctrine as laid down in the Utah case, it is sufficient to say that it can be readily distinguished from the case at bar. There the law provided that the county officers "shall be required by law to keep true and correct account of all fees collected by them, and to pay the same into the proper treasury, and the officer whose duty it is to collect such fees shall be held responsible on his bond for the same." It does not appear from the opinion to have been a condition of the bond, or the duty of the clerk, to perform all official duties that may have been imposed upon him by law, nor did the statute require the clerk to pay all moneys, "no matter from what source derived," into the treasury of the county.

It is claimed by defendant surety company that, even if defendant Mulcrevy is liable, the surety company is not, for the reason that the bond was given for the performance of official duties, and that it was not part of Mulcrevy's official duty to act in behalf of the United States and receive fees in naturalization proceedings. But the bond was conditioned that Mulcrevy would faithfully perform all official duty that might thereafter be imposed upon him by law; and the law thereafter imposed upon him the duty of performing services in naturalization proceedings. It was also his official duty to turn the money over to the treasury of the city and county of San Francisco within 24 hours after he received it. The liability of the surety follows.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J

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14 Cal. App. 790

REEDER et ux. v. WELLS FARGO & CO.

(Civ. 864.)

(Court of Appeal, Second District, California. Dec. 12, 1910. On Petition for Rehearing, Jan. 11, 1911; Denied by Supreme Court Feb. 9, 1911.)

1. WAREHOUSEMEN (§ 24*)—LIABILITY.

A warehouseman is only liable for damage to property in his custody caused by his negligence.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 48, 49, 51–54; Dec. Dig. § 24.*]

2. CARRIERS (§ 140*)—LIABILITY AS WAREHOUSEMAN—NOTICE—TIME.

Civ. Code, § 2120, provides that, if a carrier does not deliver freight to the consignee or his agent personally, he must notify the consignee of its arrival and keep it as a warehouseman until the consignee has had a reasonable time to remove it, and, if the consignee's place of residence or business be unknown, the carrier may give the notice by letter dropped in the nearest post office. Section 2121 provides that, if the consignee does not remove freight within a reasonable time after delivery or after the carrier has duly offered to deliver, the carrier may exonerate itself from further liability by placing the freight in a warehouse for the consignee and giving the latter notice thereof. *Held*, that section 2120 required that the consignee be given actual notice of the arrival of the freight in order to change the carrier's liability to that of warehouseman, so that where the notice to the consignee of the arrival of freight was dated June 25th, but was mailed in the post office on the morning of June 26th, and the freight was destroyed on the night of June 25th, the carrier's liability was that of a carrier, and not of a warehouseman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609, 611–616; Dec. Dig. § 140.*]

3. Carriers (§ 158*)—Freight—Limitations of Liability—Validity of Contract.

Under Civ. Code, § 2174, permitting the obligations of a common carrier to be limited by special contract as well as under the general rules of law, a contract with an express company, limiting the recovery to the value agreed upon between it and the shipper in consideration of a special rate given, is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663–667, 699–703, 708–710, 718; Dec. Dig. § 158.*]

4. Carriers (§ 158*)—Freight—Limitations of Liability—Stipulations of Value.

A shipper, who stipulates when the shipment is received that the goods are of a certain value, is estopped from claiming a greater amount in an action for damages for their loss or injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663–667; Dec. Dig. § 158.*]

5. Carriers (§ 162*)—Freight—Action for Damage—Allegations of Answer.

An allegation of the answer, in an action against an express company for injuries to goods, that the charge for carrying the goods was based upon a valuation not to exceed $50, and that the shipper agreed that the company should not be liable for more than $50, for failure to deliver in good order, and, in case of partial damage, should not be liable for more than such a proportion of the same as $50 bore to the actual value, if greater than that sum, did not allege a sufficient consideration for an agreement to limit the carrier's liability for loss to that sum, not alleging a special rate given in consideration of such agreement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 720, 721; Dec. Dig. § 162.*]

6. Trial (§ 397*)—Findings—Necessity—Absence of Issues.

The court was not bound to make findings upon the matter alleged in the answer, where it raised no issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

On Petition for Rehearing.

7. Trial (§ 397*)—Findings—Necessity.

The court was not bound to make a finding upon an issue in support of which no evidence was offered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

8. Appeal and Error (§ 931*) — Presumptions.

Where there is no finding made upon an issue, it must be presumed that no evidence was offered or heard in support of such issue, where none is shown by the record to have been offered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762–3771; Dec. Dig. § 931.*]

9. Appeal and Error (§ 1175*)—Disposition—Rendition or New Trial.

Where no evidence was offered at trial in support of the defense alleged, so that no findings were made thereon, judgment was properly ordered for plaintiff upon reversing a judgment for defendant instead of ordering a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573–4587; Dec. Dig. § 1175.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by L. B. Reeder and wife against Wells Fargo & Co. From a judgment for defendant, plaintiffs appeal. Reversed, with directions to enter judgment for plaintiffs, as stated.

Cryer & Tuttle, for appellants. Gurney E. Newlin (Roy V. Reppy, of counsel), for respondent.

JAMES, J. This action was brought to recover damages alleged to have been suffered by plaintiffs through the breach of contract of defendant as a common carrier to deliver safely a certain trunk and its contents. Judgment was awarded defendant, and plaintiffs have appealed.

From the findings of fact made by the trial court it appears that on the 24th day of June, 1909, plaintiffs delivered to defendant at Long Beach, Cal., a trunk and its contents. Defendant thereupon undertook and agreed to transmit to Los Angeles and deliver "to plaintiffs or their agent personally, or, if for any reason it was unable so to do, to give notice to said plaintiffs of the arrival of said trunk and contents, and to keep the same upon the responsibility of said defendant as a warehouseman." It is further found that in pursuance of said agreement defendant did transport the trunk, and that it arrived in Los Angeles on the morning of June 25, 1909; that, the place of residence of plaintiffs being unknown, defendant on the afternoon of the 25th day of June deposited in the mail a postcard containing a notice of the arrival of the trunk, which postcard was postmarked "June 25, 1909, 8 p. m.," and "was placed in the general delivery of the post office on the morning of June 26, 1909"; that after mailing the card the trunk was placed by defendant in a fireproof warehouse; that during the night of June 25th a fire occurred in said warehouse whereby the trunk and contents were damaged to the extent of $300 without any negligence on the part of defendant; and that they were delivered to plaintiffs on the 30th day of June, 1909. Upon these findings it is contended that the judgment entered in favor of defendant was not warranted. There is no disagreement between the parties that the defendant would have been responsible upon its liability as an insurer for any damage done to the trunk or contents from the time delivery was made to it until notice to the consignees of arrival was deposited in the mails. Their point of difference is as to whether or not, upon the mere mailing of notice of arrival, the liability of the defendant was changed from that of insurer to that of warehouseman with the liability only of a depositary for hire. If the last legal situation resulted immediately upon the mailing of the notification card, then, as a warehouseman is only liable for damages caused to property in his custody which arises from his negligence, there would be in this case no right of recovery. If, on the other hand, the responsibility of defendant as an insurer continued until a reasonable time had elapsed for the delivery of the card through the mails, then the plaintiffs were entitled to judgment. The trial judge concluded that the liability of defendant did not continue after the notification card was deposited in the mails, and accordingly entered the judgment indicated. In that determination of the question presented we do not concur.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A careful consideration of the Code provisions affecting the way by which a common carrier may change its responsibility from insurer to warehouseman leads us to the conclusion that upon the findings as made judgment should have been entered in favor of plaintiffs. This observation is made, however, leaving aside for the moment another point presented respecting the third alleged defense set up in the answer of defendant upon which there were no findings. Section 2120, Civ. Code, provides as follows: "If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest post office." By this section there is an obligation devolving upon the carrier to deliver freight to the consignee or his agent personally, or to give notice to the consignee of the arrival thereof. The latter portion of the section furnishes a means by which such notice may be given in the event that the address of the consignee is unknown to the carrier. It is provided in such a case that "he may give the notice by letter dropped in the nearest post office." Suppose, for instance, that the carrier does know the address of the consignee and dispatches a messenger to that address for the purpose of communicating notice of the arrival of the goods shipped. It would not be contended, we apprehend, that the notice would be deemed complete at the time of the dispatch of the messenger. The notice to the consignee in that case would be complete only when communicated to him. The statute contemplates undoubtedly that, before the carrier shall be permitted to change the extent of his liability to the consignee to that of warehouseman, the consignee shall actually have notice of the arrival of the goods. Where the mails are permitted to be resorted to for the purpose of giving such notice, then, surely, before a change is worked in the responsibility of the carrier, a reasonable time must elapse after depositing in the mails of the notice before the consignee shall be charged with the effect thereof. Added force is lent to this construction by a consideration of section 2121, Civ. Code, immediately following that quoted. This latter section provides: "If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, or storage, on account of the consignee, and giving notice thereof to him." By this provision the carrier is permitted, when a reasonable time has elapsed after such carrier has offered to deliver freight, to exonerate itself altogether by storing the freight in a suitable warehouse. The "reasonable time" mentioned commences to run only after the carrier has offered to deliver. If its offer to deliver is given by letter dropped in the post office, as is provided for by section 2120, Civ. Code, there is strong reason for concluding that the intention of the Legislature was that the notice should either be received by the consignee, or sufficient time elapse for it to be delivered to him in the usual course of mail, before the "reasonable time" mentioned in section 2121 would commence to run against the assignee. In Wilson v. California C. R. R. Co., 94 Cal. 178, 29 Pac. 866 (17 L. R. A. 685), the court says: "The plain meaning of this section (2120, Civ. Code) seems to be that, in order to reduce the responsibility of the carrier to that of a warehouseman, the notice required by the section must be given. * * * The rule requiring railroad companies to give notice to consignees of the arrival of their goods, so far as practicable, in order to reduce the liability of the carrier to that of warehouseman, irrespective of statutory enactment, seems to be founded upon the better reason and supported by the weight of authority in other states and in England. Hutchinson on Carriers, §§ 373, 374, and notes." In this case the findings recite that the card notifying consignees of the arrival of the trunk was postmarked "Los Angeles, Cal., June 25, 8 p. m.," and "was placed in the general delivery of said postoffice on the morning of June 26th." The trunk and its contents were damaged by fire during the night of June 25th and before the card went out of the post office for delivery, which was on the morning of the 26th.

In a defense set up as a third and separate defense on the part of defendant in its answer, it was alleged that the defendant did not at the time of the shipment of the trunk, or at any time before the arrival of the trunk in Los Angeles, have any information or belief as to the contents of the trunk, or the value of the trunk. Defendant then alleged: "That said charge for carrying said property was based upon a valuation not exceeding $50, and that the said plaintiffs agreed that the said defendant should not be liable in any event for more than $50 for failure through any cause to deliver said trunk and contents to the plaintiffs in good order and condition, and that in case of partial loss or damage said defendant should not be liable for more than such a proportion of the same as $50 bore to the actual value, if greater than $50." By this defense it was sought by defendant, in the event damages were recovered against it, to limit the amount of the recovery to $50. By the findings of the court it was determined that the amount of damage suffered was the sum of $300. No findings were made upon this third defense of the defendant. It seems to be settled, both by the Code provisions and the decisions, that a valid contract may be made which will limit the amount of recovery in a case like this where a special rate is given for the carriage of property to the value agreed upon between the shipper and carrier (Larsen v. Oregon Short Line R. Co. [Utah] 110 Pac. 983; Civ. Code, § 2174); and where a shipper in advance has stipulated as to the value of his goods he may be held estopped in an action for damages to claim the right to recover any amount greater than that so stipulated (Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. [N. S.] 811). If the defendant by its answer sufficiently alleged an agreement based upon a sufficient consideration made between itself and the consignees, determining in advance the value to be placed upon the goods shipped in the event of their damage or destruction, then an issue would have been presented upon which the court should have made findings. We do not consider, however, that such an agreement was sufficiently alleged in the answer. It is not there alleged that any special rate was made to the shippers by reason of their agreement not to hold the defendant liable for more than $50 for failure to deliver the trunk and contents in good order and condition. The allegation only is that the charge for carrying the property was based upon a valuation not exceeding $50. Whether this charge was less or more than the amount which would have been charged had the property been differently valued is not alleged and does not appear in the answer of defendant. No issue, therefore, having been properly tendered by this answer, it was unnecessary for the court to make a finding thereon.

As to the alleged fourth defense set out in defendant's answer, the findings as made sufficiently cover every issue tendered by it.

The judgment is reversed, with directions to the trial court to enter judgment upon the findings in favor of plaintiffs for the sum of $300.

We concur: ALLEN, P. J.; SHAW, J.

On Petition for Rehearing.

PER CURIAM. The petition of respondent for a rehearing is denied. Its contention that a new trial should have been ordered, rather than that a judgment should have been directed to be entered upon the findings, as was done, may be fully answered: The trial court failed to find upon the issue presented in the third alleged defense set out in defendant's answer as to a contract having been made between the shipper and carrier limiting liability. It was not necessary for the court to make a finding upon any issue in support of which no evidence was offered, and it is not shown that there was evidence before the court touching the defense mentioned. It must be presumed, where there is an absence of a finding upon an issue made by the pleadings, that no evidence was offered or heard in support thereof when none is shown by the record to have been so offered or heard.

Therefore, conceding that in the third alleged defense a contract limiting liability was sufficiently pleaded, nevertheless, upon the findings as made, it was proper for this court to make the order which was made directing judgment to be entered in favor of plaintiffs. Eva v. Symons, 145 Cal. 202, 78 Pac. 648; People v. McCue, 150 Cal. 200, 88 Pac. 899.

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14 Cal. App. 716

PORTER v. ANDERSON et al. (Civ. 717.)

(Court of Appeal, Third District, California.
Dec. 1, 1910. Rehearing Denied by
Supreme Court Jan. 30, 1911.)

1. SPECIFIC PERFORMANCE (§ 114*)—PROCEEDINGS—PLEADING AND PROOF OF JUSTNESS AND REASONABLENESS OF CONTRACT.

Under Civ. Code, § 3391, prohibiting specific performance of an obligation against one if he has not received an adequate consideration for the contract, or if, as to him, it is not just and reasonable, the party seeking specific performance must plead, as well as prove, such justness and reasonableness.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357, 358, 377; Dec. Dig. § 114.*]

2. SPECIFIC PERFORMANCE (§ 114*)—PROCEEDINGS—COMPLAINT.

An action is one for specific performance, as regards the necessity, under Civ. Code, §

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3391, of plaintiff's pleading and proving the justness and reasonableness of the contract as to the defendant with whom the contract was made, notwithstanding the allegation of the complainant, in aid of the ultimate relief sought, specific performance, that the conveyance of the property by such defendant to the other defendant was fraudulent.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357, 358, 377; Dec. Dig. § 114.*]

3. SPECIFIC PERFORMANCE (§ 114*)—PROCEEDINGS—COMPLAINT—AIDER BY ANSWER.

The complaint in specific performance, insufficient because not alleging, as required by Civ. Code, § 3391, the justness and reasonableness of the contract as to defendant, is not aided by the answer charging fraudulent representations by plaintiff, where no evidence is introduced, but the case is tried on the pleadings.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357, 358; Dec. Dig. § 114;* Pleading, Cent. Dig. § 1345.]

4. SPECIFIC PERFORMANCE (§ 114*)—PROCEEDINGS—COMPLAINT—SETTING OUT CONTRACT.

The contract for exchange of described properties cannot show the real values of the properties, and so, though made part of the complaint for specific performance, will not supply the allegation and proof of its justness and reasonableness, required of plaintiff by Civ. Code, § 3391.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357, 358; Dec. Dig. § 114.*]

5. APPEAL AND ERROR (§ 1071*) — REVIEW — HARMLESS ERROR—FINDINGS.

Though the court would be justified in rendering a judgment against plaintiff in specific performance for insufficiency alone of the complaint, it not alleging, as required by Civ. Code, § 3391, the justness and reasonableness of the contract, there was no harm in its doing so on a finding that the contract was not just or reasonable; the pleading being, in effect, submitted as the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. § 1071.*]

6. SPECIFIC PERFORMANCE (§ 97*)—TENDER.

Whether plaintiff in specific performance made a tender is unimportant, where he does not plead and prove, as required by Civ. Code, § 3391, the reasonableness and justness of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 286; Dec. Dig. § 97.*]

7. JUDGMENT (§ 435*)—RELIEF FROM JUDGMENT—"SURPRISE."

Surprise, within Code Civ. Proc. § 473, authorizing the trial court to relieve a party from a judgment taken against him through surprise, is some condition or situation in which a party finds himself unexpectedly placed, to his injury, without any default or negligence of his own, and against which ordinary prudence could not have guarded; and it is not a case of surprise where the complaint in specific performance having been demurred to because not alleging the justness and reasonableness of the contract, as required by Civ. Code, § 3391, and the demurrer having been overruled, the pleadings were in substantial effect submitted as the evidence, and the court found, doubtless because of a changed view as to the sufficiency of the complaint without the allegation of justness and reasonableness, that the contract set out in the complaint was not just or reasonable, especially where plaintiff's counsel had doubts of the sufficiency of the complaint, notwithstanding the ruling on demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 821; Dec. Dig. § 435.*

For other definitions, see Words and Phrases, vol. 8, pp. 6818, 6819.]

8. PLEADING (§ 237*) — AMENDMENT — AFTER TRIAL.

One is not entitled after trial to an amendment necessitating a trial de novo.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603, 605, 614; Dec. Dig. § 237.*]

Appeal from Superior Court, Butte County; E. P. McDaniel, Judge.

Action by Edwin G. Porter against Edward Anderson and others. From a judgment for defendants, and from an order denying a motion for permission to amend the complaint, plaintiff appeals. Affirmed.

J. R. King and W. H. Devlin, for appellant. William E. Duncan, for respondents.

HART, J. On the 5th day of June, 1908, Porter and the respondent, Edward Anderson, became parties to a written agreement by the terms of which they mutually covenanted to exchange certain real and personal property. The real property of Anderson which was the subject of said agreement consists of lots 1 and 2, in what is known as "Gridley Colony No. 5," in Butte county, this state, together with improvements and certain personal property, and that of Porter is situated in the state of Utah, and is described as the "S. W. ¼ of the N. W. ¼ of section 3, township 11 N., 3 West, Salt Lake Meridian, Box Elder county, Utah," together with improvements. On the latter property, so the agreement asserts, there subsisted a mortgage to secure the payment of a note for $1,250, which obligation Anderson agreed in consideration of the covenants contained in said agreement, to assume. Porter also agreed, as a part of the consideration of the contract to exchange said properties, to pay Anderson the sum of $550 in cash. It appears from the averments of the complaint that, on the 31st day of July, 1908, and while the agreement referred to still subsisted and its terms remained unexecuted, Anderson sold the lots mentioned therein to the defendant Jonathan B. Carter for the sum of $4,000, of which $1,200 was paid in cash, and time given on the balance, $2,800, the same being evidenced by a promissory note, secured by mortgage on said lots, executed by said Carter in favor of the defendant Martha Elizabeth Anderson, the wife of the said defendant, Edward Anderson. The purpose of this suit by Porter was to secure a decree: (1) To "rescind, cancel, and set aside the deed made by the defendant Edward Anderson to Jonathan B. Carter"; (2) to "rescind, cancel, and set aside the mortgage made by the defendant Carter to the defendant Martha Elizabeth Anderson"; (3) to "enforce a specific performance of the contract between plaintiff and defendant Edward Anderson." The defendants each demurred to the complaint on general grounds, and said demurrers were overruled by the court, Hon. John C. Gray, judge thereof, presiding. Thereupon answers were filed by the defendants, and later the cause was called for trial before the Honorable Eugene P. McDaniel, judge of the superior court in and for the county of Yuba; he having been requested by the judge of said first-mentioned court to try the same. Findings were filed and judgment entered in favor of the defendants and against plaintiff on the 2d day of December, 1909. Before the last-named date, however—on the 11th day of September, 1909—the judge filed a written opinion in which he declared that the case "was virtually tried upon the pleadings"; that "there was some slight evidence as to certain formal matters, such as the signing of the deed adduced upon the trial." There is, therefore, no bill of exceptions on the merits. The trial court found that the agreement "set out in plaintiff's complaint is not fair, just, or reasonable, as to any of the defendants, and that the consideration for the exchange of said property, moving from the plaintiff to defendant Edward Anderson, was not adequate." This finding was no doubt based upon the failure of the complaint to allege that the bargain pleaded was fair, just, and reasonable as to the defendants, or, more particularly, the defendant Edward Anderson, and certain averments of the answer (which we shall presently have occasion to consider) charging that the plaintiff grossly misrepresented the condition and value of his property at the time the agreement was made; the facts pleaded in the complaint and answer, respectively, being all the evidence offered and received on the merits. After the court filed its opinion, and before the findings were filed and the judgment entered, plaintiff, through his attorneys, having previously given notice thereof and served the same, presented and urged a motion that the court "arrest further proceeding in said action, refuse to sign, make, or cause to be entered any findings or judgment therein; that said cause be reopened, plaintiff to be permitted to file an amended complaint therein, a copy of which is served herewith; and that thereafter said action be again tried upon such amended complaint and such pleadings as defendant may file thereto and the trial thereof be tried de novo upon the merits thereof." The notice of this motion stated that "said motion will be made and based upon all the records, papers, and pleadings on file in said court in said action, together with an affidavit of J. R. King, one of the attorneys for plaintiff, which affidavit is served herewith." The affidavit of King sets forth an elaborate statement of the history of the cause, disclosing all the proceedings had therein up to the time of the filing of the opinion by the trial judge, and declaring that "any judgment or findings which may be made in said action in accordance with said opinion will work upon this plaintiff a serious injury, all brought about and caused by surprise on the part of this plaintiff and his attorneys, a surprise which no ordinary or any reasonable prudence or care could have obviated or avoided." Counsel for defendants filed a counter affidavit, and upon these affidavits and the pleadings, papers, etc., constituting the record of the case, said motion was heard and denied by the court. The appeal here is by the plaintiff from the judgment entered upon the merits of the case and from the order denying his said motion for permission to amend his complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appeal from the judgment is, as has been seen, upon the judgment roll alone. The transcript contains a bill of exceptions in the proceedings upon the motion for leave to amend the complaint, etc. The application for permission to amend the complaint was, as seen, based upon the ground that appellant was taken by surprise by the declaration in the court's written opinion that the complaint failed to state a cause of action, and the proceedings on said application were manifestly initiated in pursuance of the terms of section 473 of the Code of Civil Procedure, by which it is provided, inter alia, that a trial court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

1. Section 3391 of the Civil Code provides that "specific performance of an obligation cannot be enforced against a party in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) if it is not, as to him, just and reasonable. * * *" The Code rule, as it is thus given, is only a legislative reaffirmation of the rule as to the remedy of specific performance as it has always been recognized and practiced in courts of equity. Unless the contract is perfectly fair, equal, and just in its terms and in its circumstances, a court of equity will incontinently refuse to specifically enforce it. See Pomeroy's Equity (2d Ed.) § 1405. And a natural concomitant of this unassailable and well-understood proposition is the rule that a party seeking to invoke this equitable remedy must plead as well as prove that the obligation is just and reasonable as to the party against whom he asks its specific enforcement. Agard v. Valencia, 39 Cal. 292; Bruck v. Tucker, 42 Cal. 346; Nicholson v. Tarpey, 70 Cal. 609, 12 Pac. 778; Morrill v. Everson, 77 Cal. 114, 19 Pac. 190; Windsor v. Miner, 124 Cal. 492, 57 Pac. 386; Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Stiles v. Cain, 134 Cal. 171, 66 Pac. 231; Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; White v. Sage, 149 Cal. 613, 87 Pac. 193; Herzog v. Atchison, Topeka, etc., R. R., 153 Cal. 496, 95 Pac. 898,

17 L. R. A. (N. S.) 428; Martin et al. v. Condrey, 110 Pac. 457.

The complaint in the case at bar is devoid of any such averment. From its averments it cannot be told whether the contract whose covenants it is sought here to specifically enforce is just, reasonable, and fair to the defendant Anderson—that is, whether there is an adequate consideration moving from plaintiff to Anderson—and for that reason it signally fails to state a cause of action for specific performance. It is altogether incapable of supporting a decree for the relief sought, and the court below could have legally adopted no other course than to find or enter a judgment against the plaintiff. But counsel for appellant contend that the real issues made by the pleadings "were those of fraud rather than those of specific performance, strictly speaking." It is quite true that the complaint charges fraud in the sale to Carter of the property that Anderson agreed to exchange to the plaintiff and in the execution of the mortgage on said property in favor of Mrs. Anderson. And it is also true that the answers charge that plaintiff misrepresented the condition and the value of and the extent to which he had incumbered the Utah property which he agreed to exchange to Anderson. But the allegations of the complaint as to fraud are only in aid of the ultimate relief sought by the plaintiff—that of specific performance of the agreement on the part of Anderson—and clearly in no degree can they have the effect of changing the character of the action or the ultimate purpose for which it was instituted. With regard to the averments of the answers charging fraudulent representations against the plaintiff as to the character, condition, and value of his land, it may first be remarked that, in the absence of an averment in the complaint of the fairness, justness, and reasonableness of the obligation as to Edward Anderson, there was, perhaps no necessity for the defendant to anticipate an issue that the complaint had failed to tender and himself allege facts from which the conclusion must inevitably follow that the bargain was not fair or conscientious. It may parenthetically be suggested that if, under the allegations of fraud in the answer, the plaintiff had been permitted to show without objection the adequacy of the consideration by proof addressed to that point, and in response to said allegations in the answer, on an appeal from the judgment in favor of plaintiff, it might properly be held that the defect in the complaint had thus been cured. But confessedly, no evidence upon any of the issues was received, except the facts stated in the pleadings; the plaintiff making the remarkable contention that the contract, which was made a part of the complaint, shows, upon its face, that it is fair and just and that the consideration is adequate, and that it, therefore, at one and the same time, served as well the purpose of the complaint as that of the proof in that regard. This proposition is without the slightest semblance of merit. How a court or a jury could tell, from a mere inspection of a writing, in which certain property was merely described by metes and bounds, or otherwise, what the real value of such property is, is far beyond us to say. Of course, it cannot be done, and the contract here, if alone, by its mere terms, relied upon as disclosing its fairness to defendant or as proof of that fact, completely fails to accomplish its purpose.

But if the allegations of the answer as to fraud may be held, as is the contention, to inferentially or otherwise tender the issue of the adequacy of the consideration or fairness of the agreement, it would still rest on plaintiff to prove the fact before a court of equity would grant him the relief prayed for. The mere charge by defendant of fraud against plaintiff in the transaction cannot shift the burden upon defendant to show that plaintiff, having appealed for affirmative equitable aid, is prepared to do equity. This is one of the prerequisites thrown upon him who appeals affirmatively for the extraordinary favor of a court of equity. The charge made against plaintiff in the answer that he was guilty of fraud in the making of the contract only emphasizes the reason underlying the rule that in cases of this character he can have no standing whatsoever in a court of equity unless he can and does make a showing in the very beginning that he is not relying upon a transaction which is the outgrowth of fraud or any other unconscientious considerations.

The attack upon the findings is, as must be apparent from what has already been said, without merit. It is, as seen, admitted by counsel for appellant that no evidence, other than the pleadings themselves, which included the agreement as a part of the complaint, was introduced in support of and against the material and important points at issue. The plaintiff, therefore, made no proof of the fairness of the agreement. The answer, as we have seen, alleged that the property of plaintiff was of a less value than he represented it to be when he entered into the agreement with Edward Anderson. From the averments of the pleadings, then, treated as the evidence and the only proof received for and against one of the vital points in the case, the court was justified in finding that "said agreement set out in the complaint is not fair, just, or reasonable, as to any of the defendants, and that the consideration for the exchange of said property, moving from the plaintiff to defendant Edward Anderson, was not adequate." While perhaps the court would have been justified in rendering and entering judgment against plaintiff on the insufficiency of the complaint alone, without making findings, we perceive no harm in its having done so, since, as stated, the pleadings themselves were in substantial effect submitted as the evidence offered and received in support of their respective averments. In any event, the finding, if findings were necessary, that the agreement "is not fair, just, or reasonable as to the defendants," etc., is of itself sufficient to support the judgment disallowing the relief prayed for, and it therefore becomes quite unimportant whether the plaintiff did or did not tender to defendant a deed to the Utah property, or whether he did or did not tender to said defendant the sum of $550, the amount stated in the agreement that he would pay defendant as a part of the consideration for the exchange. The allegation and proof of such tenders, it is plainly apparent, could be of no material importance in the absence of an averment and proof of the fairness and reasonableness of the agreement as to the defendants.

2. Did the court abuse its discretion in refusing to allow plaintiff to amend his complaint after the trial but before the findings were filed and the judgment was entered?

The proceedings upon this motion were, as seen, based upon the pleadings, papers, minutes, and orders constituting the record of the case, together with the affidavits filed by the respective parties in support of and against the application for leave to so amend. The proposed amendment was designed to meet the objection to the complaint urged by the trial judge in his written opinion that said pleading failed to state a cause of action because of the omission of an averment therein that the pleaded agreement was, as to the defendants, fair, just, and reasonable.

We have already seen that J. R. King, leading counsel for plaintiff, filed an affidavit in support of the motion for leave to amend the complaint. In this affidavit, besides the statement therein to which we have already referred, he declares, among other allegations, that he relied upon the ruling of Judge Gray on the demurrer as involving a correct conception and view of the law as to the essentials of a complaint in such an action, and that he "fully believed, as did all of his (plaintiff's) attorneys, that said complaint was sufficient, and therefore contented himself with proving its allegations and that now to enter up a judgment against him (plaintiff) upon the merits of this case is taking him at a disadvantage and by surprise that no care or prudence on the part of himself or any of his attorneys could have foreseen or avoided," etc.

The affidavit of the attorney for defendants declares that, when the demurrers of the several defendants were argued before Judge Gray, the question whether said complaint was deficient or wholly wanting in the statement of a cause of action for specific performance of said agreement, in that it contained nothing by way of averment disclosing the fairness and reasonableness of the contract as to defendants, was fully and exhaustively argued; that affiant pointed out wherein the complaint was fatally defective; but that the court and the said judge thereof declined to accept his view of the law and so overruled the demurrers; that thereafter, and before the cause was called for trial, some of the attorneys connected as such with the plaintiff's case had admitted and declared that the order overruling the demurrers was erroneous and that in their opinion the complaint did not state a cause of action for the reasons urged by the attorney for the defendants in his argument on the demurrers; that one of the attorneys for plaintiff, after the order overruling the demurrer was made, urged upon J. R. King, leading counsel for plaintiff, the necessity of filing an amended complaint; that said J. R. King, even after the decision by the court overruling the demurrers, expressed to "various and divers persons" doubt and uncertainty as to the sufficiency of the complaint; and that he "seriously contemplated and considered the propriety of filing an amended complaint herein." It is further alleged that, on the day on which the order overruling the demurrers was made, Judge Gray, during the course of a colloquy between himself and counsel for defendant, after the order was made, himself expressed some doubt as to the correctness of his ruling, though allowing it to stand. Many more like allegations are contained in the affidavit of the attorney for defendant, and we doubt not that they were sufficient to relieve the judge hearing the motion, in the exercise of the discretion vested in the court in the disposition thereof, of the embarrassment of deciding said motion against the plaintiff under an apprehension that his leading counsel was particularly after the argument on the demurrers, wholly ignorant of the essentials of a complaint in an action for specific performance, or, at least, that said attorney was at all times, after the demurrers were argued, of the unqualified opinion that his complaint was sufficient for the relief sought. In other words, we think the court was justified in finding from the affidavit of counsel for defendant that the leading counsel for plaintiff was himself at least in grave doubt, from the time that the demurrers were overruled, whether his complaint stated a cause of action, and that entertaining such doubt, it was his duty to confirm or remove it by further investigation of the question before the cause was called for trial on the merits.

But, in any event, the "surprise" by which counsel for appellant was taken, as explained in his affidavit and upon which he planted his demand that his motion be granted, is very clearly not the "surprise" referred to and contemplated by section 473 of the Code of Civil Procedure. He merely had an erroneous view of the requisites of a sufficient complaint in this kind of action, and the last ruling of the court upon that question was a disappointment rather than the "surprise" contemplated by said section. Fuller v. Hutchings, 10 Cal. 526, 70 Am. Dec. 746; Klockenbaum v. Pierson, 22 Cal. 160; Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Dewey v. Frank Bros. & Co., 62 Cal. 343. Lawyers are constantly receiving the "surprises" that counsel complain of here. As well could it be maintained that every ruling of the court upon a question of evidence during the progress of a trial, contrary to counsel's notion of the law of evidence, and which admitted testimony that they had not prepared themselves to meet or overcome, would constitute the "surprise" which, under section 657 of the Code of Civil Procedure, may be made the basis of a motion for a new trial. While the ruling itself could, of course, be made the ground of the motion, the "surprise" of counsel at such ruling could, obviously, not be.

The "surprise" from the effect of which it is within the power of the courts, under our Code sections, upon a satisfactory showing, to relieve a party, is defined to be "some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own (see Bouvier's Law Dict.; Anderson's Law Dict.; McGuire v. Drew, 83 Cal. 229, 23 Pac. 312, and Brandt v. Krogh, 111 Pac. 275, 284), which ordinary prudence could not have guarded against," and in our opinion it would be the very limit of unreasonableness to hold that where a party, under the advice of his attorney, has acted upon an erroneous conception of the law, and suffers the injury which would be the natural and inevitable result thereof, he may be relieved of his untoward situation on the ground that he was taken by "surprise" by reason of the fatal error into which he had thus been led.

We are not unmindful of the many cases holding that, in the furtherance of justice, the rule with regard to the amendment of pleadings should be liberally construed. As is said by Judge Chipman, as commissioner, in Lee v. Murphy, 119 Cal. 367, 51 Pac. 550, 955, while "it is unusual to find it necessary to amend the complaint after a case has been submitted, yet I find no limitation as to the time before judgment entered when the power of the court ceases, and even after judgment it may be exercised for the relief of a party where the judgment results from mistake, inadvertence, surprise, or excusable neglect." It has always been held to be the proper course to allow amendments, even after the trial but before judgment is entered, if necessary to do so to make the averments of a pleading conform to the proof. But we have never heard of a case where, after the trial has been had, an amendment necessitating a trial de novo has been allowed. And such would be the result of the allowance of the proposed amendment to the complaint in the case at bar. In fact, the motion not only asks for leave to amend, but also that the cause be reopened for retrial. And herein lies the distinction between those cases, cited by appellant, wherein amendments have been allowed after the submission of the case but prior to the entry of judgment and the case here.

The conclusion at which we have arrived may appear to be a hardship on the plaintiff, yet it would result in the establishment of a very dangerous precedent to hold that litigants may be relieved of the effect of the mistakes of lawyers in the application of legal principles on the ground of "inadvertence, surprise, or excusable neglect," or that such mistakes are those from which the statutes intend or contemplate that a party may be relieved.

There was no abuse of discretion in the refusal to grant plaintiff's motion, and the judgment and order appealed from are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

14 Cal. App. 759

HENNESSY et al. v. HALL. (Civ. 840.)

(Court of Appeal, Second District, California. Dec. 7, 1910. Rehearing Denied by Supreme Court Feb. 2, 1911.)

1. Municipal Corporations (§ 582*) — Delinquent Assessments — Deeds—Application for.

Under Street Opening Act (St. 1903, c. 268) § 28, providing that the notice of intention to apply for a deed of land sold for delinquent assessments, must be served on the owner, provided, if he cannot be found after due diligence, it may be posted, to warrant the execution of a deed on constructive service, there must be a showing of due diligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. § 582.*]

2. Municipal Corporations (§ 582*)—Delinquent Assessments — Deeds — Issuance — Notice—"Show."

Whether there has been due diligence to find the owner within Street Opening Act (St. 1903, c. 268) § 28, must depend on the doing of certain acts which, if performed, constitute due diligence, and evidence of the fact of performance constitutes this showing, and mere stating that due diligence was used is insufficient, for "to show" is to make apparent or clear by evidence, to prove.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. § 582.*

For other definitions, see Words and Phrases, vol. 7, p. 6500; vol. 8, p. 7800.]

3. Municipal Corporations (§ 582*) — Delinquent Assessments — Deeds—Application—Notice—Proof.

A purchaser of land for delinquent assessments posted notice on the property of his intention to apply for a deed. He averred in an affidavit that the name of the owner as given in the certificate of sale was B., that he had made a thorough search of city directories for the name and address of the owner, but that he was unable to find the name or address, that he made inquiries of persons residing near the property, but none knew or could tell him the name or whereabouts of the owner. The record showed that B. had no interest in the property at the time, but that he had parted with the ownership nearly four years before the posting of the notice. *Held*, that the affidavit did not show due diligence to find the owner required by Street Opening Act (St. 1903, c. 268) § 28, as a condition precedent to the posting of the notice, instead of personal service thereof, and the affidavit overcame the prima facie proof of regularity which attaches to deeds when made.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. § 582.*]

4. MUNICIPAL CORPORATIONS (§ 583*) — DELINQUENT ASSESSMENTS — SALES—TITLE OF PURCHASER.

Where deeds of land sold for delinquent assessments in proceedings under Street Opening Act (St. 1903, c. 268) were invalid because of failure to give proper notice of intention to apply for deeds, the purchaser's only interest in the property was the lien of the assessments.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 583.*]

5. MUNICIPAL CORPORATIONS (§ 583*)—SPECIAL ASSESSMENTS—FORECLOSURE—INVALID DEED.

Where, in a suit to quiet title, defendant claimed under a deed under a sale for delinquent assessments in proceedings under Street Opening Act (St. 1903, c. 268), and plaintiff admitted the regularity of the proceedings on which the assessments were founded, but averred that the deed was invalid for want of sufficient notice of intention to apply for a deed, and the court found against the validity of the deed, a decree for plaintiff on condition that he pay into court for defendant's benefit, the amount of the assessment lien, was proper.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 583.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Rosa Hennessy and another against Harry E. Hall. From a judgment for plaintiffs, defendant appeals. Affirmed.

George H. Moore, for appellant. Cryer & Tuttle, for respondents.

SHAW, J. Action to quiet title to two certain lots of real estate in the city of Los Angeles. The complaint is in the usual form. The defendant answered denying that plaintiff was the owner of the lots, or had any right, title, or interest therein; and further alleged that he was the owner in fee of the same under and by virtue of deeds made, executed and delivered to him by the board of public works of the city of Los Angeles pursuant to certain proceedings had and taken by said board for the opening of Jefferson street in said city under and in accordance with the provisions of what is known as the "Street Opening Act of 1903" (St. 1903, p. 376), whereby said lots were sold and conveyed to him for delinquent assessments made for the cost of such opening. Judgment was rendered for plaintiffs. Thereafter, and in due time, defendants moved the court to vacate and set aside the judgment so rendered, and to change and modify, as indicated in the notice of motion, the conclusions of law based upon the findings, which motion was by the court denied. Defendant appeals from both judgment and order.

The court found that plaintiff Rosa Hennessy was the owner of the real property described in the complaint; that defendant was not the owner thereof and had no right, interest, or estate in or to the same, "save and except such right as accrued to said defendant under two certain certificates of sale, issued to him on or about June 19, 1907, by the board of public works of the city of Los Angeles, pursuant to a sale of the property to said defendant for delinquent street widening assessment; that the amount of said sales was $23 per lot, or $46 in all; that plaintiffs' right to redeem the property from said sales has never been foreclosed; that plaintiffs have the right to redeem said property from said sales, and the amount necessary to be paid to defendant to so redeem said property is $69." The court further found that the board of public works of the city of Los Angeles executed to defendant Hall deeds to both of the lots in question, but found that no notice of intention to apply for a deed, as required by section 28 of the Street Opening Act of 1903, and no affidavit or affidavits showing service of said notice, either actual or constructive, were ever filed with said board of public works; and as conclusions of law, the court found that the deeds so executed to defendant by said board of public works were unauthorized and void, and that plaintiff Rosa Hennessy was entitled to a decree quieting her title to said real property upon payment into court, for the use and benefit of defendant, of the sum of $69.

At the trial, it was in substance stipulated that plaintiff Rosa Hennessy was the owner of the property, subject to such claim and interest therein as defendant might have acquired by virtue of the deeds executed and delivered to him pursuant to the provisions of said street opening act, and further stipulated that all the proceedings for the opening of said street and assessments made for the cost of so doing, down to and including the issuance to defendant of the certificates of sale for the lots sold for delinquent assessments, were in all respects regularly and duly had and taken. It is also admitted the notice of the purchaser's intention to apply for a deed is sufficient in both form and substance; that the lots were unoccupied and such notice was duly posted thereon. Defendant offered in evidence the deeds, which, under section 29 of the act in question, are made prima facie evidence "of the regularity of all proceedings prior to the execution thereof, and of title in the grantee." For the purpose of overcoming this prima facie showing made by the deeds, the plaintiffs offered in evidence the affidavit filed with the board of public works, which purported to show that defendant had complied with all the provisions of section 28, without which compliance the statute provides that no deed for any property sold for delinquent assessments shall be made. This affidavit, so far as pertinent to a consideration of the case, is as follows: "That the name of the owner of said property as given in the certificate of sale is A. S. Bixby; that affiant made a careful and thorough search of the directories of the city of Los Angeles of the years 1907 and 1906 for the name and address of the owner of said property, but affiant was unable to find said name or address in either of said directories; that affiant made inquiry of persons residing near said property for the correct name and address of the owner of the same, but none of said persons knew or could tell affiant the name or whereabouts of the owner of said property; * * * that affiant was unable to find the owner of said property after due diligence exercised in that behalf." Section 28 of the act provides that the notice of intention to apply for a deed must be served upon the owner of the property; provided, however, if such owner cannot be found after due diligence, it may be posted thereon. It further provides that where such notice is not served upon the owner of the property personally "the person applying for a deed must file with the street superintendent (in this case, board of public works) an affidavit or affidavits showing * * * that due diligence was used to find said owner." It is the contention of respondents that the affidavit is insufficient, and that the execution and delivery of the deeds was unauthorized by reason of the fact that the affidavit fails to show that due diligence was exercised to find the owner of the property. The chief question presented, therefore, for consideration is whether or not this affidavit constituted sufficient proof of service of the notice of the purchaser's intention to apply for a deed, as required by section 28 of said street opening act.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

If, in the exercise of due diligence, the owner of the property cannot be found, the statute provides for a constructive service of the notice upon him by posting it upon the property, if the same be unoccupied. To warrant the execution of a deed to the purchaser and foreclose the owner's right of redemption upon such constructive service, an affidavit must be filed showing, not merely stating, that due diligence was used to find the owner. Whether or not there has been an exercise of due diligence must necessarily depend upon the doing of certain acts which, if performed, constitute due diligence, and evidence of the fact of performance constitutes the "showing." "There is an obvious and material distinction between showing a fact and stating it. In the one case, satisfactory proof may be required; in the other, the mere recital of the fact is sufficient." Meadow Valley M. Co. v. Dodds, 7 Nev. 143, 8 Am. Rep. 709. Stating that "due diligence was used" is merely alleging the fact, while "showing" it is to state the evidentiary facts which make it manifest or prove it. In Coyle v. Commonwealth, 104 Pa. 133, "to show" is said to mean, "to make apparent or clear by evidence; to prove." An examination of the affidavit in connection with the record discloses no facts whereby it is made to appear that due diligence was used to find the owner of the lots. While it appears that some time prior to June 23, 1908, the date of posting the notice, affiant examined the city directory for the years 1906 and 1907 for the purpose of locating A. S. Bixby, designated in the certificate of sale as the owner of the lots, the record not only shows that he had no interest in the property at the time, but that he had parted with the ownership thereof nearly four years before the posting of the notice. The search of the directories, therefore, was not for the purpose of finding the owner of the property, but to locate one shown by the record to have had no interest therein. Neither can the inquiry alleged to have been made of persons living near the lots, standing alone, be regarded as an act tending to show due diligence to find the owner. The affidavit failed to establish facts the existence of which was necessary to warrant the making of the deeds upon constructive notice, and its introduction in evidence overcame the prima facie proof of regularity which the statute attaches to the deeds when made. As the deeds were invalid, it follows that defendant's only interest in the property was the lien of the assessment, upon which the court found there was due the sum of $69. As a conclusion of law, the court found that plaintiffs were entitled to a decree quieting the title of Rosa Hennessy upon their paying this sum into court for the benefit of defendant.

Appellant insists that the court erred in denying his motion for a modification of the conclusions of law and the entry of a judgment that plaintiffs take nothing. This claim is based upon the fact that, while plaintiffs in the course of the trial admitted the regularity of the proceedings upon which the assessment was founded, they made no tender of payment of the amount due thereon, and hence they were not entitled to a judgment. Defendant did not assert any lien upon the lots, but claimed the ownership thereof by virtue of an alleged valid deed made pursuant to a sale to satisfy a lien. When the court found against the validity of this deed, the lien of an admitted valid assessment still attached to the lots. In Ellis v. Witmer, 134 Cal. 249, 66 Pac.

301, wherein it was sought to annul a valid street assessment, bond, and certificate of sale, and enjoin the issuance of a deed thereunder, it was said a court of equity will not grant relief on account of a sale for an excessive amount or insufficient notice, except upon condition of plaintiff paying the sum due, and further holding that where no such condition was imposed by the court the judgment should be reversed. In the case at bar such condition was imposed, the court finding that plaintiffs were entitled to a decree only upon condition that they pay into court for defendant's benefit the amount of his lien. The judgment and decree imposed like conditions. It thus appears that defendant was fully protected in all his rights. He did not ask for a foreclosure of his lien; indeed, he claimed none.

The record discloses no error, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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14 Cal. App. 739

WOMBLE v. WOMBLE et al. (Civ. 734.)

(Court of Appeal, Third District, California. Dec. 3, 1910. Rehearing Denied by Supreme Court Jan. 31, 1911.)

1. MINES AND MINERALS (§ 54*) — SALE OF LAND — CANCELLATION OF DEED — FAILURE OF CONSIDERATION.

Where an undivided interest in land is sold in consideration of a promise to pay a mortgage thereon to build a 10-room house on the property, and to erect hoisting works, sink shafts, and develop a vein or lode of mineral, the refusal of the grantee to sink the shafts and develop the vein or lode does not authorize the cancellation of the deed.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.*]

2. MINES AND MINERALS (§ 54*) — SALE OF LAND — CONSTRUCTION — CONDITION SUBSEQUENT.

A promise by a grantee as a part of the consideration for the conveyance of land to sink shafts and develop a vein or lode of mineral does not constitute a condition subsequent, but is merely personal, and binds only the parties to the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.*]

3. MINES AND MINERALS (§ 54*)—SALE OF LAND—REMEDIES OF VENDOR—LIEN.

Under Civ. Code, § 3046, giving the seller of real property a lien thereon, independent of possession, for so much of the price as remains unpaid, a vendor is not entitled to a lien where the default of the purchaser consists in a failure to perform his covenant to sink shafts, and develop a vein or lode of mineral.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 54.*]

4. VENDOR AND PURCHASER (§ 251*)—REMEDIES OF VENDOR—LIEN.

That a vendor's lien may exist, it is essential that there should be an ascertained fixed consideration, either of money or its equivalent, whereby there arises a certain absolute debt of the vendee to the vendor in consideration of the transfer of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 624–635; Dec. Dig. § 251.*]

5. APPEAL AND ERROR (§ 1071*) — REVIEW — HARMLESS ERROR—FINDING BY COURT.

Where after the introduction by plaintiff of certain preliminary evidence only defendant's motion for judgment on the ground that the complaint does not state a cause of action was granted, though the orderly course would have been to dismiss the action and award costs to defendant, and though no findings of fact were required, the action of the court in making findings of fact was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1071.*]

6. APPEAL AND ERROR (§ 499*) — PRESENTATION OF QUESTIONS IN LOWER COURT — AMENDMENT OF PLEADING.

A contention that plaintiff should have been allowed to amend cannot be considered where the record shows no application for leave to amend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295–2299; Dec. Dig. § 499.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Action by John T. Womble against Alexander M. Womble and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. H. Carpenter and Will A. Dower, for appellant. Campbell, Metson & Drew, for respondents.

BURNETT, J. Plaintiff conveyed an undivided one-half interest in real property to defendant Sue M. Womble in pursuance of a certain contract executed by said plaintiff and defendant Alexander M. Womble, in the following terms: "In consideration of John T. Womble and his wife Mary A. Womble, of the county of Calaveras, state of California, deeding to Sue M. Womble, wife of Alexander M. Womble, of the city and county of San Francisco, state of California, one undivided one-half interest in and to all that certain lots and pieces or parcels of land containing in all four hundred and eighty (480) acres and more particularly described in the above mentioned deed—That I, Alexander M. Womble, of the city and county of San Francisco, state of California, do bind myself and promise and agree to pay off the mortgage now standing on the records of Calaveras county against the said land amounting to three thousand dollars; I further agree to build a ten room house on the property, erect hoisting works, sink shafts, and develop the vein or lode known as the Pine Log Lode, which trends through this land, also agree to furnish sufficient money to pay all expenses of putting in 250 acres of land for wheat hay, also to pay all expenses in cutting the hay, baling, &c. It is agreed and understood that the profits from either source that may be derived from the farm or mine are to be equally divided share and share alike. Also that the residence now in course of erection shall be equally enjoyed by both the said Mary A. Womble and Sue M. Womble and their children. I also agree to erect a windmill and put in a force pump and tank for furnishing water to the above mentioned house. [Signed] Alexander M. Womble."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff alleges in his complaint: "That the said Alexander M. Womble has willfully neglected and refused to fulfill or perform the conditions and covenants on his part to be fulfilled and performed by him as in said agreement provided, namely, that the said Alexander M. Womble, after repeated demands have been continually made upon him, during the period that has elapsed since the execution and delivery of said deed and the agreement given in consideration thereof, for the performance of the terms and conditions of his said contract, has willfully neglected and refused to erect hoisting works on said realty which has valuable quartz mines beneath its surface, and has likewise neglected and refused to sink a shaft or shafts thereon, and has likewise neglected and refused to develop the vein or lode known as the Pine Log, which trends through said land, which said last three named covenants were the main and principal consideration for the execution and delivery of the aforesaid agreement. * * * That the said defendant Alexander M. Womble has substantially performed the remaining covenants and conditions subsequent set forth in said agreement of purchase and as are therein specified." It is also alleged that said E. I. Braddock has or claims to have some interest in the property, but that it is subsequent to and subject to the right and claim of plaintiff as his purchase was made with full notice of the existence of said contract of purchase and its nonfulfillment on the part of said Alexander M. Womble. The prayer is that said deed to Sue M. Womble be declared null and void and canceled, and that the property be conveyed to plaintiff, or that the defendants' entire interest in said property be sold, and the "proceeds of such sale be applied toward the payment of plaintiff for the nonperformance of the conditions subsequent specified in said agreement of purchase and to satisfy plaintiff's lien for the said purchase price of said realty," and for general relief.

There are two aspects in which the complaint may be viewed: First, as contemplating the cancellation of a deed of conveyance and thereby removing a cloud upon the title; and; second, as involving the foreclosure of a vendor's lien for the unpaid purchase price. But it is clear that in neither respect does it state a cause of action.

Why should the deed be canceled? It was executed for a valuable, and—as we must presume—for an adequate consideration. It was the product of the voluntary act of the grantors. There is no charge of fraud or mistake or want of good faith at the time the deed was given. It is conceded that the defendant Alexander Womble paid off the mortgage of $3,000, built the 10-room house on the property, and complied with the other agreements, except he refused to erect the hoisting works and develop what plaintiff considers a valuable mine on said premises. For aught that appears to the contrary, the consideration that passed from said defendant to plaintiff was more than equivalent to the value of the interest conveyed, and there is nothing in said contract of purchase providing that a failure to comply with any of the covenants should work a forfeiture of any interest vested in the grantee. The only pretense of a basis for an action is disclosed in the averment of the failure of Alexander Womble to fulfill a certain personal covenant in reference to a project of unknown and at best of speculative value, and this without any definite claim of damage to plaintiff by reason of said change of purpose on the part of defendant and without it appearing that said failure was not born of a wise and just regard for the welfare of all parties concerned. At any rate, it is perfectly apparent that, if plaintiff have any cause of action, it is for damages against said defendant Womble, and that he has entirely failed to disclose any ground for a judgment against defendant Braddock. There is nothing, indeed, in said contract of purchase to show that an estate on condition subsequent was created. To the contrary, as we have seen, it clearly appears that the covenants of which complaint is made are merely personal, and bound only the parties to said contract. In support of this there is abundance of authority. In Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 62 Pac. 295, it is held that "conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are to be construed strictly against a forfeiture, which is not favored in law. Conditions providing for a forfeiture are to be construed liberally in favor of the holder of the estate, and strictly against an enforcement of the forfeiture." It is further held that "a provision in the deed by which the railway company agrees, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at which all trains must stop, is not a condition upon which the estate is granted, and is not available to defeat the estate created by the grant, but is merely a personal covenant on the part of the grantee."

In Hawley v. Kafitz, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282, the deed contained the following provision: "This deed is given by the parties of the first part, upon the express agreement of the second party to build, or cause to be built, upon the said premises within six months from the date hereof, a dwelling-house to cost not less than fifteen hundred (1500) dollars. Said agreement being considered by the parties hereto as part consideration for this conveyance." No dwelling of any kind was built upon the lot within the six months, and subsequent to the expiration of that period plaintiffs brought the action to have the right of defendant in said lot declared forfeited and for a decree requiring a reconveyance to them by defendant of the property. In discussing the question involved, the Supreme Court said: "While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created—language which ex proprio vigore imports such a condition." The conclusion of the court was that it was a mere personal covenant, that there was an entire omission on the part of the grantor to use language which is necessary to create a condition subsequent or indicating that for noncompliance with the stipulation to build it was the intention of the grantor that the estate granted should be defeated and forfeited. The reasons which led to this decision are all present in the case at bar. In fact, plaintiff here by his complaint falls short of the showing made in the Behlow or the Hawley Case, supra. Liebrand v. Otto, 56 Cal. 242, cited by appellant, involves an entirely different state of facts. There the land was deeded in trust for a certain purpose, upon certain conditions, and it was expressly provided that should the land "cease to be used for the purposes for which it was granted, or should it be used for other purposes said land should revert to the plaintiff, and no money or other valuable consideration passed at the time for said land, and the plaintiff executed the deed therefor solely upon the representation that the railroad company would build its depot and shops upon the said two-acre tract as soon as the road should be finished, and that without such representations the conveyance would not have been made." It would be hard to find a more palpable illustration of an estate upon a condition subsequent and that it is not in point here is too plain for comment.

It is equally manifest that no vendor's lien is disclosed by the complaint. This follows from the consideration that no part of the purchase money is unpaid. Section 3046, Civ. Code, provides for the "lien of the seller of real property" as follows: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." As will be observed, the lien is for "so much of the purchase price as remains unpaid." It does not reach any personal service to be performed by the vendee. The cases cited by appellant bear out this view. In Sparks v. Hess, 15 Cal. 192, it is said by the court, through Chief Justice Field, that "the doctrine that the vendor of real property, after an absolute conveyance, retains a lien for the unpaid purchase money, is well established in England, and prevails, with some exceptions, in the several states of the Union. This lien is not, however, a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. It is a right founded upon the natural justice of allowing the vendor to subject the property, with which he has parted, to the satisfaction of the debt which constitutes the consideration of the transfer." In order that the lien may exist, it is fundamental that there should be an ascertained fixed consideration, either of money or its equivalent, whereby there arises a certain absolute debt of the vendee to the vendor in consideration of the transfer of the land. 29 Am. & Eng. Ency. of Law, p. 744. Thus it has been held that the consideration cannot be extended to cover collateral obligations or duties. Parrish v. Hastings, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50. By many of the authorities the rule is stated substantially as follows: "The lien lies only for a debt, which may be either for money or the rendition of services, or any other valuable consideration definite and ascertained and stipulated as the equivalent of the amount of the purchase price and arising out of the sale of land against which the lien is sought to be enforced. Where the agreement is complicated and the vendee covenanted to do other things besides pay the purchase price, as to build a house on the land and the like, and the sum total of all his promises represents the consideration for the conveyance, there is a confusion so that it is difficult to separate the purchase money and the lien will not exist. Parrish v. Hastings, supra; Hiscock v. Norton, 42 Mich. 320, 3 N. W. 868."

The foregoing disposes of the contention that a cause of action is stated against respondent. Indeed, as already appears, no sufficient showing is made even for damages against the other defendants, as there is no definite allegation in reference to any damages suffered by plaintiff.

The defendants Alexander Womble and Sue Womble failed to appear, and their default was regularly entered. E. I. Braddock demurred to the complaint upon the ground that it failed to state a cause of action against him. The demurrer was overruled, and Braddock filed an answer, and the case was set for trial. At the appointed time plaintiff was called, and, in response to questions, he gave his name and stated that he was the plaintiff in the action. He was then asked: "Do you know Alexander M. Womble and Sue M. Womble, defendants in this suit?" Counsel for respondent objected to "the introduction of any further evidence in this case, upon the ground that the complaint does not state a cause of action against the defendant, E. I. Braddock." The objection was sustained by the court, and plaintiff was thereupon prevented from introducing any other or further evidence in the action. Thereupon defendant Braddock moved for judgment and the motion was granted. The court made findings and gave respondent judgment for his costs.

Appellant complains of the court's action in finding the facts in issue in accordance with respondent's contention. It is claimed that no trial was had and no evidence was taken or received, and therefore that the judgment was rendered against the plaintiff in violation of the provisions of the Constitution that no one shall be deprived of his property without due process of law. But the result is the same whether it technically amounted to a trial or not, as it is clear that upon the pleadings defendant was entitled to a judgment for his costs, which was the actual judgment rendered. The orderly course was probably to dismiss the action and award the costs to defendant. No findings of fact were required as the judgment was one of law—either, that upon the allegations of the complaint plaintiff was not entitled to any relief, or a judgment of nonsuit, since the plaintiff failed "to prove a sufficient case for the jury." If findings of fact were required, they would necessarily be against plaintiff, as he failed to sustain the burden of proof. But, in any event, plaintiff has suffered no prejudice.

It is also contended that plaintiff should have been allowed to amend his complaint so as to have the cause tried upon its merits. It is true that the courts should be liberal in this regard, but it is sufficient to say that it does not appear that any application was made to amend and it is difficult, in view of the facts alleged, to perceive how the complaint could be amended so as to state a cause of action against respondent.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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15 Cal. App. 19

BRETTHAUER v. FOLEY. (Civ. 840.)

(Court of Appeal, First District, California. Dec. 13, 1910. Rehearing Denied Jan. 12, 1911.)

1. Deeds (§ 211*)—Fraud—Evidence.

In a suit to set aside a deed on the ground of fraud, evidence *held* not to show that the grantor was defrauded by a trust clause in the deed, creating a trust in his favor for life.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 645; Dec. Dig. § 211.*]

2. Deeds (§ 212*)—Cancellation—Failure of Consideration.

In a suit to cancel a deed executed in consideration of love and affection, evidence *held* not to show that the grantee refused to perform any act of kindness to the grantor, or that she neglected to comfort and care for him, so that the court could not grant relief on that ground.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 650; Dec. Dig. § 212.*]

3. Deeds (§ 210*)—Cancellation—Fraud.

In a suit to cancel a deed executed in consideration of love and affection, evidence *held* not to justify a finding that the grantee, as an inducement to procure the deed, promised to go on the premises and live with the grantor, so that a decree could not be granted on that ground.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635, 636; Dec. Dig. § 210.*]

4. Fraud (§ 50*)—Presumptions.

Fraud will never be presumed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

5. Fraud (§ 1*)—Acts Constituting.

"Fraud" is the successful employment of cunning, deception, or artifice used to circumvent, cheat, or defraud another. It is the doing by one's self or inducing another to do such things as lead the opposite party into error, and the intent to deceive is one of its main characteristics, and fraud may be perpetrated by misrepresentations, either by word or deed, as to material facts.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 1–7; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2943–2954; vol. 8, p. 7666.]

6. Contracts (§ 94*)—Fraud—Effect.

Fraud vitiates all contracts on the ground that the party deceived never consented to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420–430; Dec. Dig. § 94.*]

7. Deeds (§ 165*) — Conditions — Performance.

Where an aged and infirm person on an express promise has conveyed away his whole property to a child, relative, or friend, in consideration of being taken care of and furnished a home for life and the grantee fails to take care of the grantor, the court will set the deed aside at the suit of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 521; Dec. Dig. § 165.*]

8. Cancellation of Instruments (§ 3*)—Rescission—Grounds.

A deed cannot be set aside for light or trivial reasons, nor because grantor has changed his mind.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 1, 5; Dec. Dig. § 3;* Deeds, Cent. Dig. §§ 210, 211.]

9. Deeds (§ 211*)—Cancellation—Fraud.

In a suit to cancel a deed on the ground of fraud, evidence *held* not to show fraud on the part of the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 645; Dec. Dig. § 211.*]

10. Deeds (§ 68*)—Cancellation—Grounds.

Where an old man in possession of his faculties conveyed his property to his niece in consideration of love and affection, retaining a life estate in himself, and the deed was voluntarily and deliberately executed, the court could not set it aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149–155; Dec. Dig. § 68.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Hermann Bretthauer against Johanna Maria Foley. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Reversed.

A. B. Foley and Nicholas Bowden, for appellant. Wm. H. Johnson, for respondent.

COOPER, P. J. This action was commenced in October, 1907, and by the complaint then filed it was sought to have a certain deed made by plaintiff to defendant on the 7th day of March, 1905, set aside and canceled on the ground that it was made without consideration, to have it adjudged that the plaintiff had the sole right to the possession of the property described in the deed, and, further, to enjoin the defendant from occupying or retaining possession of the said premises. By leave of the court plaintiff twice amended the complaint, and the pleading on plaintiff's part on which he went to trial is the second amended complaint. It is therein sought to set aside the deed on the ground of fraud; the particular acts of fraud charged being that defendant "falsely and fraudulently" represented to plaintiff that, if he would deed the property to her, she would "immediately reside with and take care of plaintiff as her own father, and be with him in sickness or distress, and, in addition thereto, defendant would attend to the renting and managing of said property, and apply the net proceeds of said property to his wants for and during the life of plaintiff; that, in consideration of the said promise of said cohabitation of said defendant with him and of her caring for him as aforesaid continually up to his death, plaintiff made said deed." It is further alleged in the amended complaint that plaintiff relied upon the said promises so made, and was induced thereby to make and deliver said deed, and that "defendant has failed and neglected to execute or perform any of said promises or representations willfully and intentionally, and each and all said representations now remain wholly and entirely unfulfilled; that each and all said representations were made without any intention of defendant to perform them or any of them." The case was tried before the court and findings filed, in which a judgment was ordered and entered in favor of the plaintiff. The court found: "That said defendant promised said plaintiff, if he would make and deliver to her said deed to his said property, she would love and care for him during his life, and would during his life manage and care for the property deeded, and receive the rents, issues, and profits thereof, and turn the same over to him monthly; that plaintiff, reposing trust and confidence in defendant, and believing the promises and representations of defendant, and that she would keep and perform them, and would keep and perform the promises, covenants, and conditions of said deed, did on the 7th day of March, 1905, execute, acknowledge, and deliver to defendant said deed; that had plaintiff not believed said defendant would execute the said promises and representations he would not have made said conveyance." The court further found that plaintiff relied upon such promises and representations; that they were made by defendant with no intention of keeping or performing them, and that she has willfully failed and neglected to keep or perform said promises; that the value of the property is $10,000; and "that defendant has not since the recording of said deed attempted to convert, nor has she ever converted, any of the income of said property to her own and exclusive use, nor has she at any time attempted to convert the income of said property to her own use."

It is claimed that the evidence does not support the findings first above quoted, and we must so hold. The defendant is the niece of the plaintiff, and the only daughter of his favorite sister, who died a few years before the deed was made. She was at that time but a mere schoolgirl, about 17 years of age. Plaintiff was an old man, aged about 70 years, residing with his tenant on the little ranch in Santa Clara county, having no wife and no children of his own. He had always been very fond of defendant from her childhood, and had often given her little presents and written to her and visited her at the home of her father. She had never, so far as the record shows, said anything to him in regard to having the deed made to her. It is conceded by plaintiff's counsel that there was no evidence of any acts of undue influence brought to bear upon plaintiff. Let us then examine the deed and the circumstances under which it was made. It was a solemn writing made by plaintiff, and delivered to defendant. It recites that it is made by "Hermann Bretthauer, unmarried, to Johanna Maria Foley, a single woman, for and in consideration of the love and affection which the party of the first part hath and beareth to the party of the second part, and also for her better maintenance and support, and for other good and valuable considerations not herein recited." Then follows a description of the little farm by metes and bounds, and then the following clause: "In trust nevertheless that the said party of the second part during the life time of the said party of the first part shall receive the net rents, issues and profits of the said property, and turn over the same monthly in United States gold coin to the said party of the first part on the first day of each and every month during the life time of the said party of the first part, and by the term 'net rents, issues and profits' in this instrument expressed it is intended that after paying all sums necessary for repairs, improvements, taxes, water rates and other expenses connected with said property the net amount and income above remaining in the hands of the said second party shall be paid over to the said first party, and further it is intended by this instrument that the said second party shall hold the title in fee as trustee and in remainder with the life estate reserved to the said first party, and upon the termination of the life of the said party of the first part this trust shall terminate, and the title in the said party of the second part, and this grant and gift is made for the sole purpose of vesting the title in fee in the said party of the second part subject to a life in and for the benefit of the said party of the first part, and for the further purpose that upon the termination of the life of the said party of the first part the title in fee shall vest absolutely in said party of the second part."

It is too plain to admit of argument that the deed conveyed the remainder to the grantee after the termination of the life estate retained to the grantor. It was further contemplated that the defendant might receive and collect the rents, issues, and profits for the express use and benefit of the grantor during his lifetime, and that she might perhaps have claimed such right to the management of the property. But this clause, as interpreted by the circumstances and the conduct of the parties in relation thereto, was evidently intended as a precaution in case the grantor should by reason of illness or the infirmities of old age become incompetent to control and manage the property. Such meaning is evident from the fact that the plaintiff, at the time the deed was made, was in the possession of the property and enjoying its rents, issues, and profits. The defendant was a schoolgirl living in San Francisco, and evidently inexperienced as to the renting, management, or conducting of a farm. Plaintiff afterwards, and during the following year, rented the land to a tenant on shares, but retaining the right to live and occupy a room in the little dwelling house upon the premises. He managed the property after the deed was made as he had done before, and received every cent of the income. The defendant never asked for any income, nor did she ever claim the right to the possession, control or management of the property. Plaintiff never requested her to manage the property or to collect the rents. He wrote several letters to her afterwards and up to the time of the earthquake and fire which occurred in San Francisco in April, 1906, but in no letter did he even speak of or mention the fact that he desired the defendant to live with him or to collect the rents. After the fire of April, 1906, had burnt the home of defendant and her father in San Francisco, plaintiff wrote to them to come to his home and reside, and they did so, living with plaintiff several months during the summer of 1906. During all this time plaintiff never even hinted to defendant that he desired her to collect the rents for him. In fact, plaintiff testified upon the stand that he had never requested the defendant to collect the rents or to manage the property. It therefore appears plain that plaintiff was not in any manner injured, defrauded, or deceived by the so-called trust clause in the deed. He elected to attend to his little farm himself, and he did so, with no demand made upon defendant to do anything in the way of collecting rents. In fact, it would seem indeed strange if the plaintiff, an experienced farmer, while active and possessing his faculties, should have turned over the management of the farm with which he was familiar to a young girl of no experience who had been reared in the city. We apprehend that no such thought ever entered plaintiff's mind until he concluded that he wanted to call back the estate which he had deliberately given to his niece.

The claim that it was a part of the consideration for the deed that the defendant should go on the place and live with the plaintiff is equally without merit or support in the evidence. The court found that the defendant, as a part of the consideration for the deed, promised plaintiff that she would "love and care for him," and that she has failed and neglected to do so. The claim as to loving and caring for plaintiff, whatever that may mean, is not in the deed. The plaintiff had recited in the deed that in consideration of love and affection he made it, but evidently his love and affection, although expressed in writing, is not so great as it was when he made the deed, or it has settled upon some other object. Whether plaintiff's change of affections was caused by the prolonged visit of defendant and her father at plaintiff's house during the summer of 1906 is not for us to say. The words "care for" are of very little significance. It is not found that defendant ever refused to perform any act of kindness to plaintiff, that he was ever sick and afflicted and she neglected to comfort him, or that he was ever hungry and she neglected to feed him. In fact, plaintiff at all times controlled the property, collected about $1,000 per year income, and besides had plenty of money on hand for his personal needs. As to whether the defendant neglected to love him or not we cannot say, but often people are not loved because of their conduct. In any event, it was not "nominated in the bond" that she was to love him.

Equally without merit is the claim that the defendant as an inducement to procure the deed promised to go on the ranch and live with plaintiff. In all the correspondence and the letters from plaintiff to defendant after the deed was executed up to the time that the action was commenced we find no mention by plaintiff of any such promise, nor even a request by plaintiff that defendant would come and live with him save the request to defendant and her father after the fire of April, 1906. In fact, the little cottage was for most of the time occupied by plaintiff's tenants, and only one room, or one room and the kitchen, reserved for plaintiff's personal use. When the plaintiff was upon the witness stand, and the subject was first mentioned to him as to the arrangements, and as to where the defendant was to live, and the question was asked whether she was to live "with her father or elsewhere," the plaintiff answered: "I could not state where she intended to stay. I supposed she would come with him and stay with me." It is true that afterwards, when plied with questions that were leading and suggestive, the plaintiff said the defendant was to stay with him and take care of him, but, in the face of the other evidence in the record, the statement is entitled to little significance. The plaintiff nowhere said that the defendant promised, as a consideration for the deed, that she would go on the ranch and live with him. The defendant says that she never made such promise. Her father was present when the deed was made, and he testified that he never heard such promise. Mr. Barry, the attorney who drew up the deed and who had a private consultation with the plaintiff, testified that he heard no such promise and no mention made of such promise. Mr. Treat, before whom the deed was acknowledged, heard of no such arrangement. In the original complaint, verified by plaintiff, he swore that defendant "had seized upon and occupied the property described in said deed, and is attempting to convert the income thereof to her own use." It is not even hinted in the complaint that defendant had failed to keep her alleged parol promise to live with defendant, or that she had been guilty of any fraud of any kind or in any manner or shape. And not only this, but the court has not found that any such promise was made, but only that the defendant promised to "love and care" for plaintiff. The plaintiff, in order to have obtained relief against the solemn deed made by him, was required not only to allege the acts constituting fraud, but to prove them by clear and satisfactory evidence. The law is sometimes said to abhor fraud; and fraud will never be presumed. It has been defined as the successful employment of cunning, deception, or artifice used to circumvent, cheat, or defraud another. It is the doing by one's self, or inducing another to do, such things as lead the opposite party into error. The intention to deceive is one of its main characteristics. It is generally brought about by misrepresentation, either by word or deed, as to material facts by which the confiding party is misled to his injury. It may be perpetrated by the concealment of material facts which the party to be benefited was, in good conscience and equity, bound to disclose. When fraud is proven, it vitiates all contracts upon the principle that the party deceived never consented.

The case here is not like a case where an aged and infirm person, upon an express promise, has conveyed away his whole property to a child, relative, or friend, upon and in consideration of being taken care of and fed, clothed, and furnished a home for the remainder of his life, and the person so receiving the estate, after having induced the owner to make himself penniless relying upon such promise, turns ingrate, fails to keep his promise, and casts the grantor out on the world a beggar. In such case, the courts have well said that there is no magic or solemnity about a deed that it cannot be set aside. The rule is that a deed cannot be set aside for light or trivial reasons, nor because the grantor has changed his mind. The reason for the rule is apparent. When a party has signed and delivered a conveyance, it must be treated as a serious matter. As said by the late Judge McFarland in Tillaux v. Tillaux, 115 Cal. 668, 47 Pac. 692: "It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry." It was said in Soberanes v. Soberanes, 97 Cal. 144, 31 Pac. 911: "Transactions beyond any question should be thoroughly sifted, but a voluntary deed, free from any imputation of undue influence, executed by a mother with her eyes open, cannot be set aside merely upon the ground that an honorable man would not accept a gift which strips his mother of all her property and leaves her dependent on the charity of others. A person in the possession of his faculties has the right to dispose of his property as he sees fit, upon the principle stated by Lord Nottingham, that, if he will improvidently bind himself up to a voluntary deed, he need not expect the court to break the fetters put upon himself by his own folly. To hold that gifts, voluntarily made and with full knowledge of the facts and of the nature and effect of the transfer, should be set aside because the donor had divested himself of his property, would be to establish a rule that no man can make a voluntary disposition of his estate except by will."

In this case we see no evidence of any fraud upon the part of the defendant. Plaintiff disposed of his property to his niece on account of and in consideration of his love and affection, and she is still his niece. His love and affection may have gone, but he stated that as the consideration when he made the deed, and, if it was a good consideration, then it is good now. He retained a life estate for his declining years, which is perhaps all he will ever need. Having voluntarily and deliberately made the deed, and the deed having been made while he was in possession of all his faculties, he cannot now ask the aid of the court to relieve him of a condition brought about by his own deliberate and voluntary act. Courts are instituted for the purpose of enforcing rights, redressing wrongs, compelling specific performance of a certain class of contracts, and of granting relief upon the ground of fraud, duress, or mistake when such fraud, duress, or mistake is clearly proven, but not for the purpose of annulling or overhauling contracts or deeds improvidently made.

The order denying a new trial is reversed.

We concur: HALL, J.; KERRIGAN, J.

14 Cal. App. 780

SACRAMENTO COUNTY v. GLANN et al.
(Civ. 714.)

(Court of Appeal, Third District, California. Dec. 9, 1910. Rehearing Denied by Supreme Court Feb. 7, 1911.)

1. EMINENT DOMAIN (§ 75*)—COMPENSATION—TENDER—NECESSITY.

An action to condemn land for a public highway should not be brought until the owner has been tendered the compensation to which the viewers have found him entitled.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 198; Dec. Dig. § 75;* Highways, Cent. Dig. § 359.]

2. HIGHWAYS (§ 63*)—ESTABLISHMENT—PROCEEDINGS—FINDINGS OF BOARD OF SUPERVISORS—COLLATERAL ATTACK.

A finding of the viewers and board of supervisors preliminary to the acquisition of land for a highway that a certain person was the owner and entitled to the damages cannot be collaterally attacked in condemnation proceedings subsequently brought.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 168; Dec. Dig. § 63.*]

3. HIGHWAYS (§ 41*)—PROCEEDINGS FOR ESTABLISHMENT.

The viewers of land sought to be taken to establish a highway are required only to report in good faith the apparent ownership of the land, and not to adjudicate the title thereto; that being for the superior court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 115; Dec. Dig. § 41.*]

4. HIGHWAYS (§ 55*)—PROCEEDINGS—VIEWERS—REPORT—OBJECTIONS.

Where, though the viewers of land sought to be taken for a highway mistakenly reported that a certain person owned the land, when it was owned in part by others, all of the owners had personal knowledge of the acts of the viewers and made no complaint thereof, and one of them rejected the award to him, but did not demand that the land be segregated according to the interests of the owners, and condemnation proceedings were afterwards brought and the ownership of the land determined according to the facts, and damages were apportioned to the respective owners, the mistake of the viewers as to the ownership of the land was a mere irregularity, which could not have prejudiced any of the owners.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 55.*]

5. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENTION.

The court in construing statutes must effectuate the legislative intention.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.*]

6. STATUTES (§ 188*)—CONSTRUCTION—LANGUAGE—POPULAR MEANING.

The legislative intent is to be determined primarily by accepting the ordinary and popular sense of the language used, where no technical expressions are used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 188.*]

7. EMINENT DOMAIN (§ 177*)—PROCEEDINGS—PARTIES.

Under Code Civ. Proc. § 1244, subd. 5, requiring the complaint in an action to condemn land for a highway to describe the land sought to be taken, and whether it includes the whole or only a part of an entire parcel, and providing that all parcels lying in the county required for the same public use may be included in the same or separate proceedings at plaintiff's option, but that the court may consolidate or separate them to suit the convenience of the parties, actions against several owners to condemn a right of way for a highway may be joined, and the rights of each owner protected in the one proceeding, though, if the court deems it advisable, it may require separate trials.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 177.*]

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by the County of Sacramento against Peter Glann and others. From a judgment for plaintiff, defendants appeal. Affirmed.

George & Hinsdale and White, Miller & McLaughlin, for appellants. E. S. Wachhorst, A. M. Seymour, Hugh Bradford, and R. Platnauer, for respondent.

BURNETT, J. The appeal is from a judgment in favor of the county of Sacramento condemning certain land for a public highway. The land is located partly in the S. E. ¼ of section 9 and partly in the S. W. ¼ of section 10, township 5 N., range 5 E., M. D. M. The said S. E. ¼ was owned by Peter Glann, the estate of Vincent Glann, deceased, and the estate of Daniel Glann, deceased, in equal undivided shares, and the S. W. ¼ belonged to the said estates in equal shares. The action was brought against Peter Glann individually and in his representative capacity as executor of each of said estates. The judgment awards to each of the defendants the value of his respective interest in the land condemned and his proper proportion of the damage accruing to the part of the land not sought to be condemned by reason of the severance from the portion condemned and the construction of the road in the manner proposed by plaintiff. It is not disputed that the proceedings before the board of supervisors prior to the report of the viewers were entirely regular, but, by reason of said report and the action taken thereon, it is claimed that the supervisors were deprived of jurisdiction to proceed any further towards condemnation. The basis for the contention lies in the fact that the viewers reported Peter Glann as the owner of the land and designated him as the one to whom the entire damage should be paid for the taking of the property and the construction of the fence. After estimating the amount which should be paid him, they further declared that "Peter G. Glann, over whose land the proposed road is located, opposes the opening of the same, and declines to state the amount of damage to which he would be entitled for the right of way. It will be necessary, therefore, to condemn the right of way required." The board of supervisors approved said report and ordered that "the amount of damages sustained by Peter Glann, a nonconsenting landowner through whose lands said road runs, is the sum of $623.50 and said sum of $623.50 is hereby awarded to said Peter Glann as such damages. It is further ordered that said sum so fixed and assessed as the amount of damage to said Peter Glann shall be set apart in the county treasury out of the funds of road district No. 5, to be paid to said Peter Glann." The rightful ownership of the land was set forth in the pleadings, and the jury found that "the value of the land sought to be taken by the plaintiff in the S. E. ¼ of section 9 is $50.00 per acre and the damage to the lands not taken in said S. E. ¼ is five dollars per acre and the value of the land sought to be taken by the plaintiff in the S. W. ¼ of section 10 is fifty dollars per acre and the damage to the lands not taken in said S. W. ¼ is nothing." The number of acres taken in each quarter section appeared, and the cost of the construction of the fences was stipulated. The findings and decree of the court followed in accordance with the verdict of the jury and the admitted facts.

Of the two main contentions of appellants, the first is that the board of supervisors should have segregated and set apart to each of the two estates in question the amount to which said estate was entitled, and that, "in the absence of such ascertainment, assessment, award, and tender, such board was absolutely without jurisdiction to make an order establishing the road or enter the order directing this suit to be brought, * * * and, there being no valid order establishing the road or directing this action to be brought, no right of action arose in favor of the county, against the estate of Daniel Glann, the estate of Vincent Glann, or the successors in interest of either of them." In support of the position are cited County of Sonoma v. Crozier, 118 Cal. 680, 50 Pac. 845, County of Sutter v. McGriff, 130 Cal. 127, 62 Pac. 412, and Graham v. Bailard et al., 157 Cal. 96, 106 Pac. 215.

In the first of these was involved a question of pleading, and it was held that "a complaint in an action by a county to condemn the land of the defendant for a private way, which merely avers the filing of a sufficient petition and the giving and approval of the bond, and that afterwards such proceedings were had that on a day specified, the board of supervisors of the county, by order duly given and made, directed the district attorney to institute condemnation proceedings, but which fails to state that viewers were appointed, or that they proceeded to lay out the road or that they made or filed any report, or that the report was approved, or that damages awarded had been tendered to defendant and refused by him, fails to state a cause of action." The respondent in that case contended that the foregoing allegations were not necessary, for the reason that section 2690 of the Political Code makes the order directing suit to be brought conclusive as to the regularity thereof, but the Supreme Court declared that facts must be alleged showing that the board of supervisors had jurisdiction to make said order, and that said provision was not intended to obviate the necessity of pleading or proving the jurisdictional steps, but it must be understood as rendering mere irregularities harmless when it appears that the board has the jurisdiction to make the order. No such question can arise here as the facts showing the compliance of the board with the requirement of the statute are fully pleaded, so that it affirmatively appears by the allegations of the complaint that the board of supervisors acted within their statutory authority in making the order directing the district attorney to begin condemnation proceedings.

The judgment in the McGriff Case, supra, was reversed for the reason that there was an entire failure of the evidence to show that there was any compliance with the order of the board directing that the amount of the damages assessed and awarded be set apart in the treasury of the county "out of the proper fund" to be paid in accordance with law. The Supreme Court properly said: "The statutory provisions relative to this matter provide a special form of tender which must be made to the landowner before suit in condemnation may be begun. It is essential, since the law has prescribed it, that the requisites of such tender shall be strictly complied with. In effecting the tender it is required that the amount of money shall be absolutely set apart in the treasury and held for the full period of 10 days subject to the demand of the rightful owner of the land." It was admitted by respondent that there was no evidence that the money had been set apart and thereby made available for the payment of the damages awarded, and the only reason urged by respondent why the point should not be accorded decisive significance was that it would be presumed that the treasurer had done his duty. To this suggestion the court very aptly made reply that "no presumption can be indulged in to the effect that at the time of the order there was actually money in the proper fund sufficient and available for the indicated purposes." It is well to observe that the sequestration of the money in the treasury is an important step in the proceeding, and no owner of property should be held in default and subject to an action of condemnation until he has been tendered the money to which the viewers have found that he is entitled. The decision is not controlling here, however, for the reason that the vital question involved therein was for the court, and not for the board of supervisors, and an indispensable prerequisite to condemnation had not been complied with, whereas, in the case at bar, as we shall see presently, the point in dispute was within the jurisdiction of the board of supervisors to determine beyond attack in this proceeding, and there was, as a matter of fact a sufficient compliance with the statutory provisions upon the part of the viewers and of said board.

The question involved in Graham v. Bailard, 157 Cal. 96, 106 Pac. 215, and which led to a reversal of the judgment, was the construction of an order made by the board of supervisors and particularly as to what land the description in the order included. In the course of the opinion the court reasserted some familiar principles in relation to the exercise of the authority conferred upon inferior tribunals and stated that an order by a board of supervisors purporting to open a road is void unless there has been a substantial compliance with the requirement of the statute, but this was merely incidental to the holding that the board intended to adopt the report of the viewers recommending a road of 25 feet in width, since it appeared that the said report was clear and explicit so far as the intention of the viewers was concerned and that the said board ordered the report accepted and "so proceeded, all of which necessarily implies an approval of the report."

But here appellants seek to attack collaterally a finding of the board of supervisors made within their jurisdiction, and which, if not final for the purpose of determining the necessity for a public highway, and as preliminary to the order directing condemnation, is at least beyond the reach of review in this proceeding. In Re Grove Street, 61 Cal. 453, it is said: "An inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts upon the existence of which its jurisdiction or power depends. Where, however, the power depends, not upon the existence or nonexistence of matters in pais, to be established by evidence, but upon allegations in a petition, a portion of the record, the question is not the same." In discussing the duty of the board of supervisors in reference to the subject before us, it is said in Tehama County v. Bryan, 68 Cal. 63, 8 Pac. 676, that "By section 1241 it is provided that 'before property can be taken, it must appear (1) that the use to which it is to be applied is a use authorized by law; (2) that the taking is necessary to such use.' It is the province and is made the duty of the board of supervisors to decide these questions in all cases where private property is required for highway purposes. The necessity of the use, its public character, the route, and termini of the road, the land necessary therefor and the apparent ownership thereof, are to be determined by that body before steps can be initiated in the courts for its condemnation for road purposes." In Humboldt County v. Dinsmore, 75 Cal. 609, 17 Pac. 710, it is held that the board of supervisors in approving the report of the viewers acted upon matters of fact within their jurisdiction to determine and that their determination cannot be assailed collaterally. In considering the authority of the board of supervisors to pass upon a petition for the establishment of a highway, the Supreme Court in Levee District No. 9 v. Farmer, 101 Cal. 181, 35 Pac. 570 (23 L. R. A. 388), declares that "as to all facts tending to show whether the power of the board ought or ought not to be exercised, either by granting or denying the petition in whole or in part, the board exercises judicial functions and its judgments are final and cannot be attacked collaterally, but may be reviewed upon certiorari when the jurisdiction of the board has been exceeded." In Johnston v. Board of Supervisors, 104 Cal. 393, 37 Pac. 1047, is discussed the effect of an order by the board approving the report of the viewers, and it is therein said: "I think it clearly appears that by virtue of this provision of the Code (section 2688, Pen. Code) the board acquired jurisdiction to hear and determine all questions relating to the report of the viewers and to approve or reject that report either wholly or in part. That report was regular and valid upon its face, and the only question raised in regard to it was whether or not it was true—a question of fact to be resolved according to the weight of evidence. If, as contended, the conclusion or finding of the board upon this issue was contrary to the evidence, it was merely an error committed in the exercise of unquestionable jurisdiction, and is therefore beyond the reach of a writ of review." In People v. Los Angeles, 133 Cal. 342, 65 Pac. 749, the question of jurisdiction of inferior tribunals is discussed at length, the foregoing cases and other authorities to the same effect are cited with approval, and it is further declared that in such instances "a mere error in the adjudication of a question of fact, not procured by fraud, extrinsic or collateral to such question, is not a ground upon which it may be vacated, since if it were, no adjudication of a question of fact would ever become final, so long as new evidence could be had, or a different conclusion be reached upon the same evidence."

Section 2686, Pol. Code, provides what the report of the viewers shall contain, and includes "the names of landowners who do not consent, and the amount of damage claimed by each." The only objection to the report made in the case at bar is that the viewers made a mistake as to the ownership of a part of the land. It was a very natural mistake, as they probably found Peter Glann, as he was entitled to be, in possession of all the land, and it is a fair inference, also, that he declined to give the viewers any information as to the title, as he declined to state the amount of damage which he believed he would suffer by reason of the proposed highway. At any rate, under the decisions, the finding of the viewers and of the board as to the ownership was final as far as constituting a basis for further proceedings is concerned, and any other view would be exceedingly unreasonable. According to the claim of appellants, the viewers must be sufficiently familiar with the facts and the law involved therein to determine with precision who is the owner of the property, although it may be the subject of litigation and require an intimate acquaintance with legal principles appertaining to land titles to enable one to solve the question. The law is not so exacting. The true view undoubtedly is that, if the viewers act in good faith and report the apparent ownership, they have satisfied the requirement of the statute. They do not, of course, adjudicate the question of title, as that is for the superior court, but they serve notice upon the occupant of the property and report their finding as to who is the apparent owner. This was done herein and the money set apart in accordance with their recommendation. There could be no segregation of this amount unquestionably, since it was mistakenly supposed that Peter Glann was the sole owner.

If we go a step further, it is perfectly clear that appellants were not prejudiced by reason of the mistake made by the viewers. Service was made upon the occupant in possession by virtue of his own right and as the representative of the other interests. In other words, the owner of an interest and the agent of the other interests had personal knowledge of the acts of the viewers. He made no complaint, rejected the award, and made no demand that it be segregated. Suit was brought and the ownership was determined in accordance with the facts, and the damages were apportioned to the respective owners. At most, it would therefore seem to be a mere irregularity not affecting the substantial rights of the parties that the viewers were misled as to the ownership of the property. We feel satisfied, though, that the question was within the jurisdiction of the board and not reviewable in this proceeding, and that, if it could be considered here, there was a substantial compliance with the requirement of the statute, and therefore appellants have no ground for complaint.

Respondent also contends that the sufficiency of the proceedings of the board of supervisors had prior to the making of the order directing the district attorney to institute the action to condemn cannot be considered at all in this action. Authorities are cited in support of the position, among them County of Santa Barbara v. Yates, 108 Pac. 726, wherein it is said: "The order directing the district attorney to institute the action is in the nature of a judgment adjudicating upon the sufficiency of all prior proceedings requisite to the making of the order. If the proceedings be irregular, or any essential step therein wanting, objection thereto should be taken by obtaining a review upon certiorari of such proceedings in the proper court." But we deem it unnecessary to discuss the point as we are satisfied with the soundness of the other ground hereinbefore considered.

It is also claimed that there is a misjoinder of causes of action, in that a cause of action to condemn a right of way across lands of Peter Glann cannot be joined with a similar cause of action affecting the lands of Vincent Glann or Daniel Glann, or those who succeeded to his estate. Herein reliance is had upon the general rule as embodied in sections 427 and 382 of the Code of Civil Procedure providing for the joinder of causes of action. There is no controversy, however, as to the general rule, but it is insisted by respondent that the case of condemnation proceedings is governed by a special provision which authorizes the course herein pursued. In this we think respondent is clearly right. As appellants declare, "the problem to be solved is one of statutory construction, pure and simple." It is not disputed that it is competent for the Legislature to provide that such actions may be joined in one proceeding, and it appears that this has been effected in the enactment of section 1244 of the Code of Civil Procedure, providing what the complaint must contain; among other things, in subdivision 5, "a description of each piece of land sought to be taken and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties." If the Legislature had intended to limit the option to cases where all the parcels belong to all the defendants, it seems singular that it was not so expressed. We are required, of course, to give effect to the intention of the Legislature and that intention is to be determined primarily by attributing the ordinary and popular sense to the terms used, since there is no technical expression employed in the said provision. In doing this we necessarily reach the conclusion that the section covers a case like the one before us, since it is admitted that all the parcels lie in the county of Sacramento. There is another consideration justifying this view which is suggested by respondent, to the effect that if said subdivision 5 be construed as urged by appellants its enactment was entirely unnecessary, as sections 382 and 427 of the Code of Civil Procedure permit such a joinder. At any rate, we cannot say that "all parcels" mean only some of the parcels. Nor do we see any difficulty in the application of this rule to the trial of actions. Even if all the parcels belonged to the same defendant, it would be necessary to submit the evidence and make separate findings as to each of the parcels. Although there may be more than one defendant, the rights and claims of all may be protected and adjusted in one proceeding, but, if deemed advisable, the court may require separate trials. We can see nothing in this construction of the provision of which any one can justly complain.

In County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972, the order of the trial court in refusing separate trials was challenged, and it was therein held that "the discretionary power as to separation being vested in the trial court, and no abuse being apparent, its order will not be reviewed." The court assumed that there was no question that said section includes the case of several defendants owning different parcels in the same county.

There are other points made by appellants, but they are mostly incidental to what we have already considered. We have examined all of them and do not find any prejudicial error.

We do not think it would be in furtherance of justice to hold with appellants, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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14 Cal. App. 363

MACLAY CO. v. MEADS et al. (Civ. 720.)

(Court of Appeal, Third District, California. Nov. 19, 1910.)

Appeal and Error (§ 671*) — Record — Review of Matters Not of Record.

An appellate court may not go beyond the scope of the order appealed from, and review matters not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2867; Dec. Dig. § 671.*]

On rehearing. Denied.

For former opinion, see 112 Pac. 195.

HART, J. The point is made in the petition that the judgment of this court should have been that the order appealed from, in so far as it affected the defendants who were duly served with summons as well as those not served, but who made a general appearance in the proceedings on the motion to vacate the judgment, be reversed. It is asked that the judgment of this court be so modified as to conform to that suggestion.

As counsel for appellants suggest in the petition, the order vacating the judgment is rather ambiguous. All the defendants joined in the motion to vacate the judgment. The order of the court reads as follows: "The motion to set aside the judgment and default of Petaluma Transportation Company is granted." While the order is, as stated, ambiguous or uncertain in that there is nothing therein expressly indicating what disposition was made of the motion as to the defendants other than the Petaluma Transportation Company, it would nevertheless seem to follow, by implication, from the language of the order, that the motion was denied as to said other defendants. Still the court might not have acted at all on the motion in so far as it affected the defendants other than the Petaluma Transportation Company. In the opinion filed in this court herein, the concluding words were: "We think the court made no error in granting the motion as to the Petaluma Transportation Company, and the order is therefore affirmed." Counsel declare that this language still leaves in the air the question whether the order as to the other defendants is reversed or affirmed. This contention is doubtless possessed of merit, but the fault is not with this court, for the judgment here is as broad as the order appealed from, and we know of no authority or principle which would justify a court of appeal in going beyond the scope of an order or judgment from which an appeal is taken and reviewing matters as to which there is absolute silence in the record.

If the trial court failed to dispose of the motion, in so far as it applied to the defendants, Meads, Doe, Cox, and Ray, it was no doubt an oversight, which should, of course, be rectified. The parties are entitled to have the motion as to all the defendants who participated therein directly and clearly acted upon by the court below. But, as stated, we cannot see our way clear to reverse or affirm or modify or in any way interfere with an order where, as here, we are by its ambiguity led into a state of uncertainty as to its scope and effect, or, whether, indeed, any order in this case as to Meads, Cox, Doe, and Ray was made at all.

It is needless to here suggest that it necessarily follows from the views expressed in the original opinion that the motion as to the defendants other than the Petaluma Transportation Company should not have been granted by the court below.

With regard to the question whether the Petaluma Transportation Company was made a party to the action, we adhere to the views ventured in our former opinion.

The petition is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14 Cal. App. 693

COLON v. TOSETTI. (Civ. 877.)

(Court of Appeal, Second District, California. Nov. 29, 1910. Rehearing Denied Dec. 29, 1910; Denied by Supreme Court Jan. 27, 1911.)

1. NEW TRIAL (§ 71*)—DISCRETION OF COURT—GRANTING OF NEW TRIAL.

Where a finding of damages was rendered on substantially conflicting evidence, the court did not abuse its discretion in granting a new trial upon the sole ground that the finding was not supported by the evidence, unless the finding be discharged as immaterial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. FRAUDS, STATUTE OF (§ 139*)—CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR—NATURE OF STATUTE.

The statute of frauds (Civ. Code, § 1624, subd. 1), requiring an agreement not to be performed within a year to be evidenced by a writing, signed by the party to be charged, does not apply to oral agreements voluntarily performed, and where an oral agreement for the sale of budded peach trees, the buds to be procured from a designated peach tree, was made in August, 1905, the trees not to be delivered until January, 1907, and the trees were delivered voluntarily, but some of them were not budded from the designated tree, the buyer was not precluded from suing for breach of the agreement because it was not in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 337; Dec. Dig. § 139.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Jeammari Colon against G. Tosetti. Verdict for defendant, who appeals from an order granting plaintiff a new trial. Affirmed.

Hearing in Supreme Court denied in 113 Pac. 366.

Tobias R. Archer, for appellant. J. L. Murphey, for respondent.

SHAW, J. Defendant appeals from an order of court granting plaintiff's motion for a new trial. The action is one to recover damages alleged to have been sustained by reason of defendant delivering to plaintiff certain budded peach-tree stock of a variety other than and inferior to that agreed upon by the terms of a parol contract. The only ground of the motion necessary to consider is the insufficiency of the evidence to justify the decision.

Under the agreement, the buds for all of said stock were to be procured from a certain designated peach tree in the orchard of a Mr. Frazier, which defendant believed to be of the variety known as the "Early Alexander." Only part of said stock was budded from this tree; it was in fact of a variety known as the "Early Imperial." The balance of such stock was of a variety known as the "Early Alexander." Plaintiff planted the trees in orchard farm upon his land, setting 82 to the acre, with the two varieties standing and mingled together; there being at the time of the commencement of the action 56 Early Imperials and 143 Alexanders. The court found: "That neither such mingling of said trees, nor the fact that some of said trees were and are Early Alexanders, is any damage to plaintiff, nor makes the land on which said trees are standing, with the trees, of any less value than would be the value thereof were all said trees Early Imperials, and plaintiff has not suffered any damage thereby." While there was testimony tending to support the facts thus found, there was also evidence to the effect that the mingling of the different varieties, conceding them to be equally good, would, nevertheless, on account of the fruit ripening at different times, entail an increased cost of from $20 to $25 per acre in the labor required in harvesting the crop of fruit, and that the value of plaintiff's orchard set solidly to either variety would be greater than where the two varieties were mingled. Inasmuch as there was a substantial conflict of evidence in support of this finding, it cannot be said there was an abuse of discretion on the part of the court in granting a new trial upon this ground alone, unless the finding be disregarded as immaterial. Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806; Von Schroeder v. Spreckels, 147 Cal. 187, 81 Pac. 515; Cole v. Wilcox, 99 Cal. 552, 34 Pac. 114.

Among other things, the defendant pleaded the statute of frauds in bar of the action. His chief contention is that as the court upon uncontradicted evidence found the agreement pursuant to which the trees were delivered to be oral, and made in August, 1905, and the trees were not to be delivered until January, 1907, it is therefore obnoxious to subdivision 1 of section 1624, Civ. Code, which provides that "an agreement that by its terms is not to be performed within a year from the making thereof" is invalid unless there be some note or memorandum in writing thereof made and signed by the party to be charged thereby. Hence it is contended that as the agreement was invalid no recovery thereon could be had in any event, and it therefore follows that the finding upon the issue of damages is immaterial.

We cannot assent to this proposition. The statute of frauds is for the prevention, not in aid of the perpetration, of fraud. It is to be used as a shield, not as a sword. No doubt defendant might, without incurring liability, in an action upon the contract have refused to deliver the trees. He did not avail himself of this right, but, on the contrary, according to his own testimony, voluntarily assumed the obligations of the contract by delivering the trees to plaintiff. This delivery was made in January, 1907, pursuant to the contract made in August, 1905, under which and whereby the trees were to be grown from buds taken from the Frazier tree. Only a part of the trees so delivered were budded from the Frazier tree;

the remainder being of a different variety. Plaintiff was not informed of this fact and believed, and had a right to believe, that the trees so delivered were all of the variety which he had ordered and for which he paid pursuant to the terms of the agreement.

The statute does not apply to oral agreements voluntarily performed, and when thus performed there is a covenant of good faith and absence of fraud or deceit implied by law. This implied covenant is not within the statute. In the exercise of good faith and fair dealing defendant should have acquainted plaintiff with the fact that the trees delivered were not in accordance with the agreement.

The order granting the new trial is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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14 Cal. App. 693

COLON v. TOSETTI. (L. A. 2,852.)

(Supreme Court of California. Jan. 27, 1911.)

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Jeammari Colon against G. Tosetti. An order granting plaintiff a new trial after verdict for defendant was affirmed by the Court of Appeal (113 Pac. 365). Petition for rehearing. Denied.

Tobias R. Archer, for appellant. J. C. Murphey, for respondent.

PER CURIAM. The petition for a hearing of this cause after final judgment in the District Court of Appeal for the Second Appellate District is denied.

Conceding that the contract made in 1905 was void because it was not to be performed within a year, nevertheless, if, more than a year thereafter, the defendant actually delivered the number of trees referred to in the contract, such delivery, without explanation, would be sufficient to support a conclusion that there was a new contract, made at that time, that the trees so delivered were of the kind originally agreed on, and the case would not be within the statute of frauds. As we understand the opinion of the District Court of Appeal, this, in substance, is its effect. There was no occasion to say anything in that opinion concerning actual fraud, since none was shown.

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159 Cal. 270

BOND v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 5,249.)

(Supreme Court of California. Jan. 11, 1911. On Rehearing, Feb. 9, 1911.)

1. Appeal and Error (§ 113*)—Appealable Orders.

Code Civ. Proc. § 963, allows an appeal from any special order made after final judgment. Section 663 provides that a judgment not consistent with the special verdict may be set aside, and section 663a provides that an order granting a motion to set aside such a judgment may be reviewed on appeal the same as orders made on motion for new trial. *Held*, that section 663a was intended either to authorize a review of such an order on appeal from the judgment afterwards made in pursuance of it, or to authorize a direct appeal from the order itself, and does not affect the right given by section 963 to appeal from an order made after judgment denying a motion to vacate the judgment and render a judgment consistent with answers of the jury to special questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758–785; Dec. Dig. § 113.*]

2. Exceptions, Bill of (§ 26*)—Record—Sufficiency of Bill of Exceptions.

A bill of exceptions intended to show the matters upon which the court acted in ruling upon motions involved recited that on the hearing thereof certain instructions set forth in full, the general verdict, the special issues determined by the jury, the notices of motion and the pleadings were introduced in evidence and considered by the court, and that the motions were thereupon submitted to the court for consideration and decision, and properly exhibited all the documents referred to except the pleadings which were incorporated by reference to the judgment roll. *Held*, that it sufficiently showed that the motions were submitted for decision upon the evidence so detailed, and not upon other evidence not included in the bill, and showed, in effect, that it contained all the evidence taken by the court upon the hearing.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 26.*]

3. Death (§ 9*)—Right of Action.

Rights of action by or for the benefit of parents, children, or heirs of a person killed for damages to them by his death exist solely by statute, and are limited by the statutory provisions creating them; no such action existing at common law.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.*]

4. Death (§ 95*)—Action—Measure of Damages.

The right of action for wrongful death being wholly statutory, the statutory rule is the only measure of damages, the extent of the court's power being to apply it to particular cases, construing the rule liberally as in the case of other Code provisions, with a view to effect its objects and to promote justice as expressly required by Code Civ. Proc. § 4, relating to the construction of the Code.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 95.*]

5. Death (§§ 81, 82, 83, 85*)—Action—Measure of Damages—Statutory Provisions.

Code Civ. Proc. § 377, relating to actions for wrongful death, provides that in such actions such damages may be given as under all the circumstances may be just. *Held*, that the statute does not fix the period of minority as a limit beyond which the jury cannot go in estimating the probable pecuniary loss, but the damages are limited to the pecuniary loss suffered by the person for whose benefit the right of action is given, and, in an action by a parent for the death of a child, the damages recoverable are those only which have been or may be suffered by the parents, and no damages can be given for pain or anguish inflicted on the child, or for any pecuniary injury personal to such child, but the pecuniary loss for which recovery may be had should be extended to all pecuniary losses which the circumstances establish with reasonable certainty will be suffered by the beneficiary in the future because of the death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 103–107, 111; Dec. Dig. §§ 81, 82, 83, 85.*]

6. Death (§ 87*)—Actions—Damages.

In an action by a mother for death of a minor son, practically arrived at manhood, who was strong and robust, earning good wages with which he helped to support his mother, it was error to confine a recovery to the pecuniary value of the son's services between the time of his death and the time when he would have arrived at adult age, the circumstances establishing a reasonable probability that the same conditions shown would have continued for some time after he became of age.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. § 87.*]

7. APPEAL AND ERROR (§ 1004*)—REVIEW—DAMAGES.

The authority of the Supreme Court to review the amount of damages recovered exists only when the excess appears as matter of law, or is such as to suggest at first blush passion, prejudice, or corruption of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

8. DEATH (§ 95*)—ACTIONS—DAMAGES.

In an action by a mother for death of a minor son, judgment could not be given for the amount which the jury found the mother would probably have received from the son had he lived; she being entitled only to the present value of such sum.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 95.*]

9. DEATH (§ 52*)—ACTIONS—PLEADING—DAMAGES.

In a death action, it is not necessary to specifically allege the loss of society, comfort, protection, or services of decedent, but evidence may be given of the facts relating thereto and allowance made therefor under the general allegation of damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 69; Dec. Dig. § 52.*]

10. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS.

Where the evidence is not in the record on appeal, it will be presumed sufficient as matter of law to sustain the recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

11. APPEAL AND ERROR (§ 1004*)—REVIEW—FINDINGS OF FACT.

The sufficiency of evidence to support an allowance for damages cannot be reviewed if it tends to support the allowance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Annie Bond against the United Railroads of San Francisco. There was a verdict for plaintiff, together with answers to certain questions of fact, and, on defendant's motion, judgment was rendered for plaintiff upon all the answers for a reduced sum, and from the judgment rendered and from an order denying a motion to enter judgment for plaintiff for the amount of the verdict plaintiff appeals. Reversed and remanded with directions to render judgment for plaintiff for the amount of the general verdict with interest accruing between the return of the verdict and entry of judgment, without prejudice to defendant's right to move for a new trial.

Sullivan & Sullivan and Theo. J. Roche, for appellant. A. A. Moore, Stanley Moore, and Wm. M. Cannon (W. H. Orrick, of counsel), for respondent.

SHAW, J. This is an action by the plaintiff, as a parent, to recover damages for the death of her son, Gustave Fritz, alleged to have been caused by the negligence of the defendant. His father died before the injury occurred. The jury returned a general verdict in favor of the plaintiff for the sum of $4,500. Answers were also made and returned by the jury to certain particular questions of fact. The defendant moved the court, upon certain of these answers, to render judgment for the plaintiff for the sum of $405, and no more. The plaintiff moved the court, upon all the answers, to render judgment for plaintiff for the sum of $6,900. The motion of plaintiff was denied and that of the defendant granted. Judgment was entered accordingly for $405 in favor of the plaintiff. Thereafter plaintiff moved the court to vacate the judgment so entered, and to render judgment in her favor for $6,900, or, failing that, then for the sum of $4,500 given by the general verdict. The motion was based on the answers aforesaid and upon the instructions of the court to the jury upon the subject of damages. This motion was denied by the court. The plaintiff appeals from the judgment, as rendered, and also from the order after judgment denying the last-mentioned motion.

Before discussing the merits of the appeals, it is proper to dispose of some preliminary objections of the respondent. The order made after judgment, denying the motion to vacate the judgment and render a judgment consistent, as plaintiff claimed, with the answers of the jury to the questions put to it, is clearly an appealable order. By section 963 of the Code of Civil Procedure an appeal may be taken from any special order made after final judgment. This order is one of that kind. It is an order authorized by section 663 of the Code of Civil Procedure. Section 663a of the Code of Civil Procedure declares that an order "granting such motion may be reviewed on appeal in the same manner as orders made on motions for a new trial." This was intended either to authorize a review of such an order on appeal from the judgment afterward made in pursuance of it, or to authorize a direct appeal from the order itself. In either case it should not be construed so as to affect the right given by section 963 to appeal from an order denying the motion, as from an order made after judgment. Respondent's position in that behalf is untenable.

The record contains a bill of exceptions intended to show the matters upon which the court acted in ruling upon the several motions involved in these appeals. Respondent contends that this bill does not show that the evidence set forth therein constituted all the evidence before the court for its consideration in determining the motions, or either of them. As to the motions made before judgment, the bill recites that, upon the hearing thereof, certain instructions, set forth in full, the general verdict, the special issues determined by the jury, the notices of motion, and the pleadings, were introduced in evidence and considered by the court, and that "said motions were thereupon submitted to the court for consideration and decision." The documents above referred to were all properly exhibited in the bill, except the pleadings, which were incorporated by reference to the judgment roll. This, we take it, is a sufficient declaration that the motions were submitted for decision upon the evidence above detailed, and not upon other evidence not included in the bill. It shows in effect, though not expressly, that it contains all the evidence taken by the court upon the hearing. The recital concerning the motion made after judgment is substantially similar in all respects to those above mentioned. The claims of the respondent on these points are not well founded. We will now consider the merits of the appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The jury returned answers to twelve questions put at the request of the defendant and two questions requested by the plaintiff. The only questions here important are the eleventh and twelfth questions requested by defendant and the two requested by plaintiff. They are as follows:

"(11) What would have been the probable earnings of Gustave Fritz from the time of his death to the time of his majority? Answer. $765.

"(12) What would have been the probable expenses of Gustave Fritz from the time of his death up to the time of his majority? Answer. $360.

"(1) Did plaintiff, Annie Bond, have a reasonable expectation of receiving from Gustave Fritz, after he had attained his majority and during her expectation of life, contributions to her necessities and wants? Answer. Yes.

"(2) If your answer to the last interrogatory is 'Yes,' what amount would plaintiff, Annie Bond, have a reasonable expectation of receiving from Gustave Fritz, after he had attained his majority and during her expectation of life? Answer. $2,400."

The court had instructed the jury, in substance, as we construe the charge on the subject of damages, that the plaintiff could recover actual pecuniary loss caused by deprivation of the society, comfort, and protection of her son before and after his majority, but that on account of his earnings she could recover only his probable net earnings, if he had lived, from the date of his death to the time of his majority. Apparently the court was of a different opinion when it ruled upon the motions. Notwithstanding the general verdict for $4,500, it sustained the defendant's motion, allowed nothing for deprivation of either society, comfort, protection or earnings after majority, assumed that "probable earnings" during minority included the benefits of society, comfort, and protection, and gave judgment for only $405, which was the difference between the total probable earnings during the remainder of his minority and his probable expenses for that period.

The plaintiff contends that inasmuch as the court instructed the jury that they could allow as damages the pecuniary loss from deprivation of his society, comfort, and protection after, as well as during, his minority, but limited them to his minority as to earnings, it is to be presumed that the excess of the general verdict above the $405 of net earnings was allowed for loss of society, comfort, and protection, and that the judgment should have been for at least the sum of $4,500 given by the general verdict. She also contends that that verdict must stand, even if damages for loss of society, comfort, and protection is limited to the period of minority, because, if so, the jury is presumed to have allowed on that account the excess over $405, to wit, $4,095, and, except upon motion by the defendant for a new trial on the ground of excessive damages, or lack of evidence, the verdict is conclusive on that subject, and no such motion was interposed. She also makes the broader claim that in an action of this character the parent has a right to recover, as damages occasioned by the death of the child, not only such pecuniary losses as may accrue for the period of its minority, but also those which would probably be suffered after its majority, including pecuniary losses resulting from deprivation of its society, comfort, and protection and also from deprivation of such of its services and earnings, after majority, as the parent would have a reasonable expectation of receiving from such child, if it had lived, during the parent's expectancy of life. It is this broad question to which the respective counsel have devoted the main part of their several arguments. At common law no action would lie for an injury causing death. Rights of action by or for the benefit of parents, children, or heirs of the person killed, for the damage caused to them by his death, exist solely because of statutes and are limited by the statutory provisions which create or confer them. The present action is founded upon the provisions of sections 376 and 377 of the Code of Civil Procedure, which are as follows:

"Sec. 376. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person.

"Sec. 377. When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

The rights of action being wholly statutory, the statutory rule is the only measure of damages. All the court can do is to apply it to particular cases, construing the rule in the same manner as other Code provisions, liberally, "with a view to effect its objects and to promote justice." Code Civ. Proc. § 4. The rule of damages stated in the last clause of section 377 is expressly made the only rule to be applied in any action under either section. An examination of the decisions and a consideration of the subject satisfies us that the statute does not fix the period of minority as a limit beyond which the jury cannot go in estimating the probable pecuniary loss. Every case must depend on its own facts and circumstances. As decisions are made in such actions, general rules will gradually be formed for the guidance of the trial court and the jury in determining what is just and what circumstances may be considered in estimating damages in particular classes of cases, but they will probably never reach the point where such rules can be said to be invariable and not subject to modification by reason of peculiar or extraordinary circumstances. Some well-settled rules are, however, of such a nature that they must apply to all cases of the class to which they belong. In actions by a parent, either for the death or the injury of a child, the damages to be allowed are those, and those only, which have been, or may be suffered by the parent. No damages can be given in such an action for pain or anguish inflicted on the child, or for any pecuniary injury personal to such child. Durkee v. C. P. R. R. Co., 56 Cal. 388, 38 Am. Rep. 59. In all actions, under either section, the damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given from the death or injury of the victim. Morgan v. S. P. Co., 95 Cal. 516, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; Sneed v. Marysville, etc., Co., 149 Cal. 710, 87 Pac. 376, and the numerous cases there cited; Johnson v. S. P. Co., 154 Cal. 298, 97 Pac. 520; Hale v. San Bernardino, etc., Co., 156 Cal. 716, 106 Pac. 83.

It would seem to follow from this rule absolutely limiting the damages in every case to the pecuniary loss occasioned by the death, and upon a consideration of that justice which the statute itself invokes, that this pecuniary loss should be extended to, and should include, all pecuniary loss of every kind which the circumstances of the particular case establish with reasonable certainty will be suffered by the beneficiary of the statute in the future, because of the death of the victim. Nothing less would be a just compensation for the injury, and anything more, or anything in the realm of improbability, conjecture, or mere fancy, would be beyond the purview of the statute and unjust to the defendant. In many cases where the minor is near majority, the certainty of pecuniary loss from his death, to the parent, accruing after his minority, would be as great as the certainty of such loss during minority, and the expectation of benefits for many years thereafter would be as well established as in the case of the death of an adult. In other cases, where the child is a mere infant, the expectation of pecuniary benefits to accrue in the years following its arrival at majority would be so remote that it could not justly be made the basis for a large addition to the damages. So in the case of some adults such benefits would be exceedingly improbable. But the statute prescribes but one rule for all cases: "Such damages may be given as under all the circumstances of the case, may be just." The manifest effect of this language is that in all cases to which the rule applies it is to be left to the jury to say, upon a consideration of the facts, what amount is a just compensation for the financial loss which the evidence shows will probably be directly or proximately caused by the death of the victim.

In cases arising under section 377, referring to adults only and where the pecuniary loss of those who are heirs of the victim are to be considered and estimated, this is the settled rule. In Sneed v. Marysville, etc., Co., supra, the victim was an adult unmarried man, 22 years of age, his father and mother being apparently the only heirs. He was living with them and working out for himself. The court said: "This pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only." Redfield v. Oakland, etc., Co., 110 Cal. 277, 42 Pac. 822, 1063, was a case prosecuted by a husband and minor children for the death of the wife and mother. The jury was instructed that it might allow "for the probable loss of any benefit, if any, of a pecuniary value which the child would probably receive from its mother after its arrival at majority." This was held to be correct. See, also, Hillebrand v. Standard Box Co., 139 Cal. 236, 73 Pac. 163; Johnson v. S. P. Co., 154 Cal. 298, 97 Pac. 520; Beeson v. Green M. M. Co., 57 Cal. 37; Simoneau v. Pac. E. R. Co., 8 Cal. App. 595, 113 Pac. ——;[1] Ruppel v. United Railroads, 1 Cal. App. 666, 82 Pac. 1073; Valenti v. Sierra R. R. Co., 111 Pac. 97. The first statutory enactment in England giving a right of action for injuries causing death is known as Lord Campbell's act passed in 1846. It authorized such damages as the jury "should think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought." This is nowise different in substance from the rule stated in our section 377. In applying that act the English courts have laid down and uniformly adhered to the doctrine that the damages "should be calculated in reference to a reasonable expectation of the life." Franklin v. S. E. Ry. Co., 3 Hurlst. & Nor. 212. In that case the suit was in behalf of a father for the death of his son, a young man earning good wages and well disposed to assist his father. The court said: "We do not say that it was necessary that actual benefit should have been derived. A reasonable expectation is enough, and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him." In Pym v. Great Northern Ry., 4 Best & Smith, 408, the court of Queen's Bench, per Erle, J., says of these actions: "The right to damages is based on the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased." See, also, Dalton v. S. E. Ry. Co., 4 Com. Bench (N. S.) 305; Weems v. Mathieson, 4 Macqueen, App. Cas. 223; Hetherington v. N. E. Ry. Co., 9 L. R. Q. B. Div. 160. The general rule in the United States under similar statutes is the same. We do not think it necessary to cite the numerous cases to this effect. The cases relating especially to the death of minor children may be found digested and cited in 4 Sutherland on Damages (3d Ed.) §§ 1272 to 1275, inclusive, and Tiffany on Death by Wrongful Act, §§ 165 to 168, inclusive. See, also, 2 Sedgwick on Damages (8th Ed.) §§ 574, 575, 576; 2 Shearman & R. on Negligence, §§ 769, 772; 6 Thompson on Negligence, § 7089. In England, and in nearly all of the states, the statute makes no distinction between minors and adults, but gives the right of action for the death of any person, whatever his age, to, or for the use of, the heirs. The defendant argues that there must be a distinction under our statute in respect to damages as between minors and adults because the statute itself makes a distinction in respect to the parties plaintiff.

The statute, it must be admitted, presents in its practical application some peculiar features. In the original practice act, section 11, declared that "a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward." G. & S. Comp. Laws 1850–53, p. 520. It is probable that the Legislature supposed that this section gave a right of action for an injury causing the death of a child. The Supreme Court held that it did not, and that it merely designated the party authorized to sue for such injury, if subsequent legislation should give a right of action therefor. Kramer v. Market St. R. Co., 25 Cal. 436. The act of 1862 (St. 1862, p. 447) gave a right of action to the personal representative of the deceased for an injury causing the death of any person, which would include both minors and adults, and by implication it repealed section 11 aforesaid as to the parties. Kramer v. Market St. Ry. Co., supra. Nevertheless, in enacting the Codes, the language of section 11 was reproduced verbatim, as the original section 376 of the Code of Civil Procedure. Section 377, in its original form, included minors as well as adults, and, of course, gave a right of action for the death of minors or adults alike to the heirs or personal representatives. In 1874 section 377 was amended by the insertion of the words "not being a minor" after the word "person" in the first line of the first sentence, thus excluding minors from its operation, and section 376 was amended to its present form, as above given, inserting the word "minor" before the word "child," but otherwise retaining the peculiar language of the practice act. Section 376 as thus amended gives a right of action for a negligent injury causing the death of a minor, but not in all cases.

If the minor has no parent living, nor any guardian, no right of action for his or her death is given by either section, although such minor may leave surviving a wife, a husband, children, or brothers and sisters, who would be as substantially injured by the death as if the deceased had become of age before death ensued. If he has a guardian, such guardian may maintain an action for the death against the person whose negligence caused it, but whether as a sort of statutory representative of, or trustee for, the heirs really injured thereby, or otherwise, is left to conjecture. Unless he is to sue for the benefit of such persons and is to recover for them the damage they suffer, it is difficult to perceive how any damage could be allowed in such an action by a guardian. If the ward is injured, but not killed, the guardian would, of course, represent the ward and recover the damages personal to the ward. If the ward happened to be an adult, as might be the case, he would be within the terms of section 377, also, and further interesting questions as to proper parties plaintiff might arise. These anomalies show that section 376 was not carefully or skillfully drawn, and suggest that caution is necessary in its construction and application.

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[1] Rehearing pending.

The main argument of counsel for defendant in regard thereto is that inasmuch as the right of action for the injury or death of a minor is given only to the person who, by other statutory provisions, is entitled to its earnings and services during minority, the conclusion follows that the recovery was intended to be limited to the value of such services and earnings, calculated for the remaining period of minority only. Counsel call attention to the coincidence that the persons who may sue are the persons who are entitled to the child's services, and that if, at the time of the death of a minor, there is no person in existence who would have been legally entitled to the services and earnings of the minor, if he had lived, no action for his death can be maintained. It is also suggested that for the death of a child before majority the father may recover the whole damage for his own use, while for his death the day after, the parent cannot sue unless he is an heir, and he can in that case recover only his share as an heir. These discriminations, it is argued, show the legislative intent to limit the right of recovery of the parent, suing as such, to that to which he would have been legally entitled if the child had lived, and of which the untimely death deprived him; that is, the child's earnings and services during the residue of its minority. We regard these anomalies as mere evidence of careless legislation. If the parent's recovery is limited to the minority of the child, the consequences would in many cases be equally absurd. If, for example, the child dies the day before majority, under that rule the parent could recover only nominal damages, but if it died the day after, the heirs, a class which in most cases includes the parents, would recover the full pecuniary value to them of the life of the deceased. In neither alternative is the absurdity sufficient to overcome the fact that the same rule of damages is fixed for all cases and that it is stated in terms which have an obvious meaning, well established, extending the recovery to the reasonable expectation of pecuniary benefit from the continuance of the life, after as well as before majority.

In Missouri, where a different rule prevails, the statute limits the damages of the parent or heir to the "necessary injury resulting from such death." The decisions in that state in regard to actions by a parent are based on the ground that the words "necessary injury" should be construed to include only such damages as arise from the deprivation of that to which the plaintiff would have had a legal right, and hence that in the case of the death of a minor child the parents' recovery was limited to the probable net value of its services during the residue of its minority, and to the expense of nursing and burial. Parsons v. Missouri P. R. Co., 94 Mo. 286, 6 S. W. 464; Leahy v. Davis, 121 Mo. 227, 25 S. W. 941; Hickman v. Missouri, etc., Co., 22 Mo. App. 344. In the only states having statutes similar to our own which follow the same rule as Missouri, namely, Maryland, Pennsylvania, and Rhode Island, the reasons assigned are the difficulty of estimating the prospective damages, if extended beyond minority, and the danger of excessive verdicts if juries are allowed to indulge in speculation and conjecture as to what might occur after that period. State v. Baltimore, etc., Co., 24 Md. 84, 87 Am. Dec. 600; Agricultural Ass'n v. State, 71 Md. 86, 18 Atl. 37, 17 Am. St. Rep. 507; Penna. R. Co. v. Kelly, 31 Pa. 372; Penna. R. Co. v. Zebe, 33 Pa. 330; Lehigh Co. v. Rupp, 100 Pa. 99; Schnable v. Providence Market, 24 R. I. 477, 53 Atl. 634. These reasons have equal potency when applied to actions for damages from the death of adults. But, as above stated, they have been held insufficient in all the other states of the Union, including California, and in England, where it is held that the recovery may extend to all pecuniary benefits reasonably to be expected, whether founded on legal right or otherwise, and embracing the full period of the expectancy of life common to both the deceased and the beneficiary. If these reasons do not control in actions for the death of adults, they should not control in actions for the death of minors, since the statute makes the same rule apply to both.

There are several cases in this state which, in effect, decide that the jury, in such cases, may allow as damages the loss of the pecuniary benefits which there is reasonable ground to believe the parent would have received from the minor child after majority. Nehrbas v. C. P. R. R. Co., 62 Cal. 320, was an action by a parent to recover damages for the death of five minor children. The question whether pecuniary loss from deprivation of the services of a child, reasonably to be expected after minority, could be considered, was presented and argued by counsel. The court held that the rule established in actions for the death of adults, as stated in Beeson v. Green Mountain Co., supra, was applicable to cases of the death of minors. The argument of counsel shows that the case clearly involved and required a decision that pecuniary benefits reasonably to be expected after majority could be estimated. The opinion must be so understood. It declares that it is not the law in this state that the jury is "limited to the actual pecuniary injury sustained by the plaintiff by reason of the loss of the services of his children." So far as this seems to say that any other than pecuniary loss can be allowed, it was disapproved in Morgan v. S. P. Co., 95 Cal. 518, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143. But, in so far as it holds that the rule as to prospective benefits is the same for the death of a minor as for the death of an adult, the decision stands unimpeached. Lange v. Schoettler, 115 Cal.

388, 47 Pac. 139, was an action by a parent for the death of a minor child. Exemplary damages had been allowed, and for that reason the judgment was reversed. In stating the proper rule of damages in such cases, the court said that the only damage allowed, under the statute, "is the probable value of the life to those in whose behalf the action is brought," and throughout its discussion there is no suggestion of any limitation measured by the period of minority. It is proper to add that the record of the case shows that the court below had instructed the jury that they could give compensation only for the value to the parent of the services of the child during its minority. As the appeal was taken by the defendant, this instruction was not a matter for review in the Supreme Court. But it will be seen that the rule stated by the Supreme Court is much broader than that given in the instruction.

It is claimed that the case of Fox v. Oakland, etc., Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216, overrules the previous cases, and establishes the rule that a parent may recover only for the loss of pecuniary benefits during the period of the child's minority. An examination of the case shows that this question was not presented or discussed in the briefs, and was not involved in the points presented to this court on the appeal. What was said by the court on the subject was a mere recital or remark, scarcely amounting to a dictum. The child, a son, was, when killed, 4½ years old. The trial court had instructed the jury that they could not "assess plaintiff's damages beyond the probable value of the services of the deceased, until he had attained his majority, taking into consideration the cost of his support and maintenance during the early and helpless part of his life." The plaintiff had apparently accepted this as the correct measure of damages. The jurors were bound by it. A verdict for $6,000 damages was rendered. The appeal was by the defendant. It, of course, did not complain of the limitations thus imposed on the jury. On the contrary, its counsel insisted that the damages given, when measured by this limited rule, were necessarily excessive and could only be explained on the theory that the jurors were swayed by passion or prejudice, and that the trial court, as a matter of law, should have granted a new trial on that ground. So far as the damages were concerned, this was the only question submitted to or considered by the court. In introducing the subject the court, in the opinion, referred to the facts bearing upon it, and the instructions relating to it, saying that "the jury were *properly* instructed that they could award nothing in the way of penalty for his death, nor for sorrow or grief of his parents, but must confine their verdict to an amount which would justly compensate plaintiff for the probable value of the services of the deceased until he attained his majority." (Italics ours.) The court then proceeded to consider the only question presented; that is, whether "upon the evidence and these instructions" the award of $6,000 was excessive, and reached the conclusion that it was too much, and that the verdict was prompted by improper motives on the part of the jury. In considering the motives of the jury, the instructions under which it acted may be looked into, and for that purpose their accuracy as law is not material. Inasmuch as the soundness of the instructions mentioned as "properly" given in the above quotation from the opinion, was not disputed or argued, but was conceded by both parties, the fact that they were assumed to have been proper by the court, in a discussion as to the motives of the jury, is of no great significance or importance. It is obvious that the statement, if in fact intended to apply to this particular instruction at all, was at most pure dictum and that it is entitled to no weight as a decision on the point.

Respondent's counsel say that the Fox Case has been cited with approval by this court in subsequent decisions. In none of them, however, is the part of it here involved and relied on by respondent cited or approved. It is wholly without support on this point from any other decision.

The court below erred, therefore, in directing the jury to consider the pecuniary value of the son's services only for the period between the time of his death and the time he would have become of adult age. It was alleged and admitted that he had practically arrived at manhood, was strong and robust, and was earning good wages with which he helped to support his mother. These circumstances established a reasonable probability that the same conditions would have continued for some time after he became of age. It should have been left to the jury to determine this probability and to include in the damages the present value of the benefits which it could reasonably be expected he would have bestowed upon her during her expectancy of life. With regard to the danger of excessive verdicts from this rule, we can only say that the remedy is practically committed entirely to the judge who presides at the trial in the court below. If he does his duty, he will carefully weigh the evidence himself, and will not allow a verdict to stand for its full amount if he believes it gives more damages than the pecuniary loss that it may be reasonably supposed the plaintiff will actually suffer by being deprived of the services, earnings, society, comfort, and protection of the child. The rule that allowance may be made for pecuniary loss from deprivation of society, comfort, and protection of a son is apparently settled, and cannot now be disturbed. It is evident to us, however, from the cases that have come before us, that it often leads to extravagant verdicts in which the jury, in fact, allow a supposed compensation for sad emotions and injured feelings, instead of confining their verdict to the actual pecuniary loss. While it cannot be said that comfort, society, and protection is never of any pecuniary benefit either in saving or gaining money or property, it must be admitted that the connection can seldom be traced from one to the other. Juries should be insistently cautioned not to allow compensation for the sorrow and distress which always ensues from such a death, nor for a pecuniary loss which is remote or conjectural in the particular case. The trial court should be vigilant to set aside verdicts where there is reason to believe this has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant. We have cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. See Hale v. San Bernardino, etc., Co., 156 Cal. 716, 106 Pac. 83; Wheaton v. North Beach, etc., Co., 36 Cal. 591. Practically, the trial court must bear the whole responsibility in every case. The court could not have properly given judgment for the $2,400 which the jury found the mother would probably have received from the son, had he lived. She was not entitled to a present judgment for the total amount of such future receipts, but only for the present value. No basis for the calculation of such present value appears, and therefore the court could not determine the correct amount due on that account. It was not necessary to specifically allege the loss of society, comfort, protection, or services. Evidence could be given of the facts relating thereto, and allowance could be made therefor under the general allegation of damages. Morgan v. S. P. Co., supra; Peden v. American Bridge Co. (C. C.) 120 Fed. 523; Haug v. Great Northern Ry. Co., 8 N. D. 31, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727.

If the jury followed the instructions, as we must presume, they must have allowed $4,095 as the pecuniary loss accruing solely from deprivation of the society, comfort, and protection of the son during the mother's expectancy of life. The evidence is not in the record. We must presume it was sufficient, as matter of law, to sustain that allowance. We could not consider its weight, as against the decision of the lower court, if it tended to sustain the same, even if it were set forth in the record. We are not advised as to the reasons which led that court to refuse judgment for the whole amount of the general verdict. If a motion for a new trial on this ground is properly and regularly interposed, that court would have power to reduce or set aside the verdict. In the absence of such motion, it should have granted the plaintiff's motion to render judgment for $4,500, unless the amount was so obviously the result of passion, prejudice, or a disregard of the instructions as to justify the court in ordering a new trial of its own motion. As it did not do so, it is to be presumed that there was no cause for such action.

The judgment is reversed and the cause is remanded to the court below with directions to render judgment for the plaintiff for the sum of $4,500, without prejudice to any pending motion of the defendant for a new trial, or to the right of the defendant, if any it has, to move thereafter for a new trial.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; MELVIN, J.

On Rehearing.

PER CURIAM. The appellant asks the court to modify the judgment heretofore given by adding a direction that in giving the judgment in the court below the accrued interest on the verdict shall be included. Our consideration of the verdict and judgment was entirely in relation to the state of the case at the time the judgment appealed from was given in the court below. It was with reference to that period that we directed the entry of judgment by that court for the sum of $4,500 upon the going down of the remittitur. There was no intention to restrict the power of the court below, or of its clerk, to perform the ministerial duty of computing the interest which has accrued between the date of the return of the verdict and the entry of the judgment and including it in the judgment finally entered, as provided by section 1035 of the Code of Civil Procedure. The court below will be at liberty to perform that duty, or see that its clerk does so, notwithstanding the language of the mandate of the decision hereinbefore given by this court.

(159 Cal. 260)

WHALEN et al. v. WEBSTER et al.

(Sac. 1,728.)

(Supreme Court of California. Jan. 11, 1911. Rehearing Denied Feb. 10, 1911.)

WILLS (§ 577*)—CONSTRUCTION—COMMUNITY PROPERTY.

In view of Civ. Code, §§ 1324, 1327, respectively providing that the words of a will are to be taken in their ordinary sense, the will of a husband, dying without issue, whose entire estate consisted of community property, which in one clause gave his wife a life estate in all his property, and in the next, after excepting the portion to which she was entitled under the laws of California, gave the remainder to the testator's brothers and sisters, gives the wife the one half she takes absolutely under the laws of the state, and the other half on her death passes to his brothers and sisters.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 577.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Proceeding by Martin Whalen and others against Joshua B. Webster and others to determine the succession to the estate of George Roach, deceased. From a judgment awarding a three-fourths interest to the defendants, plaintiffs appeal. Reversed, with directions.

A. H. Carpenter, for appellants. Joshua B. Webster, Budd & Thompson, Ashley & Neumiller, A. C. White, Garoutte & Goodwin, Max Grimm, George McNoble, Nicol & Orr, A. L. Levinsky, and W. Goodwin Williams (C. H. Fairall, of counsel), for respondents.

SHAW, J. This is a proceeding under section 1664, Code of Civil Procedure, to determine the succession to the estate of George Roach, deceased. The plaintiff, Margaret Copsey, now deceased, was the surviving widow of George Roach. He died testate, and his will was duly probated. His estate consisted entirely of community property. The right to succeed to said estate depends upon the effect of the following clauses of his will:

"Thirdly: I give and bequeath to my wife, Margaret Roach, all and singular my property, real and personal, wherever situated, and all moneys belonging to me of which I may die possessed, to have and to hold the same during the full term of her life for her own proper use, behoof and benefit;

"Fourthly: It is my desire that on the death of my said wife, after deducting the portion to which she is legally entitled under the laws of the state of California, the remainder be equally divided among my brothers and sisters, or their descendants, according to the laws of distribution."

George Roach had only one brother, Thomas Roach, and but one sister, Ellen Whalen, both of whom are dead. His widow died on December 9, 1907, after this proceeding was begun. The court below decided and adjudged that, under the above provisions of the will, one-fourth, only, of the estate vested in the descendants of the said sister and brother of Roach, and that the other three-fourths vested in the heirs and grantees of the widow. She had married Fred Copsey after the death of Roach. The descendants of the brother and sister appeal from this adjudication. The theory of the court below was that, as the husband has not the absolute power of testamentary disposition over what is usually termed the wife's one-half of the community property, the provisions of the will, although its language would appear to include and dispose of the whole of the estate, must, under the rules stated in Estate of Gilmore, 81 Cal. 242, 22 Pac. 655, be construed to refer only to that moiety which was subject to his testamentary disposal, that, upon his death, one-half the community property became the property of the surviving widow, under section 1402 of the Civil Code, that the remaining one-half was devised to the widow for her life by the third clause of the will, and that, upon her death, the fourth clause gave one half of that half to the descendants of the brother and sister, by direct devise, and the other half to the heirs of the widow, under a devise by implication.

The appellants contend that there is no devise to the heirs of the wife by implication; that when all parts of the will are considered together, as should always be done, it is plain that by the third clause the testator intended to deal with the entire community estate, including it all in the term "my property"; that by that clause he gave to the widow an estate for life in the whole of it; that the phrase "after deducting the portion to which she is legally entitled under the laws of the state of California," in the fourth clause, must be taken to refer solely to the one-half of the community property which by law is given to her absolutely; and, consequently, that upon the death of the widow the one-half of the entire community estate was given by the will to the descendants of the brother and sister, and the other one-half being undisposed of by the will, vested in the heirs and grantees of the widow.

The respondents not only insist that the theory of a devise by implication is a permissible interpretation, but they also contend that the judgment is correct even if there was no such devise. Admitting, for the sake argument, that the testator, in each clause of the will, was speaking of the entire estate, and not merely of his disposable half thereof, they say that the above-quoted phrase in the fourth clause means precisely what it says and refers to all that part of the community property which, by the statutes of the state relating thereto, would go to the surviving wife upon the death of the husband under the circumstances of this particular case, and hence, they contend, the part to be deducted from the entire estate, in order to ascertain the remainder to be disposed of, was three-fourths thereof, and that the "remainder" to go to his brothers and sisters was only one-fourth thereof.

It is true, as contended by respondents, that by section 1402 of the Civil Code, in a case where the husband dies leaving no descendants of the descending line—that is, no issue, but only kin of the ascending or collateral line—one half of the community property descends, as such, to the surviving wife, and the other half goes in the same manner as the separate property of the husband under section 1386. Jewell v. Jewell, 28 Cal. 236; Estate of Boody, 113 Cal. 687, 45 Pac. 858. In this case, if there had been no will, this moiety would have descended, one half to the wife and the other half to the brother and sister of the husband, thus giving the wife three-fourths of the entire community property.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But although it may be technically true that the portion of the community to which the wife was "legally entitled under the laws of the state of California," quoting from the fourth clause of the will, was three-fourths thereof, it does not necessarily follow that the husband had that fact in mind when he used that phrase in the will, and meant to say that the "remainder" he gave to his brothers and sisters by that clause was only one-fourth. The words of a will are to be taken in their ordinary sense, unless a clear intention to use them in some other sense appears. Even technical words are not to be taken in their technical sense, if the context clearly indicates a contrary intention. Civ. Code, §§ 1324, 1327. The provisions of our law giving the wife a one-half interest in the community property and depriving the husband of the power to dispose of such moiety by will, except with the consent of the wife, are well known, and are peculiar as compared with the laws of other states of the Union from whence a large part of our population comes. Owing to the fact that this share is given to her absolutely, in this manner, and because of its peculiarity, it has become common usage to describe this interest in community property as that to which the wife is legally entitled under the laws of California. Thus, in common conversation, we speak of this interest as "the wife's half" or as "the wife's share" of the community estate. In writing a formal document, more formal language would be selected. But the reference always is to the law giving her a positive right to one-half of such property. Unless the connection in which the words are used indicates a different intent such expressions are understood to mean the one-half of the community property which the husband cannot take from the wife by his will. A husband, when drawing his will disposing of community property may be supposed to bear in mind his testamentary power over it. If he intends to except that moiety from the provisions of the will, he would naturally use some expression similar to that last quoted. We think this was what was intended by these words in the fourth clause in the will under consideration. Knowing that his wife was legally entitled to this half, and that he could not take it from her, and perhaps recognizing the justice of her claim to a fee simple therein, in case she survived him, he excepted that part from the ultimate disposition he was then making and gave only the remainder to his brothers and sisters, leaving the widow's half to descend to her heirs, or as she might direct by will or otherwise.

The court below was in error in declaring that the descendants of the brothers and sisters were given only one-fourth of the estate. The "remainder" given to them was a one-half interest in the entire community property.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

I dissent: BEATTY, C. J.

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159 Cal. 305

NIEHAUS BROS. CO. v. CONTRA COSTA WATER CO. (S. F. 5,089.)

(Supreme Court of California. Jan. 16, 1911. Rehearing Denied Feb. 14, 1911.)

1. WATERS AND WATER COURSES (§ 201*)—WATER SUPPLY — FIRE PROTECTION — CONTRACT.

Where defendant's predecessor water company granted a privilege to plaintiff's predecessor to erect on its premises fire hydrants to be supplied by water from the mains of such water company, plaintiff's predecessor agreeing not to use any water therefrom except for the extinguishment of fire which might break out in the building, and to pay such an amount as should be agreed on by the parties, and such contract was assumed by defendant, it did not impose on the water company a contract obligation to supply water to plaintiff's premises for fire protection.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

2. WATERS AND WATER COURSES (§ 201*)—PUBLIC WATER SUPPLY—SPECIAL CONTRACT—FIRE PROTECTION.

Letters written by the agent of defendant water company, who had no authority to make arrangements with consumers except for ordinary water supply, referring to existing conditions between plaintiff and defendant concerning the use of hydrants on plaintiff's premises connected with defendant's system, in an effort to induce plaintiff to pay certain bills presented for water furnished on an ordinance basis, and explaining to plaintiff the advantage he derived from such hydrants through large service pipes, etc., connected with the street mains, were insufficient to constitute a special contract between plaintiff and the water company to furnish water for fire protection.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

3. WATERS AND WATER COURSES (§ 201*)—PUBLIC WATER SUPPLY—DUTY TO FURNISH WATER—EXTINGUISHMENT OF FIRE.

A public water supply company, by permitting plaintiff to connect its hydrants with defendant's mains, and thereby conduct water onto its premises and to use the same for fire purposes at rates fixed by ordinance, did not obligate the water company to furnish water constantly available at the hydrants on plaintiff's premises for the extinguishment of fires.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

4. Waters and Water Courses (§ 206*)—Water Supply—Failure to Furnish Water—Extent of Liability.

There being nothing in Const. art. 14, impressing the distribution of appropriated water with a public use, nor in St. 1881, c. 52, enacted to carry out such purpose, which imposes on a water company any obligation to furnish to a municipality, or its inhabitants, any specified quantity of water, or water for any particular purpose, an action ex delicto cannot be maintained against the water company for its failure to have a supply of water at the consumer's premises for the extinguishment of fires, or for any other purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. § 206.*]

5. Waters and Water Courses (§ 201*)—Duty to Furnish Water—Express Contract.

The duty of a water company, engaged in supplying water to a city, to furnish water on a consumer's premises for fire protection, can only be created by an express contract between the water company and the consumer.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

6. Waters and Water Courses (§ 201*)—Public Service Corporation—Duty to Furnish Water.

A corporation organized to serve a municipality with water at rates fixed by ordinance is a public service corporation, bound to furnish water to any of the inhabitants of the municipality according to their desires on their payment of the established rates.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

7. Waters and Water Courses (§ 203*)—Water Rates — Reasonableness — Presumptions.

The presumption that rates for water established by a municipal ordinance are fair and reasonable applies only so far as they fix the compensation to be paid the water company for furnishing water to consumers as a commodity, and not to those who desire to use the same for fire extinguishment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 290–299; Dec. Dig. § 203.*]

8. Waters and Water Courses (§ 206*)—Public Water Supply—Water Company — Liability for Insufficient Supply — Fires.

A property owner in a city has no right of action against a water company on its contract to furnish water to the city at public hydrants for the protection of his property from fires, though his loss may have been occasioned by the negligent failure of the water company to have on hand a sufficient supply to prevent the loss, there being no privity of contract between the property owner and the water company.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 301; Dec. Dig. § 206.*]

9. Waters and Water Courses (§ 203*)—Municipal Supply—Private Hydrants—Charges.

A municipal corporation, by a contract with a water company, had no authority to arbitrarily impose on the company a liability for the destruction of the property of a private citizen because of inadequate water supply by merely fixing an ordinance rate for hydrants which the citizen may install on his premises.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 290–299; Dec. Dig. § 203.*]

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by the Niehaus Bros. Company against the Contra Costa Water Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial it appeals. Reversed.

Page, McCutchen & Knight and M. C. Chapman, for appellant. Goodfellow & Eells, for respondent.

LORIGAN, J. This action was brought to recover damages for an alleged breach of contract to supply water to the premises of plaintiff for fire protection through which failure its mill was destroyed. Plaintiff had judgment for $128,645.42, and defendant appeals therefrom and from an order denying its motion for a new trial.

On August 15, 1901, plaintiff, the owner of a planing mill in that portion of Berkeley, known as "West Berkeley," had upon its premises seven hydrants installed thereon for fire purposes by its predecessors, at their own expense, many years before. When said hydrants were so established, the predecessor of plaintiff, the Alameda Water Company, then owning the water system subsequently acquired by defendant, connected its street mains with service pipes on the premises of plaintiff for the purpose of furnishing a supply of water to the mill for general purposes, such service pipes also leading to these hydrants. These service pipes were 2 inches in size, and attached to each hydrant was a hose 100 feet long with a ½-inch nozzle. The water supply from the street main to six of these hydrants passed through valves situated close to the water meter, by means of any of which valves the water could at pleasure be turned on or off at a hydrant. The seventh hydrant was connected with the street main by a separate service pipe and its water supply did not pass through the meter. While the Alameda Water Company so owned the water system, the plaintiff, under an arrangement made with that company, was paying it for a supply of water to its premises, including the supply to the hydrants, a flat rate of practically five dollars a month. The Alameda Water Company subsequently sold its water system to the East Shore Water Company, which in turn disposed of it to the defendant, the Contra Costa Water Company, two months prior to August 15, 1901. On this latter date the mill of plaintiff caught on fire, and was with its contents destroyed, such destruction occurring, it was claimed by plaintiff, and the court so found, from the failure of the defendant to have any water supply in its mains available at the hydrants on the premises of plaintiff to prevent the loss.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff, as the basis of its action against defendant, alleged in the complaint that at the time of the fire and long prior thereto a contract subsisted between defendant and plaintiff whereby the latter for a valuable consideration "undertook to furnish to the plaintiff by means of its said reservoirs and mains and the said hydrants, protection against loss or damage to said premises and property by fire; and in that behalf to keep constantly available to the plaintiff for use upon its said premises in case of fire thereon, water from its said reservoirs and through its said mains sufficient for the use of the said hydrants in the manner aforesaid, and their application to the extinguishment of such fire." The court, following practically the language of the allegation in the complaint, found that such a contract subsisted. It further found that the defendant was furnishing water to the town of Berkeley and certain of its inhabitants as a quasi public corporation; that by an ordinance in force in said town the rates to be charged by and paid to defendant were fixed by the municipal authorities; that the rate fixed for each fire hydrant was 50 cents a month, and that defendant had been collecting and receiving from said plaintiff as a consideration for supplying water for extinguishing fire upon its premises by the use of such hydrants the said sum of 50 cents a month for each of said hydrants, whether or not there was or had been occasion to use the same, or whether or not any water had been taken or consumed thereby. The court made various additional findings, among others that the failure to supply water to the hydrants was through the negligence of the defendant, and that, had water been available at the hydrants on the premises of plaintiff when the fire was first discovered, it could have been extinguished. Though not expressly found by the court, it is conceded that in addition to fixing the ordinance rates for each hydrant at 50 cents per month, the ordinance further fixed the rate for furnishing water to consumers at 35 cents per 1,000 gallons.

While the appellant attacks all the principal findings made, and assigns various errors in the rulings of the court in admitting evidence, the principal discussion on both sides on this appeal is addressed, first, to the point whether there was any evidence to sustain the finding of the court that there was an express or private contract between the parties to the action whereby defendant obligated itself to furnish water to plaintiff's premises for the extinguishment of fires, and, secondly, if there was no such contract, was the defendant water company liable for the loss of the buildings of the plaintiff occasioned through the negligent failure of the company to have water available at the hydrants on the premises, where the only relation between the parties was the usual relation which exists between a company engaged in the sale and distribution of water for public use to consumers and a consumer. We deem these the controlling questions in the case and proceed to their consideration.

First, treating the finding of the court as being to the effect that there was an express contract existing between defendant and plaintiff for a supply of water to the premises of the latter for fire protection. Such a contract was sought to be shown by plaintiff. Its claim in this regard was that it had made a contract with the predecessor of defendant, the Alameda Water Company, to furnish water for such protection, and that such contract had been assumed by defendant when it took over the water plant. The only specific contract with the Alameda Water Company which was offered showed that in 1889 a privilege was granted to the predecessor of plaintiff to erect on its premises a "hydrant or fire plug to be supplied by water from the mains of the Alameda Water Company," the plaintiff agreeing not to use any water therefrom, except for the extinguishment of fire which might break out in the building, and to pay "such an amount as will be agreed on by the parties." This is the only agreement shown to have been made with the Alameda Water Company which is relied on as an express contract to furnish water for protection against fire, and it is quite evident that there is nothing in this contract whereby the Alameda Water Company obligated itself to furnish water for any such purpose. In fact we do not now understand counsel for respondent to particularly insist that any such arrangement was shown under this contract to have been entered into. But if it was, it affirmatively appears from the evidence that neither the East Shore Water Company nor the defendant ever assumed this contract when they respectively took over the plant of the Alameda Water Company. It was further claimed, however, by plaintiff that if no express contract existed between the Alameda Water Company and plaintiff for the supply of water for fire protection and assumed by defendant, still there was a special contract between plaintiff and defendant for such protection. In that respect it appears that for some months after the defendant acquired the water system it continued to charge plaintiff for the water supply furnished it, the same flat rate of five dollars a month which plaintiff had been paying the Alameda Water Company. In April, 1901, however, defendant notified plaintiff that such arrangement would be discontinued and ordinance rates as established by the town of Berkeley for water furnished it would be charged. As we have said, the agreement with the Alameda Water Company for the payment of a flat rate by plaintiff was not a contract for fire protection; neither was it a fixed contract rate even for a supply of water for general purposes, and there was therefore nothing which prevented the defendant from changing such rate when it saw fit and requiring the payment of ordinance rates. So commencing on May, 1901, and thereafter up to the fire, defendant presented its monthly bills to the plaintiff at ordinance rates for water used, with an additional charge of 50 cents a month at ordinance rates for each hydrant. Plaintiff refused to pay these latter bills either for water or hydrants, contending that it was only required to pay at the flat rate previously prevailing, or, at most, if the water consumed by it for any month exceeded that amount, based on the ordinance rates, then for the excess used at such rates. It absolutely refused to pay the hydrant charges, and after May, 1901, when the first bill at ordinance rates was presented, paid no water rates at all, either for water consumed or hydrants, and had not done so up to the time the fire occurred. After the presentation to the plaintiff of the first water bill, which included charges for the hydrants, and the refusal of plaintiff to pay defendant, the agent of the defendant wrote to plaintiff insisting that the company was only charging it rates fixed by the municipal ordinance of Berkeley for water supplied plaintiff and the ordinance charges for hydrants, and in an endeavor to have plaintiff pay the bills, expatiated upon the advantage plaintiff was deriving from having its hydrants connected with the water system of defendant by a large service pipe and the protection against fire it was deriving therefrom. A similar statement was made in a letter written by the agent in April notifying plaintiff of the intention of the company to abandon the flat rate and thereafter charge the ordinance rates for water and hydrants. These letters are relied on as constituting a special contract for fire protection. But aside from the fact, clearly established, that the agent writing these letters had no authority to make arrangements with consumers except for ordinary water supply purposes, the manager of the company alone being authorized to make contracts for fire protection or other special purposes, these letters themselves if the agent had power to make a contract for fire protection would not constitute such a contract. These letters had reference to existing conditions between the parties, and whatever the agent wrote was but an expression of his opinion as to the advantage the plaintiff was deriving by having hydrants connected, through large service pipes (as he stated), with the street mains of defendant, and his purpose was to prevail on plaintiff to pay the bills presented on the ordinance basis. The correspondence was not with a view to making any contract for fire protection, nor is it capable of being construed as evidencing the fact (nowhere pretended to be otherwise established) that any special contract for fire protection ever existed.

It being determined, therefore, that there was no contract entered into between the parties whereby the water company obligated itself expressly or specially to furnish water constantly available at the hydrants on the premises of plaintiff for the extinguishment of fires, the question for further consideration is, Did such an obligation arise from the only relation shown to have existed between the parties, namely, that of a public water company connecting its water system with the service pipes of the mill premises of plaintiff with which service pipes the plaintiff had connected its hydrants, the company collecting the ordinance rates for water and hydrants established by the town of Berkeley?

In considering this question we attach no particular importance to the fact that plaintiff refused to pay the monthly charges made by defendant either for water or hydrant rates. These charges were in dispute. The defendant had not disconnected its service, and the plaintiff continued to avail itself of the benefit thereof for all purposes, and was therefore liable to pay the ordinance rates. So, for present purposes, it may be assumed that whatever the liability of defendant would have been had the charge been paid such liability continued to exist at the time of the fire, notwithstanding that the charges had not been paid.

The position of respondent with respect to the liability of defendant is that it was not necessary to show any express or special contract between the parties for fire protection; that from the fact that plaintiff had installed hydrants on its premises for use should a fire occur and defendant had connected its water system therewith and charged the ordinance rates for water and for the hydrants, a contractual relation was thereby assumed by defendant to have constantly on hand, or at least to exercise ordinary care to have, a sufficient supply of water available at the hydrants to extinguish any fire which might arise on the premises with a corresponding liability for any loss occurring as a direct result of its failure to do so.

Before proceeding to a discussion of this claim, it is to be noted that respondent bases its right of recovery solely on contract—a contract which it asserts existed by reason of the relation between the parties. Necessarily its right to recover must be supported by contract because there is nothing in the constitutional provisions of this state impressing the distribution of appropriated water with a public use (Const. art. 14), or in the legislation thereunder (St. 1881, p. 54), which imposes upon a water company any obligation to furnish to the municipality, or its inhabitants, any specified quantity of water, or water for any particular purpose Hence, no action in tort for failure to have a supply of water at the premises of a consumer in a city or town for the extinguishment of fire, or for any other purpose, is given under any statute or rule of law in this state, and, hence, where liability is sought to be created it can only arise from a private contract between the company and a consumer, under which an obligation to furnish water for a specific purpose is undertaken by the company. Ukiah v. Ukiah Water & Imp. Co., 142 Cal. 175, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107.

It is true that the trial court found that the failure to have a supply of water available at the hydrants on the night of the fire was occasioned through the negligence of the defendant, but the plaintiff expressly disclaims any right to recover on that fact as disclosing a neglect of any public duty which defendant owed to plaintiff. While it was claimed that under the express or special contract primarily asserted there was an unconditional liability for failure to have water at the hydrants, proof of negligence was given solely for the purpose of showing that if, under the implied contract between the parties, defendant was only bound to use ordinary care to have a water supply available, it negligently failed to have it.

While the fact that defendant was furnishing water to be used at plaintiff's mill and available at its hydrants did not create any other relation than the ordinary contractual relation that exists in any case where a water company is supplying water to a consumer under an imposed legal duty to do so at municipally fixed rates and for such purposes as a consumer may require, the respondent, nevertheless, claims that this ordinary relation of public distributor of water and consumer was sufficient to impose upon the defendant the obligation to supply it for fire protection and relies on the cases of Hunt Brothers v. San Lorenzo Water Co., 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913, and Ukiah v. Ukiah Water & Imp. Co., supra, as authority in this state to that effect. But these cases do not support any such claim. In the Hunt Brothers Case the extent of the liability of a water company springing from the ordinary relation of distributor and consumer was not involved. The contract between the parties in that case was an express one whereby for a stipulated consideration the water company agreed to install a hydrant on the premises of the plaintiff, connect the same with its mains and by means thereof supply the premises of the plaintiff with water for the express purpose of extinguishing any fire that might occur on the premises. In the Ukiah Case the only question involved was whether under a contract between the water company and the city of Ukiah to furnish water to the public hydrants at ordinance rates for general fire purposes the company was liable for the destruction of property owned by the municipality itself, the company at the time of the fire negligently failing to have water at the public hydrants. It was held that under such a contract the company was not liable. It is true that in both cases referred to, the court, in the discussion of the questions presented, stated that the relation between a public water company and a consumer was of a contractual nature. But the court was only defining that relation in a general way and as far as it was involved in those cases.

In the Ukiah Case where the question as to what was the relation between a water company and a consumer was more particularly under consideration, the court held such relation to be contractual; that when the company on demand of the property owner connected its system with his premises a contractual relation was established, the company to furnish water and use all reasonable efforts to continue doing so, the consumer to pay the established rates. But there the court was defining simply the ordinary contractual relationship existing between them; an implied contract resulting from the duty of the water company to supply water, and the obligation of the consumer to pay for it. It was not held, or even intimated, that when a water company undertakes to supply water to a consumer for general purposes, but which, through the medium of hydrants voluntarily installed by him upon his premises, he may desire to avail himself of to extinguish fire, that the company thereby impliedly obligated itself to have constantly or at all on hand a supply of water sufficient for such fire protection, and for a failure to have it when needed, is responsible for any loss directly occasioned through such failure. On the contrary (although the precise question here presented was not there directly involved, nor in fact heretofore presented in this state) the rationale of the whole opinion in the Ukiah Case negatives the idea that from such ordinary contractual relation a public water company assumes any such obligation. It is, in effect, held that such an obligation is not implied from such relation merely, and can only exist where, in addition to the ordinary duty of supplying water for general use, the company by express contract assumes the additional obligation of furnishing it in sufficient quantity to protect specific property from fire. In that case, while the court in discussing the only question involved, namely, whether a contract with the water company for the supplying of water to public hydrants of a municipality for general fire protection gave a right of action for the destruction of specific municipal property, denied the liability of the company on the ground that there was no direct contract between it and the city for the protection of such specific property, the general tenor of the opinion is to the effect that no liability for failure to furnish water for fire protection arises from the ordinary relation of water distributor and consumer, and can only be created under an express contract between the parties whereby the water company agrees to furnish water as a protection against fire.

This is apparent further from the discussion in the opinion there of the cases relied on by appellant in that case, namely, Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536; Gorrell v. Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, and Planters' Oil Mill v. Monroe Water Works, 52 La. Ann. 1243, 27 South. 684. While as a general rule, under a contract between a water company and a municipality to furnish water for the protection of property within the municipality against fire, a private property owner is denied any right of action against the company on the ground that under such an agreement there is no privity of contract between the company and the property owner, these actions were brought against private water companies by citizens whose property had been destroyed by fire by reason of the negligence of the water companies, under contracts with the cities to supply water for fire protection to the inhabitants thereof, and the right of the property owners to recover sustained. It was insisted that these cases supported the right of the city of Ukiah, under its contract with the water company for general fire protection, to recover for the loss of its particular municipal property which had been destroyed. It was pointed out, however, that in the cases relied on the courts deciding them did not consider that they came under the general rule above stated because in each of these cases the water company in its contract with the city expressly contracted to furnish fire protection to the property of the inhabitants thereof, and that the distinction between those cases and the case of the city of Ukiah was that, as to the latter, there was no express covenant in the contract between it and the water company for security by way of fire protection to any city property owned by it. In all those cases the liability was not sought to be imposed or sustained on any implied contract springing from the ordinary relation of a public water company and its consumers, but upon a contract whereby private water companies for particular concessions and privileges extended them by the cities had expressly agreed to furnish water for protection against fire, and they were held liable for a failure to give what they had expressly obligated themselves to furnish.

Assuming, however, that the Ukiah Case may not be taken as authority denying the liability of the water company under the facts shown in the present case, we are satisfied (and little is presented on either side in adjudicated cases directly bearing on the question) that on principle no such liability is implied merely from such relation of distributor of water and consumer, and that such liability can only be created by an express contract between the parties.

When we take into consideration the status of water companies in this state, the nature of the business in which they are engaged, the constitutional control which the state, through its municipalities takes in fixing the rates which may be charged for water, and the law-imposed duties which the companies must discharge to their customers, no liability such as plaintiff claims was ever contemplated where the only relation shown is such as proceeds from the fact that the water company has undertaken to furnish the inhabitants of a municipality with water, has connected its mains with the premises of a consumer and is charging ordinance rates for the water supplied or to be supplied.

Under the Constitution of this state a corporation which has appropriated water for sale and distribution to customers is in the exercise of a public use, and by constitutional mandate the compensation or rates which may be charged in the business of exercising that use must be fixed by the municipality in which it is furnished. In harmony with this constitutional requirement the town of Berkeley fixed the rates to be charged by the defendant to the inhabitants therein which embraced a charge of 35 cents per thousand gallons for water and a charge of 50 cents per month for hydrants where hydrants were installed. As a public service corporation the defendant was under legal obligation to furnish water to any of the inhabitants of the municipality should they desire it and would pay the established rates. The plaintiff had a right to install its hydrants on its premises and require the defendant to connect its system with the service pipes of plaintiff so that water might be used at such hydrants. But so had every other property owner in the municipality. It was a right which all might exercise. The company had no voice in the matter of installing hydrants or connecting its mains with the service pipes thereon; that was a matter of volition for the owners of the premises. The only relation the company had to these hydrants was that it must furnish water available thereto at the fixed ordinance charges. This being the legal situation as respects the water company, both with reference to the restriction on its power to charge rates and its choice of supplying its consumers, it would appear that in the nature of the situation itself no obligation, implied or otherwise, to have constantly on hand a supply of water for fire protection could arise.

While it is to be presumed that the rates established by a municipal ordinance are fair and reasonable, this presumption only applies as far as such rates fix the compensation to be paid the company for furnishing water to consumers as a commodity. They are not fixed as a consideration under which the company obligates itself to furnish water for the extinguishment of fires with a corresponding liability for failure to do so. And it is from the fact that under the ordinary relation of public service corporation and consumer that the only duty of the company is to furnish water as a commodity, and not for the purpose of extinguishing fires that liability for damages for failure to supply it for the latter purpose can only be created by express contract. The weight of authority is to the effect that a property owner has no right of action against a water company under its contract with a city to supply water to public hydrants for the protection of his property, although his loss may have been occasioned through the negligent failure of the company to have on hand a supply whereby the loss might have been prevented. The authorities deny the liability on the ground that there is no privity of contract between property owners and the water company. In commenting on the rule of these authorities in 1 Farnham on Water and Water Rights, the author says (pages 848–851): "The difficulty is that these decisions, although correct in their result, are all placed on the wrong principle. The nonliability of the water company depends, not on the inability of the taxpayer to maintain the action, but on the failure of the water company's contract to cover the liability sued for. As said in Wainwright v. Queens County Water Co., 78 Hun, 146, 28 N. Y. Supp. 987, the company does not agree to extinguish fires. Its agreement is to furnish water. * * * Keeping in mind the fact that the contract of the water company is to furnish water, and not to extinguish the fire, the rule with respect to damages precludes holding the company liable. Damages must be such as were in the contemplation of the parties; and it certainly cannot be claimed that for the meager remuneration received a water company undertakes to make good the loss which would result from the destruction of a modern city by fire. And the principle applies equally to the destruction of any part of it. For there is no place to draw a line short of absolute nonliability if liability for loss of the entire city is denied. The great weight of authority agrees with this conclusion, although the decisions are not placed on this ground. * * * If the company directly contracts with the consumer to furnish a supply adequate for fire purposes, it may be regarded as having assumed liability for loss by fire if the loss can be shown to have been the result of its breach of contract."

Applying the reasoning of these authorities to the relation between the company and the consumer here, it is apparent that from that relation no obligation to furnish water for fire protection is implied, nor can it be said to exist in the absence of an express contract. Keeping in mind as suggested by the authorities just referred to that the primary business of a water company is to furnish water as a commodity, and not to extinguish fires, and further recognizing that under the law of this state the defendant is a quasi public corporation engaged in the exercise of a public use in discharging a public duty which would otherwise devolve upon the municipality itself and furnishing water at rates fixed exclusively by the municipality, it would appear plain that it was never contemplated that from the simple relation of distributor and consumer the former undertook to assume liability for failure to furnish water to extinguish fires. In the nature of things the compensation fixed by the municipality has no relation to the assumption of any such liability; that compensation is based on the expense of furnishing water simply as a commodity; liability for destruction of premises to which the company may be required to supply water was not taken into consideration in fixing the rates, nor, we apprehend, was it even thought that any such liability could be imposed by the ordinance, or was to be assumed by the company in doing so. This is apparent on reflection. As we have said the defendant is a public service corporation, and under a duty enjoined on it by law, was obligated to make connection with their premises and furnish water to any of the inhabitants of the municipality who desired it. And as further said, no one person had a right superior to another to demand that he should be supplied, and the legal duty was imposed upon the company to furnish it equally to the extent that its system was capable of doing it. The plaintiff had a right to install its hydrants, as had any other member of the municipality, and to require the water company to connect its mains with the service pipes supplying such hydrants, and for this service the company could only require the payment of the water rates and hydrant charges fixed by the ordinance of the municipality.

It would not seriously be contended where property owners have installed hydrants, standpipes, or such other facilities upon their property as might be available to them to extinguish fire that a water company furnishing water to the premises from connections made therewith, and at ordinary ordinance rates for water, would be liable for a loss by fire occasioned either through a deficiency or total failure of water at the time it occurred. Such a liability could not be forced upon the company by the action alone of the consumer installing these facilities. A fire in its incipiency might be extinguished by a garden hose, but it would not be claimed that a failure of the company to have water available for that purpose by means of a hose would entail liability upon it for the destruction of the consumer's premises by fire. Nonliability under such circumstances must be conceded.

The particular stress, however, of respondent's claim of liability of defendant is based on the fact that the company charged the monthly ordinance rates for the hydrants installed upon plaintiff's premises. But these were not paid by reason of any contract between it and the defendant. If a voluntary contract had been made between them under which a stipulated monthly sum was charged plaintiff by defendant for connecting its mains with the hydrants of the plaintiff, it might reasonably and plausibly be argued that fire protection was contemplated as the only advantage to be derived therefrom. Here, however, there was no such contract. While the municipality has the constitutional power to fix the rates at which a water company may supply water to its inhabitants, this applies only to the establishment of rates for the supply of water as a commodity, and while it may contract with the company for general protection against fire of the property of its inhabitants and expressly contract for protection of its own municipal property, it has no authority to arbitrarily impose upon a water company liability for the destruction of the property of the individual citizen on account of an inadequate water supply by simply fixing an ordinance rate for hydrants which the citizen may install upon his premises. This must be apparent, if for no other reason than that it is not only not the business of a municipality to contract for the benefit of particular individuals of the community as to fire protection, but it would be impossible for the municipality to establish rates which would adequately meet the varied risks which the company might be required to assume.

That no liability for failure to furnish fire protection could have been contemplated from the establishment of these hydrant rates is obvious. The property owner installing a hydrant available for the protection of property owned by him of the value of a few thousand dollars would pay the same rate under the ordinance for water and hydrant charges as would the owner of property worth hundreds of thousands of dollars, so that it cannot for a moment be claimed that these hydrant rates had any relation to the risk which it is claimed the water company assumed, or that they formed any adequate consideration for the assumption of such a risk or liability, or that they represented anything except a reasonable compensation for water available thereat as a commodity or as merchandise. And that it was not contemplated that any such liability should arise from the mere relation of water company to consumer is more apparent when we consider the enormous liability which the company would be compelled to assume under the theory of respondent without any adequate, and it may be said, any consideration at all, for the hazard. It is common knowledge that, notably in large manufacturing centers within municipalities, hydrants are installed on the premises and connected with a public water company's system as a precautionary measure in case of fire. This is particularly true when the enterprise in which the owners are engaged is more readily exposed to danger from fire, either from the inflammable material which is being used in the factories, or on account of the proximity of others which are of that character. The various factories or mills in which hydrants are placed and connections with the public water system made may represent property worth millions of dollars which is subject to danger of destruction by fire, and where the water to be used should fire arise is not furnished under any express contract between the parties, but is being supplied simply under the ordinance rates as to water and hydrant charges established by law. Of course, if the position of the respondent is correct, then in all these instances a public water company is assuming liability practically as an insurer of millions of dollars' worth of property, upon which, either from the nature of the business conducted on the premises or the locality in which the property is situated, an insurance company itself would not think of assuming the risk.

We make no doubt that although the primary duty of a water company, as a quasi public corporation, is to furnish water to the inhabitants of a municipality for domestic purposes, still where a person desires water to be supplied to his property for special protection against fire, and in addition to the general protection which is given it under the contract between the municipality and the water company, that this being a service of a different character than ordinarily obtains, and entailing an unusual risk, the water company may make a contract to supply it for that purpose, and under such a contract will be responsible in damages for any loss suffered by fire and directly attributable to the failure of the company to fulfill its contract. Middlesex Water Co. v. Knappan-Whiting Co., 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572, 81 Am. St. Rep. 467; New Orleans, etc., R. Co. v. Meridian W. W. Co., 73 Fed. 227, 18 C. C. A. 519. Under such circumstances there can be no room to question the liability of the water company. The parties contract freely and with the express purpose of having fire protection. Such protection is the very thing in the contemplation of the parties.

As said in Gordon & Ferguson v. Doran et al., 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1047: "So long as water supplied for protection against fire is a purely public service, under the control and management of municipal authorities generally, * * * no direct charge to individuals is proper. When, however, a sprinkling connection is made with private premises, the situation is materially different. These premises * * * are primarily under the control, not of the public, but of the owner. A peculiar personal service is provided for his benefit, which is not enjoyed in common by the community in general, but is available only to a limited class of individuals. * * * As a matter of good sense the property owner beneficially employs the water mains for his own purposes and to his own advantage, although he may not, except in case of fire, actually draw any water from the pipes. It is necessary and proper that for this he should pay. In effect he gets something of pecuniary value from another, which that other is not compelled to give except on the basis of contract."

Our conclusion therefore is that the only relation shown to exist between the defendant and the plaintiff was that of a water company engaged in distributing water for public use to a consumer who had availed himself of his legal right to have the company connect its water system with his premises for the purposes of furnishing him with water solely at ordinance rates fixed by the town of Berkeley; that under such relation no liability is imposed by any statute of this state upon such public service company for failure, from whatever cause, to have a supply of water available on the premises of the consumer for use in fire protection, although he may have installed ample facilities for that purpose, and no legal liability for such failure, independent of the statute, is implied from the relation; that such liability can only be created by contract between the parties under which the water company expressly assumes the liability. As no such contract was proven here, the plaintiff was not entitled to maintain this action.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; HENSHAW. J.; ANGELLOTTI, J.; SLOSS, J.

159 Cal. 265

HARVEY et al. v. WEISBAUM et al.

(S. F. 4,969.)

(Supreme Court of California. Jan. 11, 1911.)

Landlord and Tenant (§ 213*)—Rent—Destruction of Premises.

Though Civ. Code, § 1933, provides that the hiring of a thing terminates by the destruction of the thing hired, and a covenant of a lease provides that, in case of the destruction of the demised premises, the lease shall terminate, the lessee is not entitled, in case of such destruction, to recover a proportionate amount of rent paid in advance.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 860; Dec. Dig. § 213.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Louise Harvey and others, as executrix and executors of the estate of Joseph Harvey, and another, against Edward Weisbaum and another. From a judgment for plaintiffs, and an order denying a new trial, defendants appeal. Reversed.

A. L. Weil, for appellants. Knight & Heggerty, for respondents.

PER CURIAM. This cause was decided by the District Court of Appeal for the First district in favor of the appellants, and the judgment and order appealed from were reversed. On petition of the respondents the judgment of the District Court of Appeal was vacated, and the appeals were transferred to this court for further consideration. Upon a re-examination of the case, we find no ground for differing from the conclusions reached by the District Court. The opinion and the judgment of that court, written by Mr. Justice Cooper, is hereby adopted as the opinion and judgment of this court. It is as follows:

"This action was brought by plaintiff Daroux and the other plaintiffs, as executors of the last will and testament of Joseph Harvey, deceased, to recover of defendants rent paid in advance by said Daroux and said Harvey, deceased, under a written lease; the leased premises having been destroyed by fire on April 18, 1906, as a result of the earthquake of that date. The case was tried before the court without a jury, and findings filed, upon which judgment was entered for plaintiff for the amount claimed in the complaint. This appeal is from the judgment and the order denying defendants' motion for a new trial.

"On the 28th day of February, 1906, plaintiff Daroux and said Harvey, deceased, entered into a contract in writing, whereby they leased from defendants certain space and rooms in the second story of a brick building on Glasgow street, in the city and county of San Francisco, 'for the term of two years from the 1st day of March, 1906, at the total rent or sum of $5,400, payable one-half thereof in advance on the signing of this lease, and the remaining one-half payable monthly in advance at the rate of $225 per month, beginning March 1st, 1907.' The lease contained the following clause as to the liabilities of the respective parties in case of the destruction of the premises by fire, to wit: 'It is further agreed between the parties hereto that in case the said demised premises shall be destroyed, or become damaged to such an extent as to render the same untenantable, by reason of fire, or the act of God or the public enemy, then this lease shall terminate and be at an end; but if such damage shall not be greater than can be repaired in one month, if the parties of the first part shall, at their own cost and expense, repair such damage, and put said premises in good tenantable condition within one month from the time of the occurrence of such damage, then this lease shall continue in force; but the parties of the second part shall be allowed a proportionate reduction in the rent while such repairs are being made.' At the time the said lease was so made and executed the defendants were paid the first year's rental, $2,700, by said Daroux and said Harvey, deceased, and thereupon and thereafter said lessees entered into the possession of the said leased premises, and so continued in such possession until the premises were destroyed by fire on the day before mentioned.

"The question, and the only question that need be decided, is as to whether or not a tenant, who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, can, in the absence of any covenant in the lease, recover the rent so paid in case of the total destruction of the premises by fire without any fault of either party to the lease.

"The common-law rule, applicable where land is the subject of the lease, is that, where there is a covenant on the part of the lessee to pay rent for the term, and the buildings are destroyed by fire, the tenant is not relieved from the payment of rent, unless he has protected himself by a covenant in the lease. This rule was based, as stated by the common-law writers, upon the reason that, as the destruction is usually by means of an accident, for which neither lessor nor lessee is responsible, it is but equitable to divide the loss; and as the lessor must lose the property the lessee should lose the term; and upon the further reason that exemption from loss would tend to make the tenant less careful, as in many cases he would be benefited by the destruction of the premises, if the result would be to free him from the lease. In most states, however, the common-law rule has been superseded by either Code or statutory provisions. In this state the rule has been changed (Civ. Code, § 1933) by direct provision that the hiring of a thing terminates by the destruction of the thing hired. Ainsworth v. Ritt, 38 Cal. 89. But there is no provision of the Code, and no well-considered case to which our attention has been called, making the lessor liable to the lessee, in case of destruction of the premises by fire, for rent paid in advance, in the absence of any such provision in the agreement of lease. In such case the contract has been executed, and the estate or premises leased delivered to the lessee. The fact that rent was to be paid in advance might have been the controlling factor in the mind of the lessor when he executed the lease and delivered the possession of the premises to the lessee. The consideration for the advance payment is not only the use of the premises for the month during which the lessee is to use them under the lease, but the conveyance by way of lease and the obtaining possession of the premises. The lease is an interest in real property passing from the lessor to the lessee. In many cases the landlord may have expended more money than the advanced rent, and for the very reason that he is receiving rent in advance. It may have been the very inducement to the lease. The destruction of the premises by fire being unforeseen, and without the fault of either party in contemplation of law, they each must suffer, and being equally innocent, why should the law interfere to aid the lessee in a case where he has not taken the precaution to provide in his lease for the contingency? The lessee has only paid the money he agreed to pay at the time he agreed to pay it; and, as he has not seen fit to have any provision inserted in the lease as to the recovery of the advance rent, or a part thereof, in case the premises are destroyed by fire, the law will not insert such provision for him, particularly as in many cases it might work a great hardship on the lessor.

"In the state of New York the statute provides that, where any leased building is destroyed by fire so as to be untenantable, the lessee may quit and surrender possession, and in such case he shall not be liable to rent subsequent to the surrender. It is held, however, that where rent is paid in advance, it cannot be recovered notwithstanding the provision of the statute. Werner v. Padula et al., 49 App. Div. 135, 63 N. Y. Supp. 68. It was there said: 'If by the terms of his lease rent is to be paid in advance, the tenant comes under an absolute engagement to pay it on the day fixed, and he is not relieved from that engagement by the fact that the property is destroyed by fire, and he is liable to pay the rent due in advance, even though the destruction takes place on the very day it falls due. * * * Under the statute, therefore, the plaintiff would have been compelled to pay the first installment of rent, although the premises had been destroyed on the day after this lease was signed. But it is said that if this construction be given to the contract, she gets no more benefit from the contract than she would have had, had she relied upon the statute. That is undoubtedly true. If she had written into her lease the exact words of the statute, they would have received there the same construction which the statute itself has received, and the fact that she has written words in her contract which have the same meaning gives her no other or different rights. When, therefore, on the day the lease was signed, she paid the rent in accordance with its terms, that payment was final and absolute. She was not entitled to recover it back in the event of the destruction of the premises before the whole of that rent had been earned.'

"This case was affirmed in 167 N. Y. 611, 60 N. E. 1122, and again in Einstein v. Tutelman [59 Misc. Rep. 462] 110 N. Y. Supp. 1025.

"In Tarkovsky v. George H. Hess Co., 64 Ill. App. 513, the lease contained the provision: 'Upon the destruction of said premises by fire the term hereby created shall cease and determine.' The premises were totally destroyed by fire, and the action was brought to recover part of a month's rent which had been paid in advance under the terms of the lease. The court held that such rent could not be recovered. In the opinion the court said: 'Can a proportionate part of such payment be recovered back? We think not. The contract of the parties ought to govern. They provided by their agreement how the rent should be paid, but did not agree that the rent should be abated for any part of the term for which it should be paid, in case the premises should be destroyed. Their only agreement with reference to the destruction of the premises was that the lease should thereupon terminate, and, impliedly, that no more rent should accrue. Such was probably the law without any agreement. But as to rent previously paid they made no provision, and we do not feel called upon to make one for them. As we view the case, the risk of the lease being terminated before the time expired for which rent was paid was upon the party paying. That was in effect what his contract was when he agreed to pay in advance.'

"The same ruling has been made by the Supreme Court of Ohio (Felix v. Griffiths, 56 Ohio St. 39, 45 N. E. 1092), of Wisconsin (Cross v. Button, 4 Wis. 468; Copeland v. Goldsmith, 100 Wis. 436, 76 N. W. 358), and of Michigan (Lieberthal v. Montgomery, 121 Mich. 369, 80 N. W. 115).

"The only case cited which appears to be directly in point, holding the contrary rule, is Porter v. Tull, 6 Wash. 408, 33 Pac. 965, 22 L. R. A. 613, 36 Am. St. Rep. 172. The reasoning of that case, however, is not convincing, and the opinion states that the court has not been cited to any adjudicated cases on the question. The cases to which we have referred, and which have been cited herein, evidently were not called to the attention of the court.

"We are aware that there may be cases in which the rule that we have adopted may work injustice; but we apprehend that to hold to the contrary would work greater injustice in many cases. In our opinion it is better to let the rights of the parties rest upon their contract as they have made it, and not by judicial construction place a covenant in the lease which the parties have neglected to insert there themselves. It is better to have the rule uniform and certain, and any such contingency may be provided for in the lease.

"The judgment and order are reversed."

159 Cal. 288

LIGHT v. STEVENS. (S. F. 5,266.)

(Supreme Court of California. Jan. 11, 1911.)

1. Bills and Notes (§ 434*)—Presumption—Purpose of Payment.

Under Code Civ. Proc. § 1963, subd. 7, providing that money paid by one to another is presumed to have been due to the latter, and section 1961, providing that unless there is evidence controverting a presumption, the jury are bound to find according to it, defendant in an action on a note, cannot recover by counterclaim, for payments in excess of the amount of the note in the absence of evidence to contradict the presumption stated.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268–1274; Dec. Dig. § 434.*]

2. Bills and Notes (§ 499*)—Actions—Presumptions and Burden of Proof—Payment.

The possession of the note by the payee bearing no indorsement of payment, raises a presumption of nonpayment of any portion, especially in view of Code Civ. Proc. § 1963, subd. 20, declaring that the ordinary course of business is presumed to have been followed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695–1697; Dec. Dig. § 499.*]

3. Bills and Notes (§ 499*)—Actions—Presumptions and Burden of Proof—Payment.

To meet the burden of proving payment of a note on its production without indorsement, the maker must show not only the delivery of money, but that it was on account of the particular obligation in suit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695–1697; Dec. Dig. § 499.*]

4. Payment (§ 68*)—Presumption and Burden of Proof—Application of Payments.

In an action on a note, where two or more obligations of the maker to the payee are shown, evidence of the mere payment of money which could have been applied on either obligation does not tend to overcome the presumption of nonpayment of the note on its production without indorsement of payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 195, 202; Dec. Dig. § 68.*]

5. Payment (§ 68*) — Evidence — Presumptions and Burden of Proof.

Where it affirmatively appears that there is but one obligation, and a payment by the debtor to the creditor is shown, it is presumed that the payment was on account of that obligation.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 195, 202; Dec. Dig. § 68.*]

6. Payment (§ 68*) — Evidence — Presumptions and Burden of Proof.

Where the only obligation of the debtor expressly shown, is the one in suit, the burden is on the debtor to produce evidence warranting the inference that there was no other obligation or transaction on which a payment by him might properly be applied.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 195, 202; Dec. Dig. § 68.*]

7. Bills and Notes (§ 537*) — Actions—Questions for Jury—Payment.

On the production by plaintiff of the note, bearing no indorsement of payment, and the introduction of evidence by defendant sufficient to warrant the inference that there was no other obligation on which payment by him might properly be applied, the question of payment was for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1885; Dec. Dig. § 537.*]

8. Bills and Notes (§ 527*)—Actions—Evidence—Weight and Sufficiency.

In an action on a note, evidence *held* sufficient to support a finding by the jury that defendant had not shown payment of any part of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847–1855; Dec. Dig. § 527.*]

9. Payment (§ 76*) — Application of Payments—Questions for Jury.

In an action on a note, evidence *held* to present a question for the jury, whether payments made by the maker were to be applied in payment of part or all of the sum due on the note.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 248; Dec. Dig. § 76.*]

10. Appeal and Error (§ 1064*)—Review—Prejudice from Error—Instructions.

In an action on a note, where there was evidence presenting a question for the jury whether particular payments by the maker to the payee, each less than the face of the note, but aggregating more than the amount due thereon, were to be applied on the note, the error in instructing that if the jury found for plaintiff at all, they must return a verdict for the full face value of the note, was prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

11. New Trial (§ 128*) — Proceedings to Procure — Statement — Specification of Errors.

Under Code Civ. Proc. § 659, subd. 3, providing that when errors in law are relied on as grounds for new trial, the statement shall specify the particular errors on which the party will rely, a specification that the court erred in giving each and every instruction requested by plaintiff, sufficiently specified error in the giving of one of the instructions.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 259; Dec. Dig. § 128.*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by E. S. Light against C. A. Stevens (F. S. Crouch substituted) as administrator of the estate of Theodore A. Light. From an order denying new trial after verdict for plaintiff, defendant appeals. Reversed.

Bell, York & Bell, E. S. Bell, White, Miller & C. E. McLaughlin, for appellant. Lynch & Drury and Raymond Benjamin, for respondent.

ANGELLOTTI, J. This is an appeal by defendant from an order denying his motion for a new trial in an action upon a promissory note for $3,000, given by defendant's intestate to plaintiff on April 15, 1902. The case was tried by a jury, and a verdict was rendered for the full amount of said note, with interest at the rate of 7 per cent. per annum from its date and for $500 attorney fees. The defense relied on by defendant was payment by the decedent in his lifetime of the full amount of the note and interest. This is the second appeal in this case. On a former trial, the trial court struck out certain evidence given by C. A. Stevens on behalf of the defendant for the purpose of showing payment, and on appeal the district court of appeal reversed the judgment on the ground that such evidence was competent and material on the question of payment. Light v. Stevens, 8 Cal. App. 74, 103 Pac. 361. On the second trial, such evidence was read to the jury, Mr. Stevens having died in the meantime, but notwithstanding the same a jury again found for the plaintiff in the full amount claimed, and the trial court denied a motion for a new trial. It is claimed by defendant that there was no basis in the evidence for a conclusion that the note had not been fully paid. Plaintiff made a prima facie case by producing and introducing in evidence the note in suit. The note bore no indorsement of any payment having been made thereon. The evidence of the wife of plaintiff showed that the note had been deposited with Mr. C. A. Stevens, who was a banker at Calistoga, for safe-keeping, and that after the death of defendant's intestate, it had been delivered by Mr. Stevens to plaintiff in pursuance of several demands made by him therefor. The record must be taken as showing that at all times Mr. Stevens' possession of the note was for plaintiff. This constituted all of the evidence in support of plaintiff's claim.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The evidence given by Mr. Stevens showed the following facts: Plaintiff, E. S. Light, and defendant's intestate, Theodore A. Light, were brothers. There were two other brothers, Ephraim and Marcus. Theodore was unmarried. He died May 20, 1904. He left an estate appraised at about $18,000, consisting in part of certain notes due him and three certificates of deposit for amounts aggregating $3,100, and in part of a vineyard at Calistoga. Both he and E. S. Light did business with Mr. Stevens, as a banker, for a number of years prior to his death. In April, 1902, one Richard Schmidt borrowed of Theodore $6,000, giving him therefor the note of himself and wife, secured by mortgage. This loan was arranged through Stevens. To make it, Theodore borrowed $3,000 from E. S. Light, and the note in suit was given therefor. Subsequent to the giving of this note, Theodore paid certain amounts of money to plaintiff, as follows: On July 10, 1902, $1,250; on April 13, 1903, $1,408.65; on December 28, 1903, $2,000; on February 23, 1904, $300. The first and second of these payments were made by depositing the money in Stevens' bank and taking certificates of deposit in favor of plaintiff, which were on subsequent dates cashed by the latter. The third and fourth payments were made from Theodore's personal account at Stevens' bank on drafts drawn in favor of plaintiff. At the date of the second payment, April 13, 1903, Schmidt paid Theodore $2,517.63 on account of his note and mortgage. At the death of Theodore his personal effects other than the note in suit were taken possession of by plaintiff and his wife, and Mr. Stevens testified that plaintiff endeavored to induce him to cash the three certificates of deposit found among such personal effects, and asked him if he would not do so for a consideration, saying that he wished to get possession of the money so that his brother Ephraim would not get it. This evidence was not contradicted. There was no evidence bearing on the question whether there was ever any indebtedness on the part of Theodore to plaintiff other than the indebtedness evidenced by the note in suit, except such as was furnished, if any, by the payments by him to plaintiff of amounts aggregating more than the amount due on said note.

It will be observed that if the first two payments were made on the note in suit, the amount due thereon would have been reduced to less than $500, and that the third payment, that of December 28, 1903, of $2,000, was about $1,489 more than was necessary to pay the balance due on the note. On this evidence, defendant claims that the only possible conclusion is that the note was paid in full, and that his counterclaim for the surplus of about $1,800 paid, based on the ground that the same was loaned by defendant's intestate to plaintiff, should have been sustained.

Defendant's contention in regard to the counterclaim is fully answered by the presumption declared by subdivision 7 of section 1963, Code Civ. Proc., viz., "that money paid by one to another was due to the latter." There is absolutely nothing in the evidence to contradict this presumption, and "unless so controverted the jury are bound to find according to the presumption." Section 1961, Code Civ. Proc.

Upon the question of payment of the note, we think that the evidence must be held sufficient to support the verdict. Owing to the fact that the lips of one of the parties to the transaction are closed by death, and those of the other party by the law, the evidence on this question is somewhat unsatisfactory. Nevertheless we believe that it sufficiently presented a pure question of fact for the jury, and that it cannot be held as matter of law that any portion of the amount evidenced by the note was in fact paid by the debtor.

Admittedly, the burden of proving payment of the note was on defendant. It is elementary that the possession of the note by the payee, bearing no indorsement of payment, raises a presumption of nonpayment of any portion of the amount thereof. It is provided by our Code that an obligation delivered up to the debtor is presumed to have been paid (subdivision 9, § 1963, Code Civ. Proc.), and the converse of this, viz., that possession by the payee is prima facie evidence of nonpayment, is universally held (see Turner v. Turner, 79 Cal. 565, 21 Pac. 959; Griffith v. Lewin, 125 Cal. 618, 58 Pac. 205). This presumption is well supported by reason, and, in the absence of proof of other facts reasonably warranting an inference of payment, must prevail. It is the ordinary course of business on the part of reasonably careful persons to require the delivery of their written obligations upon discharge thereof, or if this cannot be obtained, to require some written evidence of the discharge, and it would be quite a departure from "the ordinary course of business," which is presumed to have been followed (Code Civ. Proc. § 1963, subd. 20), to pay the full amount due on a note without receiving the note from the payee, or, if it cannot be delivered, some other evidence of payment. Griffith v. Lewin, supra. The burden of proving payment resting on defendant, he must introduce evidence which warrants the conclusion of not only the mere delivery of money to the creditor, but the conclusion of the delivery of money on account of the particular obligation in suit, for this is involved in the term "payment" when applied to any particular obligation. This much seems very clear, and is well supported by the authorities. The question about which there is more difficulty is as to what evidence warrants such a conclusion. While it is one of the presumptions declared by our Code "that money paid by one to another was due to the latter," and was therefore paid on account of some legal obligation of the payer to the payee (see also Lawson's Law of Presumptive Evidence, p. 418), if two or more such obligations are shown, and one of such obligations is a note held by the payee bearing no indorsement of payment, and there is nothing but the mere payment of money which could have been applied upon either obligation, there would be nothing to overcome the presumption of nonpayment of the note. The payer would not have satisfied the requirement of furnishing evidence warranting the inference that the payment was on account of the note rather than on account of the other obligation or obligations. See White v. White, 44 S. W. 83, 19 Ky. Law Rep. 1590; Wessel v. Bishop, 76 Neb. 74, 107 N. W. 220; Wells v. Ryan, 84 Va. 341, 5 S. E. 21. If, on the other hand, it is made to affirmatively appear that there was but one obligation or transaction, and a payment of money by the debtor to the creditor is shown, it would follow, by reason of the presumption that money paid was due to the payee, that the money was paid on account of that obligation. There is apparently some confusion in the authorities as to the situation where the only obligation of the debtor expressly shown is the one in suit, the debtor having failed to introduce evidence tending to show that there was no other obligation, and there is nothing in the evidence bearing on that question. On the one hand it is strongly maintained that the burden is on the debtor to produce evidence warranting the inference that there was no other obligation or transaction on which the money paid might properly be applied (see Somervail v. Gillies, 31 Wis. 152; Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. Law Rep. 2090; Smith's Appeal, 52 Mich. 415, 18 N. W. 195), while on the other hand it appears to be intimated that the payment being shown, the burden shifts to the payee to affirmatively show that there was some other obligation to which the money paid might properly be applied, and that in the absence of such showing the conclusion is inevitable that the payment was on account of the debt in suit. Murphy v. Richardson, 33 Pa. 235; Masser v. Bowen, 29 Pa. 128, 72 Am. Dec. 619; Jesse v. Davis, Adm'r, 34 Mo. App. 353. We do not see how the reasoning of such opinions as those in Somervail v. Gillies, supra, Galbraith v. Starks, supra, and Smith's Appeal, supra, can be refuted, if we follow the rule that the burden of proof of "payment" is on the debtor. The real doctrine of those cases is simply that the person upon whom rests this burden of proof of payment must introduce evidence tending to show that the money paid was paid on account of the particular debt rather than upon some other debt or transaction not involved in the action—evidence sufficient to warrant such an inference. If such evidence be produced, the question of payment is one for the jury. The presumption of nonpayment of a note, arising from the possession of the note is opposed by the evidence so introduced, and the issue is purely one of fact. In Galbraith v. Starks, supra, where it was held that "the debtor must show that the money was to be applied on such indebtedness, or at least that there was no other indebtedness," it was said that the mere passing of money from the debtor to the creditor may be a strong circumstance in determining whether it was intended and accepted as payment on the note, and that other slight circumstances might satisfy. For this reason such evidence is always admissible, as was held on the former appeal in this case, and practically nothing more than the question of the admissibility of such evidence was involved in the cases relied on by defendant which we have just cited. But such evidence cannot as matter of law controvert the presumption of nonpayment. It is to be noted that the statute nowhere declares that any presumption arises from such evidence. Its sole effect, if sufficient to warrant an inference of payment on account of the debt in suit, is to make the question of payment on such debt one of fact for the jury. The opinion of the district court of appeal on the former appeal cannot be held to establish the law of the case to any greater extent than this, and the opinion of that court on this appeal clearly shows why the former opinion should not be construed as attempting to decide anything more than that the evidence stricken out was competent and relevant. We are satisfied that it must be held that the evidence we have set forth was such as to sufficiently support the finding of the jury that the defendant had not shown payment of any part of the obligation in suit. Prominent among the things tending to support such conclusion is, of course, the fact that the amounts paid were in the aggregate largely in excess of the amount of the note.

At the same time we think there was enough in the evidence, taking it as a whole and considering all of the circumstances, to support a conclusion that so far as was necessary to accomplish that result, the payments were on account of the note, and that the excess only was on account of some other obligation or transaction. The relation of the parties and the probable resulting confidence in each other therefrom, the apparent actual confidence in each other, the manner of payment of the amounts of money actually given by Theodore to plaintiff, the fact that Theodore was financially able to easily discharge this obligation and left several thousand dollars in certificates of deposit at his death, are circumstances that might properly influence the jury in arriving at such conclusion. Especially is it true that such a conclusion would be warranted as to the first two payments which taken together did not exceed the amount due on the note. As to these payments the circumstance of a payment in excess of the amount due on the obligation shown does not exist, and these payments are so distinguished thereby from the last two payments that the jury would have been warranted in concluding that they were made upon the note, and that the last two were wholly on some other obligation or transaction. And more especially would the conclusion of payment on the note be warranted as to the second payment because of the fact that it was made upon the very day that a payment was made to Theodore on account of the Schmidt loan, to assist in making which plaintiff loaned Theodore the $3,000, which constituted one-half of the loan, and that the payment then made by Theodore to plaintiff was in amount a little over one-half of the amount received by him from Schmidt.

It is further to be observed that if the jury were satisfied from the evidence that even one of the payments was made upon the note in suit, that fact would be a circumstance in support of the conclusion that all were so made, in view of the nonindorsement of such payment upon the note. Such nonindorsement of a payment actually made would tend to show a course of dealing in regard to this note that might satisfactorily account to the jury for the absence of any indorsement as to other payments or even the surrender of the note on its full payment.

In view of what we have said, it is clear, as decided by the District Court of Appeal, that the lower court erred in instructing the jury that if they found for the plaintiff at all, they must return a verdict for the full face value of the note, with interest thereon from its date. The effect of this was to require a verdict for plaintiff in the full amount claimed, even though the jury were satisfied that the first two payments or one of such payments had been made on the note. We have seen that the jury may have so concluded on the evidence, and in the face of this instruction we cannot assume that they did not so conclude. The evidence in the case is of such a nature that the error in giving this instruction must be held to have been prejudicial.

Plaintiff's main contention in reply to the claim of error in this behalf is that the giving of this instruction was not sufficiently specified as error in the statement on motion for new trial, the statute (subdivision 3, § 659, Code Civ. Proc.) providing that when errors in law are relied on "the statement shall specify the particular errors upon which the party will rely," and "if no such specification be made, the statement shall be disregarded on the hearing of the motion." The statement does contain an attempted specification of the particular errors relied on, but in regard to the instruction in question the only specification was the general one covering all of plaintiff's requested instructions. It reads: "The court erred in giving each and every instruction requested by plaintiff." There were nine instructions so requested, and of these the giving of three others was specified elsewhere with more particularity. It cannot be doubted if defendant had severally specified as error the giving of each of the nine instructions requested by plaintiff, there would have been a sufficient compliance with the statute. While the omnibus method followed here is not a method that it would always be safe to adopt, we cannot see but that in this case it as clearly notified plaintiff as to the particular errors relied on as would a several specification as to each instruction. We are of the opinion that the specifications should, under the circumstances, be held sufficient. Plaintiff cites Hall v. Susskind, 120 Cal. 559, 566, 53 Pac. 46, in support of his contention. That case does not go to the extent of holding that such a specification as the one here involved will never be considered sufficient. The only assignment there was of errors "pointed out and designated in the foregoing transcript by exceptions Nos. 1, 2, 3, etc., to 25, and the court erred in each of its said rulings." This court was unable to find any exceptions in the transcript numbered in any manner. It was said simply that the specification "can scarcely be regarded as such a specification of particular errors as the statute requires" and "moreover, we have been unable to find an exception in the transcript numbered in any manner." The other cases relied on in this connection related to the question of sufficiency of statement of claim of error in printed briefs of counsel.

The order denying a new trial is reversed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

(159 Cal. 368)

STEIN v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 5,148.)

(Supreme Court of California. Feb. 2, 1911.)

1. Street Railroads (§ 110*)—Actions for Injuries—Pleading—Negligence.

A complaint against a street railroad company for personal injuries which alleges that the defendant ran one of its cars in such a negligent manner that, when it came to a crossing of two designated streets, it ran into and severely injured plaintiff sufficiently avers negligence, it being sufficient to say that an act was negligently done without stating the particular omission which rendered it negligent, although it must appear from the facts averred that the negligence caused or contributed to the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 224; Dec. Dig. § 110.*]

2. Appeal and Error (§ 1040*)—Harmless Error—Demurrers—Overruling Demurrer.

Where a street railroad company demurs to the complaint in an action against it for personal injuries on the ground of its uncertainty in charging negligence, the overruling of the demurrer is error without prejudice, unless the defendant was misled by the defect in the pleadings, and the case was not fairly tried on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089–4105; Dec. Dig. § 1040.*]

3. Municipal Corporations (§ 705*)—Use of Streets—Negligence—Violation of Ordinance—"Crossing."

The violation of a local ordinance which forbids driving faster than a walk over or upon a crossing is negligence per se, if such violation contributes proximately to an accident, the word "crossing" including not merely that part of the street used ordinarily by pedestrians in moving from one side of the street to the other, but the entire area covered by the intersection of two streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1763, 1764; vol. 8, p. 7624.]

4. Appeal and Error (§ 1067*)—Review—Prejudicial Error—Instructions—Refusal.

Where there was evidence in an action against a street railroad company for personal injuries that plaintiff at the time of the accident was driving over a crossing faster than a walk, which was forbidden by ordinance, so that plaintiff was negligent per se, if his violation contributed to an accident, the refusal of instructions that if plaintiff drove over the street crossing faster than a walk he was negligent as matter of law, and that the failure of any person to perform a duty imposed by ordinance or other legal authority of itself was negligence, is reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.*]

5. Trial (§ 296*)—Instructions—Construction—Construction of Charge as a Whole.

It is not an objection to instructions upon contributory negligence that they ignore the doctrine of last clear chance, where an instruction covering that subject is given in another part of the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713; Dec. Dig. § 296.*]

6. Street Railroads (§ 103*)—Actions for Injuries—Injury Avoidable Notwithstanding Contributory Negligence—Last Clear Chance.

Where the motorman of a street car which struck plaintiff saw or had the means of seeing plaintiff's situation before the collision, and had the opportunity by proper care to avoid the collision and failed to exercise such care or to do what reasonable prudence dictated, the street railroad company is liable.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

7. Trial (§ 236*)—Instructions—Sufficiency as to Subject-Matter—Credibility of Witnesses.

In an action against a street railroad for personal injuries, where there is no suggestion of perjury, an instruction on the credibility of a witness to consider whether his testimony is in itself contradictory, whether it has been contradicted by other credible witnesses, whether his statements are reasonable and consistent with facts established by other evidence, his manner, the bias or prejudice, if any, manifested by him, etc., without an instruction that "if a witness has sworn falsely to any material matter the jury should distrust his testimony" is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531–533; Dec. Dig. § 236.*]

8. Street Railroads (§ 118*)—Personal Injuries—Instructions.

The refusal of an instruction to the jury in an action against a street railroad company for personal injuries that if the accident occurred without the fault of either party, defendant would not be liable is not error, as it is only the formal statement of a rule which the jury would know without instruction.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. § 118.*]

9. Damages (§ 216*)—Personal Injuries—Instructions.

Under Civ. Code, § 3283, the award of damages for detriment resulting after the commencement of the action or certain to result in the future, an instruction in an action for personal injuries that, in estimating the damages, the jury might consider whether the injury to plaintiff was temporary or was likely to be permanent and which, by the following sentence, instructed, "And from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained," and by another part of the instruction limits the jury to a consideration of the pecuniary damage, if any, "proved to have been sustained," is proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. § 216.*]

10. Appeal and Error (§ 932*)—Review—Presumptions—Verdict—Amount of Recovery.

There is no presumption from the smallness of a verdict that any element of damages was ignored by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3782; Dec. Dig. § 932.*]

11. STREET RAILROADS (§ 114*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—VIOLATION OF MUNICIPAL ORDINANCE—WILLFUL OR WANTON INJURY.

Evidence in an action against a street railroad company for personal injuries *held* sufficient to show that the plaintiff was guilty of contributory negligence, and sufficient, upon the theory of the last clear chance, to support the general verdict for the defendant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

12. APPEAL AND ERROR (§ 1177*)—PREJUDICIAL ERROR—REFUSAL OF INSTRUCTION.

In an action against a street railroad company for personal injuries where the defendant's negligence depended upon whether it had observed the last chance rule, the refusal to submit to the jury a special interrogatory as to the degree of care exercised by the motorman, after his apprehension of the plaintiff's danger, necessitates a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Jacob Stein against the United Railroads of San Franscisco. Judgment for plaintiff, and defendant appeals. Reversed.

A. A. Moore, Stanley Moore, W. M. Cannon, and W. H. Orrick, for appellant. Wal. J. Tuska, for respondent.

MELVIN, J. Plaintiff's wagon was struck by one of the electric cars of the defendant corporation while he was driving across the track on Turk street at the crossing of Buchanan street in the city of San Francisco. Judgment was rendered in favor of plaintiff. Defendant appeals therefrom and from an order denying its motion for a new trial.

The allegations of the complaint material to this discussion are that the defendant "operated, ran, and conducted one of its cars upon and along said Turk street aforesaid in such a careless, negligent, reckless, wrongful, and unlawful manner that the said car, when it came to the crossing by the street known as Buchanan street and the said Turk street, while going in an easterly direction, ran into and upon the plaintiff and severely injured the plaintiff in and upon his head and in and about his body." Then follow averments describing in detail the extent of the injuries and setting forth the amount claimed as damages.

There was a special demurrer to the complaint on the ground of uncertainty in that, according to appellant's contention, it could not be determined therefrom what act the defendant did or omitted to do which constituted negligence. This not being an action in which negligence is presumed from the occurrence of the accident and the burden of exculpation is upon the defendant, as in those cases wherein the relation of carrier and passenger existed between the parties, appellant earnestly urges that the complaint should have specified the acts and omissions constituting the alleged negligence. Many cases are cited showing that the rule for which appellant contends exists in some other states. In California, however, it is different. It was expressed in Smith v. Buttner, 90 Cal. 99, 27 Pac. 29, as follows: "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence cause or contributed to the injury." It may be said, further, that even if it were error (and it was not), to overrule the demurrer for uncertainty, it was error without prejudice unless the demurring party was misled by the defects in the pleading, and the case was not fairly tried on the merits. Here it appears that the issues were all fully, fairly, and understandingly tried. Lemoore v. Fulgham, 151 Cal. 234, 90 Pac. 936; Irrgang v. Ott, 9 Cal. App. 440, 99 Pac. 528.

In an amendment to the answer defendant pleaded plaintiff's contributory negligence in violating a certain ordinance of the city and county of San Francisco numbered 803. At the trial the ordinance was introduced without objection. This by-law provided that it should be unlawful for any person "to drive any horse or horses at a rate of speed faster than a walk over or upon any street crossing." Defendant offered, and the court refused, a number of instructions with reference to this ordinance. For purposes of illustration, it will be sufficient to quote two of these instructions, as all were of similar purport:

"If you find from the evidence in this case that plaintiff Jacob Stein drove over the street crossing at Turk and Buchanan streets at a faster gait than a walk, I instruct you as a matter of law that he was guilty of negligence.

"I instruct you that the failure of any person to perform a duty imposed upon him by an ordinance or other legal authority of itself constitutes negligence."

The refusal of the court to give this instruction is assigned as error by appellant, who cites in support of this contention Siemers v. Eisen, 54 Cal. 418; Higgins v. Deeney, 78 Cal. 578, 21 Pac. 428; Driscoll v. Market St., etc., Ry. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; Denison, etc., Ry. Co. v. Carter, 98 Tex. 196, 82 S. W. 783, 107 Am. St. Rep. 626; Harrington v. L. A. Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. Evidently the word "crossing" as used in the ordinance includes, not merely that part of the street used ordinarily by pedestrians in moving from one side of the street to the other, but refers to the entire area covered by the two streets at their place of intersection. In City St. Imp. Co. v. Laird, 138 Cal. 29, 70 Pac. 917, it was held that "a crossing is the intersection of two streets and from the nature of the term can have no property fronting upon it." The title and contents of the ordinance both indicate that this was the meaning of the word "crossing" in the minds of the legislators who enacted the by-law. The ordinance is entitled "Ordinance No. 803 (approved June 11, 1903), Prohibiting Fast Driving on Public Highways," and the same section which contains the inhibition to drive faster than a walk over or upon a crossing makes it unlawful and in violation of the ordinance to drive immoderately on a public highway. That the respondent was driving faster than a walk is undisputed. He himself said: "My horse was proceeding at a slow trot as it crossed the crossing at Turk and Buchanan streets, and when the accident occurred." James B. Molloy, who was a passenger on the appellant's car, testified that "the horse was proceeding at a slow trot—a little over a walk"; while Fletcher, the conductor, declared, "The horse and wagon were going along at about eight or nine miles an hour. The horse was trotting along at a little above a medium trot; he was going at a pretty good trot." These were the only witnesses who testified regarding the speed of the horse, and in any view of the testimony of any or all of them, the instruction above quoted, and the others upon the same subject, should have been given. It is the settled rule in this state under the doctrine of Californian cases above cited that the violator of a local ordinance is guilty of negligence per se if such violation contributes proximately to the accident. It is no sufficient answer to appellant's objection to the court's refusal to give the requested instructions that they ignored the doctrine of the "last clear chance." To announce such a rule would be to hold that each instruction must express all the law on the subject considered. The jurors were elsewhere in the charge of the court fully informed regarding the doctrine of "last clear chance" as follows: "I instruct you that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring another, must do so, notwithstanding the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence that the motorman of defendant's car which collided with the plaintiff, saw or had the means of seeing the situation in which plaintiff was before the collision, and had the opportunity, by the exercise of proper care, to avoid the collision and avoid injuring the plaintiff, and failed to exercise such care or to do what reasonable prudence would dictate he should have done to avoid injuring the plaintiff, the defendant is liable, and your verdict must be for the plaintiff." The ordinance in question was pleaded and was introduced in evidence. To refuse the requested instructions with reference to it was clearly erroneous and so prejudicial to appellant that a new trial must be ordered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant's next assignment of error relates to the court's refusal to give the following instruction approved in People v. Stevens, 141 Cal. 492, 75 Pac. 64: "If a witness before you has willfully sworn falsely to any material matter, it is your duty to distrust his testimony." Unquestionably this is a proper instruction when occasion requires the court to give one upon the subject of willful false swearing. In the present case we cannot say that the court erred in determining that there was no occasion for giving the instruction. There was no suggestion by either side of willful perjury, and the jurors were fully instructed on the method of determining the credibility of a witness as follows: "In determining the credibility of a witness, you should consider whether his testimony is in itself contradictory, whether it has been contradicted by other credible witnesses, whether his statements are reasonable or unreasonable, whether they are consistent with other or with the facts established by other evidence or admitted. You may also consider the witness' manner of testifying upon examination, the bias or prejudice, if any, manifested by him, his interest or absence of interest in the suit, his recollection, whether good or bad, clear or indistinct, concerning the facts to which he testifies, his inclination or motives, together with his opportunity of knowing the facts whereof he speaks. The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in a civil suit."

It was not error for the court to refuse an instruction that if the accident occurred without the fault of either party appellant would not be liable. A juror would know that such was the rule without instruction and it would seem absurd to burden the record with a formal statement of a truth so self-evident. The jury was charged fairly and fully upon the subject of contributory negligence, and although certain of appellant's proposed instructions on this subject were refused, their substance was properly submitted to the jury in the charge given by the court of its own motion.

As a part of one of the instructions the jurors were told that "in estimating the amount of damage they might consider whether the injury was temporary in its nature, or was likely to be permanent in its character." It is most earnestly submitted that the above language violates the rule of damages declared by section 3283, Civ. Code, which provides that "damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or certain to result in the future." We do not think the instruction as given did violence to the rule announced in Melone v. Sierra Ry. Co., 151 Cal. 116, 91 Pac. 522. In that case the jury were told that an element of damage was "the pain and anxiety that he has suffered or may suffer by reason of his injuries," and that in estimating the damages to be awarded "you may take into consideration * * * the physical and mental suffering he may have sustained or may undergo in the future by reason of his injuries." In that case, the judgment was very properly reversed because an instruction that a recovery might be had for pain and suffering merely possible in the future was clearly opposed to the criterion announced by section 3283 of the Civil Code. But the sentence above quoted from an instruction given in this case neither stated nor implied that damages might be awarded for merely possible future suffering. The language is taken from the midst of an instruction wherein the jurors were informed that in estimating the amount of damage, if any, they might consider the pain suffered, if any, the nature, extent and severity of the injuries sustained, if any, the extent, degree and character of suffering, mental or physical, if any, its duration and severity, and medical expenses, cost of nursing, loss of time and value thereof, and loss, if any, of earning capacity. Then comes the sentence: "You may also consider whether the injury was temporary in its nature, or likely to be permanent in its character." This is immediately followed by the concluding sentence of the instruction: "And from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained." The former sentence describes the mental process which the jury must follow in reaching a conclusion regarding the permanent or temporary character of the injury. True, if the sentence stood alone, it might be open to the objection urged against it, but its vice is nullified by the very next sentence which limits the jury's award to the injury "sustained"—not to a future, contingent injury. The first sentence of the instruction also limits the jury to a consideration of the pecuniary damage, if any, "proved to have been sustained." The instruction was more favorable to appellant than a full statement of the law would have been, for the jurors were not told that they might grant any compensation for future suffering, certain or otherwise.

Respondent also contends that the smallness of the verdict ($500) precludes the idea that the jury considered anything except the actual loss of time, the medical expenses and cost of nursing which he was forced to meet by reason of his injuries, and that therefore the element of suffering, either future or past, was not considered by the jury. This argument, though ingenious, is fallacious. We cannot presume that any element of damage was ignored by the jury merely because the verdict was not for a large sum of money. Such presumption would carry us into the realm of most unsatisfactory speculation. Before considering the question of negligence involved in this case, it will be necessary briefly to review the evidence.

The plaintiff testified: "I was proceeding along Buchanan street in a southerly direction at a slow trot. I did not see anything when I got to the crossing of Turk and Buchanan streets. When within four or six feet from the northerly line of Turk street while I was driving on Buchanan street I saw several chuck holes, and I was driving so as to get out of the way of these. When I got to the corner of Turk street I looked up Turk or Webster street but saw no car. I then drove over the crossing toward the track; when I got on the track I saw a car coming at great speed from 100 to 200 feet away, west from where I then was while crossing the track. I am pretty positive the car was over 100 or 200 feet to the west when I first saw it. I was going in a southerly direction. I speeded up my horse—I saw the car—and I speeded up my horse to get out of the way. The car struck my wagon." The witness then described his injuries due to his being thrown from the wagon. He also said: "I didn't observe any obstruction in the neighborhood of the accident. There was no obstruction either way that I could see. The street was clear both ways as far as I could see. My wagon was a covered wagon, with glass windows on both sides. The weather was good that night." Witness further testified: "When I encountered the second chuck hole, I looked up Turk street. I could see all the way up to Webster street. When my body came into the line of Turk street, there was nothing to prevent me seeing clear up to Fillmore street. The front feet of my horse were on the track when I first saw the headlight of the car. The car was then nearer 200 feet away than 100 feet; maybe it was 300 feet, I could not be positive. I was going at a slow trot. I then struck the horse with the lines and he went forward. I did not attempt to stop the horse, or to back him up. The car was going at a tremendous speed, at a very rapid rate. When I first saw the car coming my body was not upon the track, my wagon was near the track." James B. Molloy, who was seated on the front of the Turk street car testified that it was running at a high rate of speed after leaving Fillmore street. He said: "It took a part of a minute for the car to go from Fillmore to Webster street; it did not take a minute. I should judge it did not take as long to go from Webster street to Buchanan street as it did to go from Fillmore to Webster. The current was on full force." He also testified that when about the middle of the block between Webster and Buchanan streets he observed the wagon in full view not quite on the track; that the car struck the wagon and the occupant was thrown out; and that the motorman "did not put the air brake on until within 10 feet away from the wagon." The witness also stated that the horse's head was about 4 feet from the track when he first saw it, and that about 20 seconds elapsed from the time he saw the wagon until the car struck it; that the way was unobstructed, and that if he had been observing he could have seen the car as soon as it came out "from behind the property line," and that the car was almost upon the driver before he made any effort to get out of the way—that the front wheels had cleared both rails of the track before the driver attempted to increase the speed of the horse. Mr. Molloy said additionally: "The bumper of the car struck the rear wheel of the wagon. The driver attempted to turn his horse to the left, right when the car was upon him, and after the fore wheels had cleared the track. The motorman could have stopped the car to avoid a collision when the wagon was first seen by me. I did not think there would be a collision * * * because the least effort of the motorman would have prevented a collision." The conductor, Fletcher, in addition to the testimony about the speed of the horse previously referred to, said: "About when I neared Buchanan street, about 30 feet away from the track we saw a covered wagon and a horse coming. About the minute I saw the horse and wagon, the motorman must have seen them, too, because that instant he turned off the power and put the air brakes on as fully as he could, and the car immediately slackened, but the wagon and driver kept coming right along, about the same gait of speed, I should judge. The horse and wagon were going along at about eight or nine miles an hour. * * * He kept going right along. He did not slacken his speed at all, and kept driving right across the track. When he got on the track the car closed in on him and struck him. At that time the car had slowed down to about six miles an hour, or about half speed —we were running about 12 miles when we saw him. The horse was not thrown down; the wagon was overturned. * * * I should judge that when I first saw the wagon the car was about 40 feet from the point where the accident occurred." Other details were related by Fletcher, but the above sufficiently sets forth the substance of his testimony. Stein, Molloy, and Fletcher were the only ones who testified regarding the circumstances of the accident.

This cause was transferred to the District Court of Appeal for the Third district. The justices of that court could not agree and each wrote an opinion setting forth his views. After a careful consideration of the record and of these opinions we agree with the conclusions of Mr. Justice Burnett on the questions of negligence involved. He says: "I cannot resist the conclusion that plaintiff was guilty of 'contributory negligence' as defined by the law. We are bound by the finding of the jury that 'the plaintiff, while approaching the car track on Turk street, by the exercise of ordinary care could have seen the approaching car.' But plaintiff testified that he did not see said car until he 'got on' the track. Therefore, I am convinced, he did not exercise ordinary care in approaching the crossing. However, notwithstanding his contributory negligence, I think there is sufficient evidence upon the theory of the 'last clear chance' to support the general verdict. The law upon this branch of the case, as I understand it, was correctly given by the court in the following language: 'I instruct you that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring him, must do so, notwithstanding the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence that the motorman of the defendant's car which collided with the plaintiff saw the plaintiff before the collision, and had opportunity by the exercise of ordinary care, to avoid the collision, and failing to exercise such care or to do what reasonable prudence would dictate he should have done to avoid injuring the plaintiff, the defendant is liable and your verdict must be for the plaintiff.' Of the two elements therein declared necessary to exist to enable plaintiff to recover notwithstanding his own negligence, knowledge by the motorman of the danger is disclosed by the testimony of Molloy and it is inferable also from the statement of Fletcher, the conductor, that 'as soon as the motorman saw the wagon he threw off the power and applied the brakes.' If the motorman endeavored to stop the car it was clearly for the purpose of avoiding a collision with plaintiff's wagon. This purpose necessarily implies on the part of the motorman an apprehension of danger to plaintiff. Besides, from the fact of the injury itself and the position of the said motorman, it would be fair to infer that he had knowledge before the accident occurred of the probability of the collision. The evidence then being sufficient to show that the motorman had reason to believe that the plaintiff was likely to be injured, the law imposed upon him the duty of exercising at least ordinary care to avoid the injury. It is clear that within the contemplation of ordinary care and prudence and in consonance with a just regard for the safety and welfare of others the act required of him was to endeavor to stop his car before a collision occurred. At least, the case was such as to make it a proper question to be determined by the jury whether he acted promptly in his effort to stop the car when he was apprised of plaintiff's danger. If he made an honest effort to do so, no one, of course, could contend that he was at fault. But, on the other hand, if he failed to use the means at hand and made no effort to prevent the accident until he saw that it was impossible to avert it, the jury would be justified in finding for the plaintiff. To my mind this consideration appears to be the pivotal question in the case. Upon its solution depends, as I view it, the disposition of the cause. The evidence upon this point is conflicting. The verdict can be sustained if credit is given to Molloy's testimony as to the conduct of the motorman. But if the conductor is to be believed, the motorman did all that could be required of any man. To weigh this testimony and to determine the question was, of course, the province of the jury. The trouble is, however, that we are left in doubt as to the conclusion of the jury upon this question of fact. The jurors were asked to find upon it but the court below—mistakenly, I think—held it to be immaterial. It seems to me as material as any question of fact in the case. It may be that the jury could not determine exactly 'how far the car was from the place of collision at the time the motorman turned off the power and applied the brakes.' But from the testimony it could be ascertained at least approximately and within reasonable limits, and under the law and decisions of the Supreme Court appellant clearly had the right, I think, to have the general verdict tested by this finding of fact. The result of the failure to find upon this material issue is the same as though there had been no agreement upon the general verdict, as pointed out in Plyeer v. Pacific, etc., Cement Co., 152 Cal. 125, 92 Pac. 56, where the whole question of special findings by a jury is thoroughly discussed.

"In recapitulation: The case presents itself to my mind as follows: Plaintiff was clearly chargeable with contributory negligence. The verdict can be upheld, therefore, only upon the theory of recklessness or wantonness upon the part of defendant's servant, the motorman. This latter depends upon two elements, to wit, knowledge of the danger and the want of ordinary care. There is evidence of both but the latter depends entirely upon the question whether the motorman made every effort to stop his car as soon as he had knowledge of the danger. The jury was requested virtually to find as to this fact. They failed to do so and therefore the alternative is a new trial."

From the foregoing it appears that a reversal is necessary.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, J. I concur. In view of the undisputed evidence, the plaintiff was driving his horse at a rate of speed faster than a walk over a street crossing, in violation of the terms of a city ordinance. As is clearly shown in the opinion, it must be held that he was guilty of negligence in so doing; in other words, that he did not use ordinary care in approaching the car track on said crossing. The answer of the jury to the first interrogatory, "Did the plaintiff, in approaching the car track on Turk street, use ordinary care to protect himself from injury?" which was, "Yes," is therefore in conflict with the uncontradicted testimony. This answer may well be attributed to the failure of the court to give the two requested instructions first discussed in the opinion, which, as is there shown, correctly stated the law. If the negligence of plaintiff in this regard contributed proximately to his injury, as it might well have done in view of the evidence, he could not recover, unless defendant was liable under the "last clear chance" doctrine. It is impossible for us to say, upon the record before us, that the verdict of the jury was not based upon the theory that plaintiff was not guilty of contributory negligence, rather than upon the last clear chance doctrine. Indeed there is absolutely nothing in the findings of the jury to indicate that they based their verdict upon the last clear chance doctrine, and the evidence is such upon the question of the motorman's want of actual knowledge of plaintiff's dangerous position, an essential element of that doctrine, as to make it extremely doubtful whether a finding of liability on that ground could be held to be sufficiently sustained. I think, therefore, that it is very clear that the refusal to give the requested instructions was prejudicial.

Upon the other questions discussed in the opinion, I concur in the views expressed by Justice MELVIN.

We concur: SHAW, J.; SLOSS, J.

159 Cal. 323

CONTRA COSTA WATER CO. v. CITY OF OAKLAND et al. (S. F. 4,462.)

(Supreme Court of California. Jan. 19, 1911.)

1. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—RATES—VALIDITY.

The court in determining whether water rates for a corporation formed to supply a city with water are confiscatory, must ascertain the value of the property on which the corporation is entited to a return, and determine the percentage of return to which the corporation is entitled on such value, and where the rates yield less than the lowest percentage of return to which the corporation is entitled the rates are confiscatory.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203.*]

2. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—RATES—VALIDITY.

The court, in such case, must determine what is the lowest fair percentage, and where an ordinance gives a return which, though low, is not palpably unreasonable, the court may not disturb it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292–294; Dec. Dig. § 203.*]

3. Waters and Water Courses (§ 203*)—Water Companies—Rates—Validity.

The presumption is in favor of the validity of a legislative determination fixing rates for water furnished by a corporation to supply a city, and the burden is on the party attacking the rates to show their invalidity.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 293; Dec. Dig. § 203.*]

4. Waters and Water Courses (§ 203*)—Water Companies—Rates—Validity.

The provision in Const. art. 14, § 1, declaring that the use of all water appropriated for sale, rental, or distribution is a public use, subject to the control of the state, and the rates to be collected for the use of water supplied to any city or the inhabitants thereof, must be fixed, annually, by the city authorities, is sustained on the principle that where one devotes his property to a public use, he grants to the public an interest therein, and must submit to be controlled for the common good.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 292; Dec. Dig. § 203.*]

5. Municipal Corporations (§ 619*)—Police Power—Rates.

Where the right of a municipality to regulate property devoted to a public use exists, the right to establish reasonable compensation for services as a means of regulation is implied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1359; Dec. Dig. § 619.*]

6. Constitutional Law (§ 70*)—Legislative Power—Power of Courts.

The exercise of the right by the state to establish reasonable compensation for services, where private property is devoted to a public use, is a legislative function, whether the power is exercised directly by the Legislature or by a subordinate or administrative body, and the courts have no authority to revise the action of the rate-fixing body.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 129; Dec. Dig. § 70.*]

7. Waters and Water Courses (§ 203*)—Water Companies—Rates—Municipal Ordinances.

A city ordinance fixing rates for water furnished by a corporation supplying a city, cannot be set aside when enacted in the manner provided by law unless it is invalid on a constitutional ground.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292–294; Dec. Dig. § 203.*]

8. Eminent Domain (§ 2*)—Water Companies—Rates—Municipal Ordinances.

Where the effect of a city ordinance fixing rates for water furnished by a corporation supplying the city is to deprive the corporation of a fair return on its property, the ordinance is violative of the state and federal constitutional guaranties that no one can be deprived of his property without just compensation, and the courts will hold the ordinance void, and this is the full extent of the power of the courts in such a matter.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.*]

9. Waters and Water Courses (§ 203*)—Water Companies—Rates—Municipal Ordinances.

One engaged in furnishing water to the public is entitled to a fair return on the reasonable value of the property at the time it is used for the public, over and above its necessary operating expenses, including current repairs and taxes, and also possibly an annual allowance to provide for making good the depreciation which must occur in much of the property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203.*]

10. Waters and Water Courses (§ 203*)—Constitutional Law (§ 70*)—Water Companies—Rates—Municipal Ordinances—Legislative Questions—Power of Courts.

The legislative body fixing rates for water furnished by a corporation supplying a city with water, on determining the present value of the property used in the public service, must fix such rates as will allow the corporation a fair return over and above its operating expenses, taxes, and current repairs, and the annual depreciation in the property, and the questions of the value of the property and the amount of expenses, allowance for depreciation and fair compensation, are for the legislative body, and the courts will not set aside its action on the ground that it deprives a corporation of its property without fair compensation, unless that fact clearly appears.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203;* Constitutional Law, Cent. Dig. § 129; Dec. Dig. § 70.*]

11. Waters and Water Courses (§ 203*)—Water Companies—Rates—Municipal Ordinances.

An ordinance, which affords a net revenue, over operating expenses and taxes, of 5.682 per cent. on the value of the property used in the service, cannot be adjudged invalid as fixing so low a rate as to be confiscatory, though there must be deducted therefrom a fair allowance for the ordinary annual depreciation in the value of the perishable portion of the plant.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203.*]

12. Waters and Water Courses (§ 203*)—Water Companies—Rates—Municipal Ordinances.

In a suit by a corporation supplying water to a city and its inhabitants to restrain the enforcement of an ordinance fixing water rates, evidence *held* not to justify a finding that the value of the property on which the corporation was entitled to return was $7,000,000, but to show that the value of the property was a great deal less.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 293; Dec. Dig. § 203.*]

13. Waters and Water Courses (§ 203*)—Water Rates—Value of Property.

Such corporation is not entitled to any allowance in the annual fixing of rates to cover any past depreciation, but it is the value of the property at the time of fixing the rates that must be ascertained, and the only depreciation that can be allowed is such as may properly be apportioned to the year for which the rates are fixed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14. WATERS AND WATER COURSES (§ 203*)—WATER RATES — REASONABLENESS — GOOD WILL OF BUSINESS.

Such corporation, having a monopoly, is not entitled to an allowance for good will in determining the value of the property used in the business on which it is entitled to a return.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203.*]

15. WATERS AND WATER COURSES (§ 203*)—RATES—REASONABLENESS—GOING CONCERN.

Where the earning power of the corporation depends on the rates to be fixed annually by the city council so as to give only a fair return on the property in use, and the franchise of the corporation is neither exclusive nor defined by any special contract with the city, the value of the going business of the corporation and franchise are of little consideration, in the matter of valuation of the property in use, and the corporation has the burden of furnishing data showing that these elements have a distinct, independent productive value, before any such value may be included.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 293; Dec. Dig. § 203.*]

16. WATERS AND WATER COURSES (§ 203*)—RATES — VALUATION — COST OF REPRODUCTION.

The cost of reproduction of the works is not the true test of determining the value of the property, unless the cost is diminished by depreciation from age and use, and a substantial allowance for depreciation ought to be made in a case where a part of the plant has been in use for many years.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292, 294; Dec. Dig. § 203.*]

17. WATERS AND WATER COURSES (§ 203*)—RATES—REASONABLENESS—VALUE OF PROPERTY.

Where the evidence showed that the plant of the corporation included a plant acquired from a competitor, that the deed conveying the plant recited a consideration of $1,500,000 subject to a bonded indebtedness of $1,500,000, but no money passed, the expressed consideration being paid in stock of the corporation at par, which, a few months after the transaction, was at 70 cents on the dollar, and lower at the time of the purchase, the price paid was practically immaterial in determining the value of all the property of the corporation to determine the reasonableness of the rates.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 292-294; Dec. Dig. § 203.*]

18. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES — RATES — UNREASONABLENESS—BURDEN OF PROOF.

The corporation has the burden of proving the valuation of its property to show the invalidity of the ordinance, and it must supply such evidence as will clearly warrant the valuation it seeks to have placed on its property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 293; Dec. Dig. § 203.*]

19. WATERS AND WATER COURSES (§ 203*)—RATES—ORDINANCES—VALIDITY.

Where the corporation furnished the city council with a detailed statement, as required by St. 1881, c. 52, of its revenue and expenditures, together with the money actually expended annually, since commencing business, in the purchase, construction, and maintenance of the property necessary to carry on the business, with the gross cash receipts annually, for the same period, and its president appeared before the council in behalf of the corporation on two occasions, but no request was made by the corporation for a further opportunity to present further proofs or argument, except the request made after the investigations of the council were completed and the ordinance fixing rates was about to be voted on, the refusal of the council to then suspend proceedings and enter into a further investigation merely on the general statement of the president as to what he could show, was not a deprival of an opportunity of the corporation to be heard in the matter of fixing rates, and did not indicate any unfairness of the council.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 293; Dec. Dig. § 203.*]

20. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—RATES—ORDINANCES—REASONABLENESS.

In the absence of a finding on the question of the value of the property of the corporation, the court cannot determine that the compensation afforded by the ordinance is not reasonable, and, where reasonable, the corporation cannot complain in the courts because of the methods used by the city council in arriving at the conclusion embodied in the ordinance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 293; Dec. Dig. § 203.*]

Chipman, J., pro tem., dissenting.

In Bank. Appeal from Superior Court, Alameda County; E. C. Hart, Judge.

Action by the Contra Costa Water Company against the City of Oakland and others. From a judgment for plaintiff, defendants appeal. Reversed.

John W. Stetson, City Atty., 1909, J. E. McElroy, City Atty., 1908, and Carl H. Abbott, Deputy City Atty., for appellants. John Garber, Garret W. McEnerney (Frank C. Cleary, of counsel) for respondent. Page, McCutchen & Knight, Heller, Powers & Ehrman, Ralph C. Harrison, and Jesse W. Lilienthal, amici curiæ.

ANGELLOTTI, J. An opinion was filed in this case on July 6, 1909, written by Justice Angellotti, and concurred in by Justices Shaw, Sloss, and Lorigan. A rehearing was granted in order that further consideration might be given to certain matters discussed in the petition for rehearing and in briefs filed by plaintiff and other parties interested in the questions involved.

It was earnestly contended by learned counsel representing plaintiff and other public service corporations that the portion of the opinion filed in this case relative to returns to the stockholders of about 3½ per cent. per annum on the value of the property of plaintiff may be construed as intimating that this court would not hold even such a rate confiscatory. We are satisfied that it cannot reasonably be construed as intimating anything of the kind. It is simply a statement to the effect that this question is not presented for decision in this case, and was made in view of the fact that there was some evidence to the effect that the annual depreciation might amount to 2 per cent. per annum, which would reduce the net return to the stockholders on a basis of valuation of $3,500,000, to a little over 3½ per cent. per annum. But as the trial court had not found as to the annual depreciation, and as the record would support a finding of not exceeding 1 per cent. per annum for such annual depreciation, we freely concede that the expression was not at all necessary to the decision, and can see no objection to striking it from the opinion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

What was said in the opinion relative to a return to the stockholders of over 4½ per cent. net, namely, 4.682 per cent., was necessary to the decision, in view of the condition of the record, as the opinion clearly shows. If it had been admitted by the pleadings or established by evidence without conflict that the value of plaintiff's property was such that the rates fixed by the ordinance would yield such a small return to the stockholders that the courts would be compelled to hold that the rates fixed were confiscatory, we would not have felt called upon to reverse the judgment declaring the ordinance void, even though the finding of the $7,000,000 valuation is not supported by the evidence. The ordinance being clearly void upon facts admitted by the pleadings or shown by undisputed evidence, it would have been unnecessary to put the parties to the expense and loss of time involved in another trial, as well as to delay the final disposition of the action. But no value in excess of $3,000,000 being admitted by the pleadings in this case, and there being evidence that would have sufficiently supported a finding of value as low as $3,500,000, we were constrained to deal with the appeal, in the absence of a finding of value sufficiently supported by evidence, on the theory that the value was no greater than the lowest amount as to which a finding would have been held to have been sufficiently supported by the evidence contained in the record. That amount we practically declared to be $3,500,000. If on that basis of valuation the rates fixed by the ordinance were confiscatory, it would have been useless and unprofitable to require plaintiff to further carry on this litigation to obtain the relief to which it was clearly entitled and which it must ultimately be granted. This situation presented the necessity for determining whether the return given by the ordinance on a $3,500,000 valuation was confiscatory. Upon the record we were compelled to assume that the ordinance would give a net return to the stockholders, after payment of all expenses, including taxes, and with sufficient allowance for annual depreciation of the value of the property, of 4.682 per cent. per annum. The trial court has not in terms found that this percentage is unreasonable, but, in view of the nature and purpose of this proceeding, the finding that a fair return to plaintiff is 7 per cent. on the value of its plant, involves, by necessary implication, a finding that any lesser rate of return is unreasonable. As to this return (4.682 per cent.), we said that while we were not to be understood as intimating that such a return would be considered by us a full and fair return under all the circumstances, were we engaged in the exercise of the function of fixing rates, we did not believe that upon the record before us a court would be warranted in holding it to be beyond the power of a legislative body to fix, in other words, that upon the record before us we could not hold that the rates fixed were confiscatory. We see no reason for modifying our expression of views in this regard. This conclusion does not involve any contradiction of the proposition, earnestly advanced by respondent, that the question whether the percentage of return allowed by a rate-fixing ordinance is reasonable or unreasonable is one of fact, to be determined in the first instance, like other questions of fact, by the trial court, upon the evidence given in the particular case. In the effort to determine whether a given rate is or is not confiscatory, two elements must necessarily be inquired into. First, the court must ascertain the value of the property upon which the plaintiff is entitled to seek a return, and, second, it must determine what is the percentage of return to which the plaintiff is entitled upon such value. In order to say whether or not a given scale of charges will take property without just compensation, it is as essential to know what is a fair ratio of return upon property devoted to the use in question as it is to know what amount or value of property is so devoted. The range of judicial investigation must be as wide in case of the one element as in that of the other. If the rates fixed yield less than the lowest percentage of profit which is ordinarily obtained in the locality upon equally safe and permanent investments in enterprises of a kindred character the regulation is as clearly confiscatory as if no return at all is provided upon a portion of the property actually employed. The ultimate issue is whether the ordinance deprives plaintiff of its property without just compensation, but, in order to answer this issue in the affirmative, the trial court must find, either in terms or impliedly, that the return allowed will give less than the lowest reasonable percentage of profit upon the actual value of the property devoted to the public use. In fixing upon such percentage, however, the court is not to act upon what it, as an original question, might think to be fair and reasonable, but is, rather, to determine what is the lowest percentage which could properly be thought by the rate-fixing body to be fair and reasonable. On this question, there must be a certain range of discretion which may be traversed by the city council without infringing upon constitutional rights. If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think a higher rate more appropriate. The presumption is in favor of the validity of the legislative determination, and the burden is on the party attacking the rate fixed to show its invalidity. Applying these principles, we held, in our former opinion, and now hold, that the evidence in this case did not warrant a finding that a net return of 4.682 per cent. was less than the lowest rate of return which the city council might fairly have determined to be just. We did not, and do not, intend to declare that this rate is, as matter of law, adequate or above the dividing line which separates lawful regulation from confiscation. The minimum rate of percentage justly returnable must, in any other case, or in another trial of this case, be determined upon the evidence introduced in the trial of the particular case. All this, we think, is, in effect, stated in the original opinion. We have here amplified the discussion in order to meet the fears, expressed by counsel petitioning for a rehearing, that our decision would be taken as announcing, as a rule of law applicable to all cases and under all circumstances, that a net return of 4½ per cent. upon property devoted to a public use will not be regarded by the courts as confiscatory. As to all other questions, we adhere to the views expressed in the opinion.

The opinion heretofore filed, omitting the portion first discussed, being that portion relative to the return to the stockholders of about 3½ per cent. per annum, was as follows:

"This action was commenced in the superior court of Alameda county on April 5, 1900, by plaintiff, a corporation formed and existing for the purpose of supplying the city of Oakland and other cities and towns in Alameda county and the inhabitants thereof with water, against said city of Oakland and the members of the city council, to obtain a decree adjudging void an ordinance adopted on March 26, 1900, by such council, fixing the rates to be collected by plaintiff for the water to be furnished such city and its inhabitants for the year commencing July 1, 1900, and ending June 30, 1901, restraining its enforcement, and requiring the council to adopt, after full investigation and opportunity to plaintiff to be heard, an ordinance fixing just and reasonable rates for such year. The general ground stated for this relief was that such ordinance was adopted by the council arbitrarily and without any sufficient investigation or any opportunity to plaintiff to be heard upon the question of the reasonableness of the rates proposed thereby, that the rates fixed thereby were unreasonable, unjust, and oppressive, and did not permit of nor provide for a just or fair compensation to plaintiff, and that the effect thereof would be to take away plaintiff's property without due process of law by depriving it of any fair return upon its property and in such service of furnishing water.

"Judgment was given in favor of plaintiff on May 28, 1901. The bill of exceptions for use on motion for new trial and appeal was settled by the trial judge on April 8, 1905, on which day defendants' motion for a new trial was denied. Appeals were taken by defendants from the judgment and the order denying a new trial, and these appeals were submitted to this court for decision in January of this year.

"The trial court found that the property of plaintiff necessary to enable it to furnish the city of Oakland and its inhabitants with water, being its reservoir sites, reservoirs, water rights and other rights necessary to secure the absolute ownership of the water caught and impounded, land, pumping and other works, many miles of water pipe laid for distributing waters, buildings and improvements, are of the value of $7,000,000. There is nothing in the findings to indicate, except as just stated, what items of property were taken into consideration as constituting this aggregate of property found to be worth $7,000,000, or the value given to any particular item, except that it is further found that the properties known as the Pleasanton Sink, Central Reservoir, and the Glue Works Plant are not used for supplying the city of Oakland or its inhabitants with water, and constitute no part of the property which the court found to be of the value of $7,000,000. The court further found, according to a stipulation of the parties, that the operating expenses of plaintiff which must be incurred during the year ending June 30, 1901, including all taxes, will amount in the aggregate to $134,200, seven-eighths of which will be incurred in supplying the city of Oakland and its inhabitants, and the other one-eighth in supplying the towns of San Leandro and Emeryville and a portion of the city of Berkeley, and the inhabitants thereof, and also the county of Alameda for certain purposes. Adopting the theory of plaintiff that the ordinance would reduce the receipts under the ordinance of the next preceding year 25 per cent., a conclusion that we cannot hold is without sufficient support in the evidence, it further found that the gross income under the ordinance in question for the year 1900–01 from all sources would not exceed $323,500, of which $51,750 would be received from consumers other than the city of Oakland and its inhabitants. Except in so far as this failed to take into account and add to the gross receipts $13,230.91, the amount of rebates shown to have been made by plaintiff to certain consumers during the preceding year, and except also that under the stipulation of the parties the gross receipts would amount, without adding such rebates, and with a 25 per cent. deduction, to $323,561, the finding was sufficiently supported by the stipulation of the parties and the evidence. This conclusion is based entirely on the assumption of the parties that there would be no increase in the business over that of the preceding year. Deducting from these gross receipts the amount of such operating expenses, including taxes, which we shall take in round numbers at $135,000, as the same are taken in the calculations contained in appellants' brief, left the probable net revenue for the year under the ordinance in question at $188,561.66 under the findings without adding the rebates, and at $198,898.-31 if the rebates are added to the gross receipts, as we are satisfied they should be. Upon these facts, it appears that the net revenue of plaintiff from its property on the basis of $7,000,000 valuation would be but 2,841 per cent., without any allowance for depreciation in the value of the plant. The court found that a fair return and rate of interest for the year 1900–01, and a just and reasonable rate for the water to be supplied is 7 per cent. on $7,000,000, over and above the operating expenses and taxes, and that plaintiff is entitled to receive for the water furnished by it to the city of Oakland and its inhabitants at least that amount, less the income derived by it from consumers outside the said city, amounting as hereinbefore stated to $51,750. It further found substantially that the ordinance was passed without any opportunity to be heard against it on the part of the plaintiff or other persons interested, that no consideration was given to a large and material part of plaintiff's property, that at the meeting at which the ordinance was finally passed, March 26, 1900, plaintiff offered to produce evidence to show that it was unreasonable but that the council refused to allow it to do so, although this was the first opportunity plaintiff had to present its objections; that the rates fixed were fixed arbitrarily and without any consideration of or regard to the right of plaintiff to a reasonable consideration, etc., and that the subject of said ordinance and water rates was not carefully considered by the individual members of the council.

"Upon these findings a decree was entered adjudging the ordinance null and void, and setting aside, vacating and annulling the same, adjudging that plaintiff is entitled to have rates for supplying fresh water to the city of Oakland and its inhabitants for the year commencing July 1, 1900, and ending June 30, 1901, so fixed that they will in the aggregate afford to plaintiff a just and reasonable compensation, and as will yield a sufficient income to pay its expenses and taxes and a reasonable rate of interest upon the value of plaintiff's property decreed to be the sum of $7,000,000, ordering the city council to forthwith fix the rates for said year 'in accordance with the principles established in this decree,' and enjoining the defendants from enforcing or attempting to enforce the said ordinance.

"The general principles applicable in cases of this character are now fairly well settled. Under the provisions of our state Constitution, the use of all water appropriated for sale, rental, or distribution is a public use, subject to the regulation and control of the state, and the rates to be collected by any person, company, or corporation in this state for the use of water supplied to any city or town, or the inhabitants thereof, must be fixed, annually, by the city or town council or other governing body of such city or town. Article 14, § 1. As was said in Spring Valley Water Company v. San Francisco [C. C.] 165 Fed. 676, this provision of our Constitution is justified and sustained by the well-settled principle enunciated in Munn v. Illinois, 94 U. S. 113, 126 [24 L. Ed. 77], that where one devotes his property to a public use, 'he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created, * * * so long as he maintains the use. * * * When private property is devoted to public use, it is subject to public regulation.' If the right to regulate exists, the right to establish the reasonable compensation for services as one of the means of regulation is implied. The exercise of this right on the part of the state is a legislative function. As is the case in regard to many other legislative acts, the legislative officers in determining what will be the proper rate of compensation are necessarily obliged to use some degree of judgment and discretion, and are 'bound in morals and in law to exercise an honest judgment as to all matters submitted to their official determination.' Spring Valley Water Works v. Schottler, 110 U. S. 354 [4 Sup. Ct. 48, 28 L. Ed. 173]. To this extent, their duties in the exercise of their legislative function are judicial in their nature. But, as was said by the Supreme Court of the United States in the recent case of Knoxville v. Knoxville Water Co., 29 Sup. Ct. 148, 212 U. S. 1 [53 L. Ed. 371]: 'The function of rate making is purely legislative in its character, and this is true, whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature, and must be regarded as an exercise of the legislative power.' This was fully recognized in the opinions in the case of San Diego Water Co. v. San Diego, 118 Cal. 556 [50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261]. The courts have no power to revise the action of the rate-fixing body in this regard. No authority is given by the law for any such review by a judicial tribunal. If an ordinance fixing rates is enacted in the manner provided by law, it can be set aside by the courts only where it is invalid on some constitutional ground. Under our constitutional guaranties, federal and state, no one can be deprived of his property without just compensation, and if the effect of an ordinance fixing water rates is to deprive one engaged in the exercise of such public use of a fair return upon his property used in such service, such act deprives the party of the lawful use of his property, 'and thus, in substance and effect, of the property itself,' in violation of the constitutional provisions. Chicago, etc., R. R. Co. v. Minnesota, 134 U. S. 418, 458 [10 Sup. Ct. 462, 702, 33 L. Ed. 970]. Where such is the effect, the courts, enforcing the mandate of the constitutional provisions, will hold the ordinance to be void and prevent its enforcement. This is the full extent of their power in such a matter, and the basis upon which such power rests. As said in San Diego Water Co. v. San Diego, supra: 'The function of the courts is merely to ascertain whether the power has been carried beyond the constitutional limits so fixed; and, if such be found to be the case, to declare the acts of the council void. They do not sit as appellate tribunals to review the correctness of the council's determination, nor need they know anything about the evidence on which that body has acted. All that they have to consider is, whether, in a given case, the result of the council's action will be to take the property of the complaining party without just compensation.' The ultimate question in any judicial proceeding of this character is whether the rates fixed are confiscatory. It is now settled that what one engaged in furnishing water to the public is entitled to demand 'is a fair return upon the reasonable value of the property at the time it is being used for the public,' over and above its necessary operating expenses, including current repairs and taxes. San Diego, etc., Co. v. National City, 174 U. S. 739, 757 [19 Sup. Ct. 804, 43 L. Ed. 1154]; San Diego, etc., Co. v. Jasper, 189 U. S. 442 [23 Sup. Ct. 571, 47 L. Ed. 892]; County of Stanislaus v. San Joaquin Co., 192 U. S. 201 [24 Sup. Ct. 241, 48 L. Ed. 406]. To this should probably be added, in a case where the property is irrevocably devoted to a public use, as intimated by the United States Supreme Court in Knoxville v. Knoxville Water Co., supra, an annual allowance to provide for making good the depreciation which must occur in much of the property used in such a service. The court said: 'The company is not bound to see its property gradually wasted, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning.' This is in line with what was said by Chief Justice Beatty in San Diego Water Company v. San Diego, supra. It is the plain duty of the legislative body fixing rates to take all of the elements properly involved in the determination of the question of the present value of the property used in the public service into consideration, and, having ascertained that value, to fix such rates as will allow the person engaged in furnishing the water, over and above its operating expenses, taxes, and current repairs, such amount as will fairly compensate him for the annual depreciation in the property, and leave him with what, under all the circumstances, will be a fair and just return for the use by the public of his property. All of these questions, the value of the property, the amount of expenses, the amount of allowance for depreciation, and what, under all the circumstances, will be a fair compensation to the owner, are, however, for the rate-fixing body, and the courts should never set aside the action of that body upon the ground that it deprives a party furnishing water of his property without fair compensation, unless that fact is very clearly made to appear. The burden of making this showing is on the person who assails the law. As was said in Knoxville v. Knoxville Water Co., supra, the judicial power of annulling legislation on this ground 'ought to be exercised only in the clearest cases.' In San Diego Land & Town Co. v. National City, supra, the United States Supreme Court said: 'Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.' In Munn v. Illinois, supra, the same court said, as has repeatedly since been said: 'Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained.'

"With these general observations, we come to a consideration of a few of the many questions presented by this appeal.

"It is self-evident that there is no more material question of fact in a judicial investigation of this character than that of the present reasonable value of the property devoted to the public use. Only by a determination of that question can we have any foundation upon which to rest a conclusion as to the sufficiency of the compensation that will be given by the rates fixed. It is the question too, which presents the greatest difficulty, and upon which the greatest difference of opinion ordinarily exists, both before the rate-making body and in any judicial proceeding in which the action of that body is assailed. As we have seen, the trial court found that the property of the plaintiff so devoted to this use was of the value of $7,000,000. The claim of defendants, as stated in their answer, was that such value did not exceed $3,000,000. This finding of the trial court is assailed by defendants as not being supported by the evidence. If this claim of defendants be well based, the judgment must, in our opinion, be reversed, for we would then be without any finding on the question of value, and without any power or ability to supply such a finding. There was evidence which probably would have supported a findings of value very slightly in excess of the amount claimed by the defendants in their answer, $3,000,000, and which certainly would have supported a finding of a value not exceeding $3,500,000. Taking the value to be $3,500,000 only, the ordinance would afford a net revenue over operating expenses and taxes of 5.682 per cent. which is not, in our judgment, so low a rate that a court, upon the record before us, would be warranted in holding that it was beyond the power of the council to fix, even if we hold that there must be deducted therefrom what would be a fair allowance for the ordinary annual depreciation in the value of the perishable portion of the plant. What such an allowance would be has not been determined by the trial court, and we cannot say from the record. It may be that it would not amount to more than 1 per cent. of the value of all the property, perishable or nonperishable. Such an allowance for depreciation would be in excess of that testified to as a proper allowance on the application for an injunction in Spring Valley Water Co. v. San Francisco [C. C.] 165 Fed. 676, if the opinion correctly states such testimony. In that event, we would have over 4½ per cent. net for the stockholders. This certainly would be a very substantial net return, considerably more than is derived from many investments eagerly sought by capital. We do not wish to be understood as intimating that even such a return would be considered by us a full and fair return under all the circumstances, were we engaged in the exercise of the legislative power of fixing the rates. That, as said before, is not a function of the courts. We simply mean that we do not believe it to be so low, under the circumstances appearing here, as to warrant a court in holding it to be beyond the legislative power to fix. We have said this much for the purpose of showing that the judgment cannot stand if the finding of the trial court as to the value of plaintiff's property is not sufficiently sustained by the evidence. Moreover, the judgment itself finally fixes as between the parties the value of the property of plaintiff, for all the purposes of fixing rates for the year 1900–01, at least, at the sum of $7,000,000.

"We have carefully examined the record on this appeal, consisting of over 5,500 printed pages, for the purpose of acquainting ourselves with the evidence upon the value of plaintiff's property used in the year 1900 in furnishing the city of Oakland and its inhabitants with water. We assume that the trial court was fully warranted in concluding that the portion of the system acquired by plaintiff from the Oakland Water Company in 1899 should be included as a portion of said property. So assuming, we are nevertheless unable to find such substantial evidence in the record as would warrant a trial court in a proceeding of this kind in concluding that the property of plaintiff was of the value of $7,000,000, or anything near that sum. All of the testimony as to value was exceedingly unsatisfactory. It consisted almost wholly of the giving of opinions by expert witnesses as to the value, and the usual radical difference is to be found between the opinions of the experts produced by plaintiff and those produced by defendants. To add to the usual difficulty in ascertaining the real value in such a case is the fact that most of the books and records of the Contra Costa Water Company showing details of cost of construction and operating expenses had been destroyed by the plaintiff in the year 1899. As was said recently by the Supreme Court of the United States regarding a case of conflict between the evidence of experts in a case of somewhat similar character, it is apparent that the total value must necessarily be more or less in doubt, and becomes matter of speculation or conjecture to a great extent. Willcox v. Consolidated Gas Co. [212 U. S. 19], 29 Sup. Ct. 192 [53 L. Ed. 382]. But even an analysis of the evidence of plaintiff's expert witnesses shows it to be without sufficient support for this finding. It is true that three of plaintiff's expert witnesses testified that the value exceeded $7,000,000; Mr. Adams putting it at $7,077,527, without including certain real estate valued at about $200,000; Mr. Schuyler putting it at $7,633,447, including all real estate, and Mr. Kiersted putting it at about $7,500,000. The testimony given by these witnesses, however, showed very clearly that these conclusions were not based upon data sufficiently certain to warrant their acceptance by the trial court as against the ordinance adopted by the city council.

"Both Mr. Adams and Mr. Schuyler included as a part of their total an item of $184,000, as Mr. Adams put it, to replace past depreciation in the works not provided for, and as Mr. Schuyler put it, to provide a sinking fund for such past depreciation. Clearly this had nothing to do with the question of the value of the property. Nor is the person furnishing water entitled to have any allowance made in the annual fixing of rates to cover any past depreciation. It is the value of the property at the time of fixing the rates that is to be ascertained and upon which the party furnishing water is entitled to an income, and the only depreciation that can be allowed for is such as may properly be apportioned to the year for which the rates are being fixed. This is made clear by the opinion in Knoxville v. Knoxville Water Co., supra. It is agreed by counsel that the trial court excluded this item in arriving at its conclusion. Both of these witnesses also included in their totals an item of $500,000, as the value of the going business of plaintiff. Their theory in regard to this item was, as stated by learned counsel for plaintiff, that the property and business of the plaintiff had a value as being the property and business of a concern which, in the legal and commercial sense, is a 'going concern' and which has a thoroughly established business, over and above and in addition to the mere cost or cost of reproduction of its property and plant, and what the value of said property would be at the time when its works were just completed. So far as this may include what is generally known as 'good will,' it could not be considered at all in determining the question of value of the property. Like the Consolidated Gas Company of New York in Willcox v. Consolidated Gas Co., etc. [212 U. S. 19] 29 Sup. Ct. 192 [53 L. Ed. 382], the plaintiff here had a monopoly in fact of the business in which it was engaged. It was the only party having water to furnish in the city of Oakland, and one having to purchase water had no other vendor to whom to resort. Of such a situation the Supreme Court of the United States said in the case last cited: 'We are of the opinion that it is not a case for a valuation of "good will." * * * The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the "old stand," because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action.' It may be conceded that the fact that the works of plaintiff are in actual use as part of a going concern give them a greater value to the stockholders than they would otherwise have. It supplies the capacity to earn returns which would otherwise be wanting. Purely for the purposes of this decision, we may assume it to be true, as was said by Judge Farrington in Spring Valley Water Co. v. City and County of San Francisco, supra, that the value of the going business and franchise depends upon their earning power. Where, as here, that earning power depends on the rates to be fixed annually by the city council in such a way as to give only a fair return on the property in use, and the franchise is neither exclusive nor defined by any special contract with the city, these elements would appear to play a very small part, if any, in the matter of valuation. However this may be, it is plain that none of the witnesses furnished any evidence upon which any value could be added on account of either of these items. The theory of both Mr. Adams and Mr. Schuyler was, as stated by plaintiff's counsel, that this value was measured by the losses sustained and the deficiencies of income accruing to it, in the early period of its operations, and up to the time that it had been brought to a paying basis. Mr. Kiersted, the only other witness on this subject, measured the value of this element of 'going concern' in practically the same way. Mr. Adams, in one of his estimates, concluded as a matter of individual judgment that in an enterprise having the characteristics and magnitude of the old Contra Costa Water Company, there must have been in the inception of the concern losses or deficiencies in income to the extent of $500,000. In his other estimate, he made a computation of the early losses, treating them as the difference between the return of 5.63 per cent. which the company had actually received, as computed by him from its annual statements, and the return of 7 per cent. which he believed it should have received. Mr. Schuyler and Mr. Kiersted followed the same general lines. This was all the evidence supporting this item. We think it very clear that it had no relation to the question of present value and afforded no basis for any valuation by the trial court of either of these elements, franchise or going concern. In this connection we quote the words of Judge Farrington in the case last cited: 'Two of the experts estimated the value of the going business to be equal to the total amount by which current rates of interest exceeded the net profits of the business prior to 1880. In other words, the value of the going business is equal to the cost of establishing the Spring Valley Water Company's business originally, and that cost is equal to the deficiency of the revenue prior to 1880. This estimate is open to the objection that the deficiency of revenue may have been due to extravagant or wasteful management. The company may have purchased a plant larger and more expensive than necessary; current rates of interest may have been abnormally high; many causes which have absolutely no relation to the value of a company's business now as a going concern may have increased or diminished the deficiency in revenue. Furthermore, if it be conceded that early deficiency of revenue is the proper measure of value for the present going concern, then it follows that, the greater the deficiency and the more unprofitable the business, the greater the present value of the going concern; and, if the business had yielded large profits from its very inception, the going business to-day would be worthless. These variant methods, leading to equally variant results, are not in accord with the actual conditions. None of the estimates can be followed.' It is unnecessary to say that the burden was on plaintiff to furnish data showing that these elements had a distinct, independent productive value, before any such value could be included. See, in regard to value of franchise, Willcox v. Consolidated Gas Co., supra. In what we have said, we do not desire to be understood as deciding that in the matter of fixing water rates anything at all should be added to the value on account of the element of 'going concern.'

"So far as the evidence of Mr. Adams and Mr. Schuyler afforded any basis for a valuation of plaintiff's property by the trial court, other than the property acquired from the Oakland Water Company, such support was to be found in the evidence relating to the cost of the works and the cost of the reproduction thereof. The evidence of Mr. Adams that San Leandro Lake, including real estate and appurtenances, which was the main source of plaintiff's water supply, was worth $1,537,500, was based solely upon the theory that it supplied '615 miner's inches of water under four-inch pressure, practically constant and certain yielding capacity, at $2,500 per inch.' This valuation of $2,500 per inch was, as shown by his examination, a mere arbitrary conclusion, based upon his views as to what, under all the circumstances, would be fair, and in part upon what he thought the consumer would be able to pay. Mr. Schuyler does likewise. We find in this evidence no such certainty as renders it available as a guide to the value. Each of these witnesses included over $3,000,000 as the cost of construction of the plant (exclusive of the plant of the Oakland Water Company), or the cost of reproduction thereof. Neither of them made any deduction on account of depreciation which must have come from age and use. The Contra Costa Water Company had existed ever since 1866, and more than two-thirds of its construction work was done prior to 1886. In the case of Knoxville v. Knoxville Water Co., supra, the United States Supreme Court said: 'The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use. * * * The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property like real estate, for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools, and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case.' A reading of the record cannot fail to convince one that the estimates of both Mr. Adams and Mr. Schuyler were practically of all the construction work that has been done since the year 1866, without any allowance whatever for the depreciation that must have occurred. It is apparent from the record that even upon the basis of an allowance of only 1 per cent. annually for depreciation, the depreciation in the Contra Costa plant would have exceeded $500,000. According to all of defendants' witnesses except one, Mr. Miller, it was practicaly $1,000,000 or more. Mr. Adams himself testified that from his investigation he believed that the prevailing rate of depreciation per annum in such property was 2 per cent., taking the property as a whole. There is nothing in the evidence of these witnesses or elsewhere in the record to indicate any basis upon which the trial court might properly hold this element of depreciation to be offset or materially affected by appreciation in the value of any portion of the property or of the plant as a whole. So far as real estate values were concerned, including the value of San Leandro Lake and the water rights thereunto appertaining, the testimony given was of present value.

"Both Mr. Adams and Mr. Schuyler placed the value of the plant acquired from the Oakland Water Company in 1899, which in 1900 constituted a part of plaintiff's system, at $2,550,000. This they did solely upon the theory that it was the price paid by plaintiff for the property. At the time of the arrangement between these two companies, they were and had been for some time competing companies in the business of furnishing water to the city of Oakland and its inhabitants. The deed by which plaintiff acquired the property and business of the other company recited a consideration of $1,500,000, and that the conveyance was subject to a bonded indebtedness in the sum of $1,500,000. It appears that no money passed in this transaction, the $1,500,000 expressed consideration being paid in stock of the Contra Costa Water Company at its par value. It was assumed that this stock was worth 70 cents on the dollar, viz., $1,050,000, and by adding this to the bonded indebtedness of $1,500,000, the values of Mr. Adams and Mr. Schuyler of $2,550,000 are obtained. This 70 cents on the dollar was the market value of Contra Costa Company stock some few months after the arrangement was perfected, but it had no such market value at the time of the arrangement. What its value then was does not appear, except that it appears that it was lower than 70, but it is claimed that such lower price was not the fair price. While the price paid for an article is ordinarily some evidence of its value, the evidence of price here is practically worthless. Regardless of other considerations, it appears that no estimate of the value of the various items composing that property, even including that of Mr. Adams, brought the aggregate higher than about $2,300,000, and the great weight of evidence in number of witnesses, at least, put it even far below the amount of the bonded indebtedness. See Knoxville v. Knoxville Water Co., supra. Of Mr. Kiersted's testimony as to the value of this property it is sufficient to say that it shows simply a method of arriving at the value which does not appear to us to furnish the least particle of support for any judgment as to the actual value.

"Mr. Kiersted based his conclusion as to the total value of plaintiff's property solely on two methods pursued in determining that value, one of which may properly be called the investment method, and the other the capitalization method. Mr. Adams and Mr. Schuyler also used somewhat similar methods in arriving at a conclusion, as confirmatory of their other method of valuation. The data upon which all these calculations were based were very uncertain, in view of the fact already stated that most of the books and records of the Contra Costa Water Company showing details of cost of construction and operating expenses had been destroyed by plaintiff in the year 1899, and to a great extent only certain incomplete memoranda testified to have been taken from the books by the president of the plaintiff, and certain very general statements filed by the company with the city council in the year 1886, and annually since, were available as a basis for the calculations. It was necessary for these witnesses in making their calculations to assume many things for which no basis existed in the evidence. Taking all of the evidence of this character together, it was too uncertain to afford any measure of or guide to the present value of the property.

"The only other expert witness on the part of plaintiff was Mr. Le Conte. He confined himself to estimates of the actual cost of construction, without undertaking to place any value on the aggregate property of plaintiff. If there be deducted from his estimate of actual cost anything like a fair allowance for depreciation, it would be impossible to find in the record a total value of $7,000,000 or anything near that sum for plaintiff's property, based upon Mr. Le Conte's estimate so far as the cost of construction was concerned.

"There is no other evidence in the record that would, taken alone or in connection with such portions of the testimony of the witnesses already named as furnish evidence of the value of plaintiff's property, bring the present value of such property as high as $7,000,000. It is suggested by learned counsel that there are many other elements upon which no value was given by the testimony, that might properly have been taken into consideration, and must be assumed to have been taken into consideration by the trial court in arriving at a conclusion as to value, such as appreciation in value, the skill and good management in the upbuilding of the works, the obstacles and difficulties encountered in the construction of the works, the unusual natural advantages presented by the San Leandro Lake as a source of water supply, the fact that the system of plaintiff had been thoroughly tried and proved equal to all demands, the prospective value of the property, the fact that plaintiff was carrying on its business in the exercise of a franchise emanating from the state, and the risks of the business. As to all of these items, regardless of all other consideration, we find no foundation in the record of any additional valuation by the trial court. The burden of proof as to valuation is on the plaintiff seeking to show the invalidity of such an ordinance as the one we have before us, and he must supply such evidence as will clearly warrant the valuation he seeks to have placed upon his property. See San Diego Water Co. v. San Diego, 118 Cal. 573 [50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261]. A trial court is not warranted in indulging in mere conjectures or surmises as to the value of certain alleged elements, and in basing its conclusion as to the value of the whole property in part thereon. We are unable to conceive of any proper theory upon which the finding of the trial court as to value can be held to be sufficiently sustained by the evidence.

"As to the facts surrounding the adoption of the ordinance and the contention of plaintiff based thereon, it is necessary to say a few words. There is no claim, as we understand it, that there was any actual fraud on the part of the council, or that the members of the council did not act in good faith and with the belief that they were fixing rates that would insure a fair and just return upon the actual value of plaintiff's property, and the findings do not, as we understand them, intimate anything of this kind. So far as the findings may imply that the ordinance was passed without any opportunity to plaintiff to be fully heard on the question as to the proper rates to be fixed, we think that the evidence does not support the conclusion. The time for the annual establishment of rates was fixed by law. Under the act of March 7, 1881 (St. 1881, p. 54), it was the duty of the plaintiff to furnish the council in the month of January with a detailed statement showing the names of water rate payers during the year preceding, and also 'all revenue derived from all sources, and an itemized statement of expenditures made.' This statement was furnished. It was also the right of plaintiff to furnish with such statement, a detailed statement of the amount of money actually expended annually, since commencing business, in the purchase, construction, and maintenance respectively, of the property necessary to the carrying on of its business, and also the gross cash receipts annually, for the same period, from all sources. Plaintiff had the right to fortify this statement by such explanations and proofs as it might see fit to insert. This was a full and sufficient opportunity to present its case. San Diego L. & T. Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154. It may be said that common fairness would demand that plaintiff should be allowed, if it so desired, to supplement its written statement with proof and argument before the council. The evidence shows that such opportunity was accorded it, and that the president of plaintiff appeared before the council in its behalf on two occasions. No request made by plaintiff looking to a further opportunity to present proofs or argument or to be present at any investigation of the council or its committee to which the matter was referred was denied, except the request made after the investigations of the council were completed and the ordinance was about to be voted on. It certainly cannot be held that the refusal of the council to then suspend proceedings and enter into a further investigation, especially upon the very general statement of the president as to what he could show, amounted to a deprival of an opportunity to plaintiff to be fully heard in the matter of the fixing of the water rates, or indicated any unfairness on the part of the members of the council. We are satisfied that the evidence is not sufficient to sustain the conclusion that the rates were established by 'a merely arbitrary conjecture * * * not based on investigation or the exercise of judgment or discretion.' See Railroad Commission v. Cumberland, etc., Co. [212 U. S. 414] 29 Sup. Ct. 357 [53 L. Ed. 577]. We are not to be understood by what we have said as intimating that, if these findings were sufficiently supported by the evidence, it could make any difference in our disposition of this appeal, in the absence of a finding as to value sufficiently sustained by the evidence. We are satisfied that all of the other findings in this connection are immaterial on this appeal, in view of our conclusion that the finding as to the value of plaintiff's property is not sustained by the evidence. In the absence of a finding on that question, we cannot determine that the compensation afforded by the ordinance is not a just and reasonable compensation, and if the compensation afforded be just and reasonable, plaintiff cannot complain in the courts as to the methods used by the council in arriving at the conclusion embodied in the ordinance. We cannot do better than to quote what was said by Judge Farrington in this connection, in Spring Valley Water Company v. City and County of San Francisco, supra: 'This case comes here on one vital issue, are the water rates confiscatory? To this all other questions involved are mere incidents. If the water rates in question are confiscatory, then the ordinance is repugnant to the federal Constitution, and must be pronounced invalid. Its invalidity cannot be healed by showing the supervisors were actuated by the purest motives, that they committed no error in applying the law to the facts, and that their deliberations were conducted in strict obedience to the rules which govern courts in the administration of justice, and in the admission and rejection of evidence. But, on the other hand, if it appears that the rates will afford complainant a just and reasonable compensation for the use of its property, the ordinance is not repugnant to the constitutional provision invoked, because it does not deprive the company of anything whatever. And this is so even though it be shown that the board in its proceedings violated every rule in the law of evidence. The rates are either just and reasonable or unjust and unreasonable, and that fact must be ascertained by this court from its own independent investigations, and not from a review of the proceedings before the board of supervisors to ascertain whether it erred in the admission or rejection of testimony, or whether, on the testimony before that body, it should have arrived at a different conclusion.' We have already quoted from Justice Van Fleet in San Diego Water Co. v. San Diego, supra, as to the function of the courts in cases of this character, as follows: 'All that they have to consider is, whether, in a given case, the result of the council's action will be to take the property of the complaining party without just compensation.' Indeed, we do not understand learned counsel for plaintiff to claim that they are entitled to any relief in the courts as against the ordinance, unless the rates fixed are unreasonable and unjust, and amount, legally, to a confiscation. We do not read the opinion in Spring Valley Water Co. v. San Francisco, 82 Cal. 286 [22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116], or the opinion of Judge Van Fleet in San Diego Water Co. v. San Diego, supra, as declaring a contrary view."

There are many other matters discussed in the briefs, but we do not deem it necessary for the disposition of this appeal to consider any of them.

This is adopted as the opinion of the court on this hearing.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; ALLEN, J., pro tem.

CHIPMAN, J. pro tem. (dissenting). I am unable to agree with the majority opinion. In the consideration of the evidence to determine whether it is sufficient to support the findings, I can see no reason why any different rule should be applied from that governing cases generally coming here on appeal—i. e., that if there is any substantial evidence to support any particular finding, for example, the valuation of plaintiff's property, it must stand and will not be overthrown because there may be apparently a preponderance of evidence to the contrary. The rule is well established, and necessarily it can admit of no exception without violating the constitutional provision which leaves with the jury or the trial court the determination of all questions of fact. It seems to me that if the majority opinion had been written with due regard for this rule a different conclusion would have been reached upon the vital question, to wit, the valuation of plaintiff's property devoted to the public use.

When, however, the conclusion was reached that there was not sufficient evidence to justify the finding of $7,000,000 as the valuation, there was then determined, as the opinion justly observes, that there existed no "foundation upon which to rest a conclusion as to the sufficiency of the compensation that will be given by the rates fixed, * * * for we would then be without any finding on the question of value, and without any power or ability to supply such finding." This conclusion reached, it seems to me, the case was practically ended, and the reversal of the judgment would necessarily follow. If, however, there was not sufficient evidence to justify the finding of valuation, this court is not authorized to search for evidence in the record to find support for some different and lower valuation of plaintiff's property in order to determine the reasonableness or unreasonableness of the ordinance complained of, for I do not understand that we can make findings of fact for any purpose. Neither have we the right to say that the evidence justifies any given valuation, and no more, for to do this is both to pass upon questions of fact and to prejudice the case upon a retrial which the reversal of the judgment requires must take place. The argument upon this point has been addressed wholly to the question, Does the evidence sustain the finding of valuation as fixed by the trial court? Before this court can properly take up the question of some different valuation there should be a trial of that question and a finding by the trial court which alone can make findings of fact.

In order to reach the conclusion that there was evidence justifying a valuation of $3,500,000 and hence the rate fixed was not confiscatory because it would, at that valuation, yield an income of 4½ per cent., it became necessary to violate the rule first above stated, whereas, I think, the conclusion, if the court is to enter upon so delicate and dangerous a field of inquiry at all, should have been drawn from such substantial evidence as might be found in the record, whether or not in conflict with other evidence. Had this been done, in my opinion, a much larger valuation than $3,500,000 would have found ample justification. The income increases proportionately with the increase of the valuation, the rate being fixed, and hence the importance of ascertaining, in a spirit of fairness to plaintiff, the full reasonable value of its property, taking into account every element which justly enters into such value.

If there were elements of value admitted in evidence in support of the finding adverse to defendants, and against their objection, this court may properly decide whether or not error was committed, in the particular assigned as error. Such is one of the legitimate functions of an appellate court, and is exercised as a guide to the trial court upon the retrial of the case as well as to the rate-making body. But to sum up the result of the evidence, independently of the finding of the trial court, and make a finding of the value of plaintiff's property for the purpose of passing upon the reasonableness or unreasonableness of the ordinance, is, in my judgment, an assumption of the prerogative of the trial court, and, besides, it can be of little value, for the evidence may not be the same upon a retrial.

If there is to be an end to litigation growing out of rate fixing by the rate-making board and successive appeals are to be avoided, this court should, so far as possible, indicate what in its opinion constitute the elements to be considered in ascertaining the value of the property devoted to the public use. No court, so far as I have found, has undertaken to catalogue all these elements or precisely delimit what are and what are not proper to be considered. Some of these, however, have been named as just and proper and should enter into the calculations of the rate-making body. The original cost of construction of the plant, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by statute or ordinance, and the sum required to meet operating expenses, while there may be others, are all matters for consideration and are to be given such weight as may be just and right in each case. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

Appreciation in value is an element to be considered, for there is no reason why a public service corporation should not enjoy the same advantage of enhanced value as is enjoyed by the owners of other property which has been made more valuable by the service given it by the corporation or which in turn, by becoming more valuable, has added new value to the public service plant. Ordinarily all properties of the community enhance in value pari passu, and in so far as this enhanced value attaches to the property of the public service company it becomes a factor in fixing the value for rate making as well as for any other purpose. Metropolitan Trust Co. v. Houston, etc., R. R. Co. (C. C.) 90 Fed. 683, 687; Cotting v. Kansas City Stock Yards Co. (C. C.) 82 Fed. 850. Speaking of property affected with a public use, the court said, in San Diego v. National City (C. C.) 74 Fed. 79: "If it has since enhanced in value, those who invested their money in it, like others who invest their money in any other kind of property, are justly entitled to the benefit of the increased value."

The courts also take cognizance of the element of skill and good management which has contributed to the upbuilding of the enterprise in question. Most public service works are the growth of years of constant changes and development, and, we may safely say, for the enhancement of their usefulness and value. Foresight, intelligent management, and special skill, exceptionally adapted to the work in hand, are required and must be taken into account. Speaking of the persons engaged in these enterprises, the court said, in Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 379, 59 Atl. 537, 540: "To be successful, they must be wise and prudent, thrifty and energetic. These virtues, if they have them, they impress upon the property, making it more valuable than it otherwise would have been. Is it to be said that they can have no return for skill and good management? We do not think so."

In the decision of the Interstate Commerce Commission, entitled "Reproposed Advance in Freight Rates" (1902), 9 Interstate Commerce Com. Rep. 381, 402, it was said: "Moreover, the value of a railway system does not depend upon the mere cost of its embankment or its equipment. It is rather a question of location, of connections, of terminal facilities, of enterprises along its line; and shall nothing be allowed to the foresight and ability which have marked out and perfected that system?"

The evidence showed that plaintiff had encountered and successfully overcome serious difficulties and obstacles in perfecting its system of "which a casual inspection of the works as they now exist gives a very faint idea." An unusual advantage as a source of water supply is the San Leandro Lake, which supplies a large proportion of the water supplying the city of Oakland, and the permanency and reliability of the sources of supply by this and other means should be considered. Speaking of these, one of the witnesses testified: "There are two sources of water supply owned by the company that are deemed of great value in the open market —San Leandro Lake, and that pumped from underground sources at Alvarado. The latter is, of course, included in the purchase price of the Oakland Water Company's plant. The former has been developed at great expense from unusual natural advantages improved by works of great stability and permanency. It represents a property that could not probably be duplicated at equal cost on any other site within many miles of Oakland." The evidence showed that the plant is in no sense experimental, but has been thoroughly tested and found equal to all requirements and of tried stability, and this is, as the witness said, "a very important factor in considering relative values of existing properties and properties that are yet uncreated," as any new waterworks would be if built to supplant the present one. These elements, as are others not mentioned, are in a large degree intangible, the value of which in money it is difficult to estimate but which may and should be considered in fixing the value of plaintiff's plant and no doubt entered into the calculation made by the trial court, a fact to which the majority opinion seems not to have given due importance.

Then there are the risks of the business to be considered, for, as was said in San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261: "This is not an ordinary business enterprise. Those who engage in it put their property entirely into the hands of the public. Having once embarked, it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off of demand." There are other risks to which the enterprise is liable; it must submit to regulation of rates which may be arbitrarily or unjustly fixed, requiring resort to the courts for relief; it is subject to condemnation by the municipality and although presumably it would be paid full compensation, it would be a risk in some measure affecting the value for rate making; there are also dangers of loss from earthquake and flood. The value of the tangible property is doubtless the basic element in the inquiry, but clearly there are many others to which consideration must be given and no doubt was given by the trial court, and this it was its duty to do although the evidence named no specific amount as the value of these elements.

Still other elements may be mentioned which enter into any fair consideration of value. "The value of the service which the public receives is also an element to be determined in considering whether the rates are reasonable." Redlands, etc., W. Co. v. Redlands, 121 Cal. 365, 371, 53 Pac. 843; San Diego Land & Town Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

That plaintiff is a going concern is an important element, the value of which witnesses fixed at $500,000, but this item is disregarded in the principal opinion because the value placed upon it by the witnesses, like that of the value of the franchise, was not thought to rest upon any sufficient basis. The opinion states that because the value of the going business and franchise depends upon their earning power, which in turn "depends upon rates to be fixed annually by the city council in such a way as to give only a fair return on the property in use, and the franchise is neither exclusive nor defined by any special contract with the city, these elements would appear to play a very small part, if any, in the matter of valuation." In effect the opinion eliminates both of these elements from any consideration in arriving at the value of plaintiff's property and would warrant their exclusion in any further hearing of the matter. The reasons given for this conclusion are, to my mind, inconclusive and furnish no ground for their elimination altogether as elements of value. It cannot be fair or just to reduce the valuation of the property because of the fact that the council may fix the rates annually, for that would make the rate govern value whereas value should govern the rate, i. e., the rate should always be governed by the principle that the public service corporation is entitled to be allowed to charge a rate which would yield a just and reasonable income based upon the full reasonable value of its property.

Nor should the fact that the franchise is not exclusive or defined by any special contract take from it all value. The view of the majority opinion, on the question of a going concern, seems to be derived from the Consolidated Gas Company Case, of New York City (212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382), where the court placed its opinion largely upon the assumption that the gas company was a monopoly and "that it is not a case for a valuation of 'good will.'" That the gas company was a monopoly was assumed from the further assumed fact that the city would not be likely to ever allow its streets and alleys to be disturbed in competition with the established company which had occupied every available space in building and extending its plant. No such assumption can be here indulged. Much testimony was taken to show that another system of supplying the city of Oakland could be built, and that the city had the right to build it. Is the city to be allowed to beat down the valuation of a going business by menacing it with threatened possible competition? In the very recent case, decided April 10, 1910, by the U. S. Supreme Court—City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991, this question is considered. The city of Omaha resolved to exercise its option to purchase defendant's plant, under legislative authority. The court said: "The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making up a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That the kind of good will, as suggested in Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, is of little or no commercial value when the business, as here, is a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the duplication, less depreciation, of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident"—citing National Water Works Co. v. Kansas City, 62 Fed. 855, 10 C. C. A. 655, 27 U. S. App. 165, 27 L. R. A. 827. In the cited case, Mr. Justice Brewer said: "A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than the system connected as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with capacity to supply the city, but actually supplying many buildings in the city, not only with a capacity to earn, but actually earning, makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction. * * * It should pay, therefore, not merely the value of a system which might be made to earn, but that of a system which does earn." I venture to suggest that "good will" is to be distinguished from what is meant by the term "going business." "Good will," said Lord Eldon, "means nothing more than the probability that the old customers will resort to the old place." Words and Phrases, title "Good Will." "Going business or concern" is a term applied to a corporation which is "still prosecuting its business with the prospect and expectation of continuing to do so, even though its assets are insufficient to pay its debts." Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 353, 23 L. R. A. 618, 42 Am. St. Rep. 29. When applied to a corporation it "means that it continues to transact its ordinary business." White et al. Mfg. Co. v. Pettus Importing Co. (C. C.) 30 Fed. 864, 865. Words and Phrases. Here is a duly organized corporation with an established business in full operation and likely to continue for an indefinite period. If its property was being condemned, the Omaha Case, supra, is authority for holding that the "going business" is an asset of value to be considered. For the purposes of rate making I am unable to see why it is not a proper and necessary factor. Any element that goes to enhance the legitimate value of plaintiff's plant is part of its property rights and must be taken into account in ascertaining the total value of its property.

After showing, from the point of view taken of the evidence by the majority opinion that a valuation of $3,500,000 might find support "over operating expenses and taxes; and after deducting for depreciation what is assumed as 1 per cent. of the value of the perishable and nonperishable property, the opinion proceeds: 'In that event, we would have over 4½ per cent. (the excess would be very slight) net for the stockholders. This certainly would be a very substantial net return, considerably more than is derived from many investments eagerly sought by capital. We do not wish to be understood as intimating that even such a return would be considered by us as a full and fair return under all the circumstances, were we engaged in the exercise of the legislative power of fixing the rates. That, as said before, is not a function of the courts. We simply mean that we do not believe it to be so low, under the circumstances appearing here, as to warrant a court in holding it to be beyond the legislative power to fix.'"

The opinion holds that the evidence presented in the 5,500 printed pages "would have supported a value of not exceeding $3,500,000," from which must be deducted something for depreciation. The case seems to have been exhaustively tried on all questions of law and facts. Whether on a retrial plaintiff's case may be strengthened I know not. But as it stands, this court, by a majority, holds that unless strengthened no greater amount than $3,500,000 can be supported, and this amount must be diminished by depreciation. As already suggested, I think the court should not thus forestall and prejudge the findings to be made upon a retrial. And the reason given in the opinion for discussing the question does not seem to me satisfactory, namely: "We have said this much for the purpose of showing that the judgment cannot stand if the finding of the trial court as to the value of plaintiff's property is not sufficiently sustained by the evidence." As heretofore remarked, there has been no fair opportunity given plaintiff to show that the evidence would justify a finding of something, and it may be but little less than $7,000,000, which, in my opinion, should first be passed upon by a trial court, either on the evidence presented by this record or such additional evidence as may then be submitted. The conclusion reached by the majority of the court, I am satisfied, leaves out of its consideration elements of value which the trial court properly included and which materially affected its conclusions.

There was much evidence directed to the question, What would have been a reasonable per cent., when the ordinance was passed, to allow as income based upon the valuation of the property, exclusive of operating expenses and taxes? It was shown in many different ways, which need not be enumerated, that 7 per cent. was a reasonable rate; that ordinary investments upon security absolutely safe, such as government bonds, mortgages, and the like, yielded 6 per cent. The cases hold that stockholders in water companies are entitled to receive a rate of interest in excess of that which would be considered reasonable where the loan is free from risk. The cases are cited in the briefs and are conclusive upon the point.

In San Diego Water Co. v. San Diego, 118 Cal. 556, 570, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261, this court held that in the ascertainment of the rate of interest which should be allowed, comparison should be made between the company's business and other kinds of business involving a similar degree of risk. Chief Justice Beatty, in that case, stated what he regarded and what I think the company is entitled to, namely, "rates ought to be adjusted to the value of the service rendered, and this means that the water company should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency, and declare a dividend to stockholders equal at least to the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing the water to consumers." Even now when money is "easier" and rates of interest less than in former years—say 10 years ago when this ordinance was passed—the current rate on undoubted security is 6 per cent. How, then, can it be justly said that 4½ per cent. to the stockholders "would be a very substantial net return, considerably more than is derived from many investments eagerly sought by capital"? This may be true of surplus capital held "on call" in safe hands, or of trust funds where absolute security is the prime consideration, but it is not true of investments similar to the one here, nor is it true of ordinary, current loans in business enterprises.

Neither am I willing to subscribe to the proposition that the rate-making authority may, with the sanction of this court, adopt 4½ per cent. as a reasonable rate of net income to the company, while at the same time informing that body that "we do not wish to be understood as intimating that even such a return would be considered by us as a full and fair return under all the circumstances, were we engaged in the exercise of the legislative power of fixing rates." This may be a salve to the consciences of the court, but it is tantamount to saying to the rate-making body, The courts will not disturb your ordinances so long as you provide an income to plaintiff equal to 4½ per cent. upon the value of its property, although we think it unreasonable; and it is quite probable that a body acting for the consumers and deriving its life from them, would not be likely to allow any greater rate.

And this leads to the question, What is the function of the trial court in passing upon the reasonableness or unreasonableness of a rate-fixing ordinance? The opinion says it is not the function of the court to fix the rate, as that is purely a legislative function. In the sense that the court may not fix a rate and order the legislative body to adopt it, the proposition is correct. In its decree the trial court did not direct the council to provide for 7 per cent. income over and above plaintiff's operating expenses and taxes. In one of its findings it did, however, upon sufficient evidence, express the opinion that "a just and reasonable rate for the water to be so supplied is 7 per cent. of said sum of $7,000,000, over and above the expenses and taxes hereinafter mentioned; and plaintiff is entitled to receive for the water which will be supplied by it * * * at least 7 per cent. upon said $7,000,000 over and above and in addition to its operating and other expenses," etc. It is well settled that the lower court had the authority to determine whether or not the rates fixed by the council were reasonable. Incidentally to this inquiry it was within the power of the court to say what is a proper charge. The council is entitled to know what the court would regard as unreasonably low, and, in determining what rate would be unreasonable, the court must have some standard by which to govern its action, some rate which may be brought into comparison with the rate allowed by the ordinance, without which I can conceive of no criterion to control its decision. In the case here the evidence fully sustained the conclusion of the trial court. But even so, the decree directed the council to so fix the rates as to "afford to plaintiff a just and reasonable compensation for the service rendered and the water supplied, and as will yield a sufficient income to pay its expenses and taxes, and a reasonable rate of interest upon the value of plaintiff's property," etc.; and further, to fix the rates "in accordance with the principles established in this decree." I do not understand that the council was directed to do more than fix a reasonable and just rate, guided, it may be, though not compelled to adopt what the court named as a reasonable rate.

Some writers have spoken of a "twilight zone of injustice" in which the legislative body may roam at will in fixing rates, and, while acting in this unilluminated region, the courts are powerless to control its judgment. That is, as intimated in the majority opinion, that the council may adopt a rate which the court would not, if sitting as a legislative body, regard as reasonable, and yet, sitting as a court, it cannot say is unreasonable. If there is warrant in reason for such a doctrine, the court should at least place some sort of limit to this field in which the rate-making body may exercise an uncontrolled discretion. It is within the proper and rightful exercise of its functions for the court to say to the legislative body that any rate which fails to measure up to what the court may declare to be reasonable compensation would be void as unreasonable, and, in my judgment, it is competent for the court, in view of all the circumstances, to say what this minimum should be, having reference to the nature and character of the service to be rendered. How can this court consistently say that 4½ per cent. is not "a full and fair return under all the circumstances" and yet, in view of the evidence, say that 4½ per cent. would be "a very substantial return, considerably more than is derived from many investments eagerly sought by capital"? Apparently, this "twilight zone" has a range of 2½ per cent. below what the evidence showed would be a reasonable rate. This is altogether too wide a range of discretion.

Expert witnesses, in placing a value upon the San Leandro Lake, based their valuation upon "the miners inches of water under a four-inch pressure practically constant and certain yielding capacity," at $2,500 per inch. Whether this was too high a value it is not within our province to determine. As a fair and legitimate method of ascertaining the value of this reservoir, however, I have no doubt. In many parts of the state the value of water is thus ascertained. The majority opinion seems to discredit it.

Finally, in the opinion prepared on rehearing, the court says: "If the rates fixed yield less than the lowest percentage of profit which is ordinarily obtained in the locality upon equally safe and permanent investments in enterprises of a kindred character, the regulation is as clearly confiscatory as if no return at all is provided upon a portion of the property actually employed." Applying this rule to the evidence before us, I am clearly of the opinion that the rates fixed by the council are confiscatory. Nor can I reconcile the above rule with subsequent portions of the majority opinion which holds that 4½ per cent. is not confiscatory, for the evidence would warrant our holding that 6 per cent. "is the lowest percentage of profit which is ordinarily obtained in the locality upon equally safe and permanent investments in enterprises of a kindred character."

HENSHAW and MELVIN, JJ., being disqualified and unable to act in this cause, Hon. N. P. CHIPMAN, presiding justice of the District Court of Appeal for the Third appellate district, and Hon. M. T. ALLEN, presiding justice of the District Court of Appeal from the Second appellate district, were selected by the remaining justices of this court to act pro tempore, in the consideration and decision of this cause and until the decision therein becomes final.

159 Cal. 360

In re HUGHES, Judge. (S. F. 5,645.)

(Supreme Court of California. Jan. 23, 1911.)

1. HOMICIDE (§ 141*)—INFORMATION—SUFFICIENCY.

An information for assault with intent to murder, alleging that defendant did willfully, feloniously, and with malice aforethought assault a certain person, being a human being, with a deadly weapon, is sufficient without describing what the weapon was.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 248; Dec. Dig. § 141.*]

2. HABEAS CORPUS (§ 30*)—SCOPE OF REMEDY—SUFFICIENCY OF INFORMATION—JURISDICTION.

A judgment of the superior court of one county holding that an information for assault with intent to murder was sufficient is conclusive on the superior court of another county in habeas corpus proceedings to determine the validity of defendant's detention after conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. HABEAS CORPUS (§ 113*) — APPEAL — APPEALABILITY OF JUDGMENT.

No appeal lies from a judgment in a proceeding in habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102–115; Dec. Dig. § 113.*]

4. HABEAS CORPUS (§ 114*)—GROUNDS—WANT OF JURISDICTION—ERROR OF LAW.

Code Civ. Proc. § 1068, provides that a writ of review may be granted by any court whenever an inferior tribunal having judicial functions has exceeded its jurisdiction, and no appeal lies. Section 1074 provides that the writ cannot be extended further than to determine whether the inferior tribunal has regularly pursued its authority. Const. art. 6, § 5, confers on the superior courts power to issue writs of habeas corpus on petition of any person in actual custody in their respective counties. One convicted of crime in L. county was committed to the state prison in S. county. *Held*, that a proceeding in habeas corpus, regularly brought in S. county, to determine the validity of the commitment, was not without jurisdiction, and a determination in such proceeding that the information on which the conviction was based was insufficient was not reviewable in the Supreme Court on writ of review, though such determination was incorrect, and the information was in fact sufficient.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 116; Dec. Dig. § 114.*]

5. HABEAS CORPUS (§ 114*)—GROUNDS—WANT OF JURISDICTION—REVIEW BY WRIT OF REVIEW.

That a petition to the superior court for a writ of habeas corpus did not state facts sufficient to warrant a release of a prisoner did not authorize a review by writ of certiorari, where the superior court in fact held that the petition was sufficient; such ruling not being one in excess of its jurisdiction.

[Ed. Note.—For other cases, see Habeas Corpus. Cent. Dig. § 116; Dec. Dig. § 114.*]

6. JUDGMENT (§ 487*)—COLLATERAL ATTACK.

A judgment based on a complaint which does not state facts sufficient to constitute a cause of action is not for that reason a judgment in excess of jurisdiction or void, and as such open to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 921; Dec. Dig. § 487.*]

7. HABEAS CORPUS (§ 114*)—JURISDICTION—CERTIORARI.

Since Const. art. 6, § 5, gives the superior court power to issue writs of habeas corpus, that jurisdiction is not impaired by Pen. Code, § 1474, providing that a petition for habeas corpus must state in what the alleged illegality of the imprisonment consisted; and hence a determination of the superior court that a petition for a writ of habeas corpus is sufficient, though such determination is erroneous, is not reviewable by certiorari.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 116; Dec. Dig. § 114.*]

In Bank. Certiorari by the People, on the relation of the Attorney General and others, to review and annul an order of a judge of the superior court of Sacramento county discharging Fred Horning from custody as a convict in the Folsom State Prison. Writ discharged, and proceeding dismissed.

U. S. Webb, Atty. Gen., R. C. Van Fleet, Deputy Atty. Gen., J. D. Fredericks, Dist. Atty., and John C. North, Deputy Dist. Atty., for petitioner. Garrett W. McEnerney, for respondent.

SHAW, J. This is a proceeding to review and annul an order of the superior court of Sacramento county discharging from custody one Fred Horning, a convict in the Folsom state prison.

Horning was charged by information in the superior court of Los Angeles county with the crime of assault with intent to commit murder. He entered a plea of guilty, and in September, 1908, was sentenced to confinement in the state prison at Folsom for the period of 14 years. In May, 1910, he applied for a writ of habeas corpus by petition addressed to the superior court of Sacramento county. The writ was issued, a return duly made showing that he was confined in the state prison, under judgment of conviction in the superior court of Los Angeles county. The petition for the writ of habeas corpus alleged that he was imprisoned on said judgment, but that the imprisonment was illegal and said judgment null and void because the information did not state facts sufficient to constitute a public offense. Upon the hearing he was ordered to be released from prison. The Attorney General and the district attorney of Los Angeles county thereupon instituted this proceeding, claiming that the superior court of Sacramento county, in discharging the prisoner, was acting in excess of its jurisdiction.

The information charged that in the county of Los Angeles on December 15, 1906, said Fred Horning "did willfully, unlawfully, and feloniously and with malice aforethought assault one Caesar Vervoort, a human being, with a deadly weapon, with intent then and there him, the said Caesar Vervoort to kill and murder," contrary, etc. This was a sufficient description of the offense of assault with intent to commit murder. It was not necessary to further describe the weapon alleged to be "deadly." People v. Congleton, 44 Cal. 94; People v. Savercool, 81 Cal. 651, 22 Pac. 856. The use of a weapon need not have been mentioned at all. Furthermore, the judgment of the superior court of Los

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Angeles county that Horning was guilty of assault with intent to commit murder was, in effect, an adjudication that the information was sufficient by a court having jurisdiction to decide that question, and it was conclusive upon the Sacramento superior court upon that point. There can be no doubt, therefore, that the judgment of the latter court holding the commitment void and discharging the prisoner was erroneous.

But this is not an appeal from the decision in the habeas corpus case. No appeal lies from a judgment, given in a proceeding in habeas corpus. In re Perkins, 2 Cal. 430; People v. Schuster, 40 Cal. 627. This is an application for a writ of review or certiorari. The Supreme Court has jurisdiction in certiorari to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ. Proc. § 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction, or, as the Code expresses it, "the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board or officer." Code Civ. Proc. § 1074. If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it. This has been repeatedly stated in former decisions of this court.

"Mere irregularity intervening in the exercise of an admitted jurisdiction—mere mistakes of law committed in conducting the proceedings in an inquiry which the board had power to entertain— * * * are not to be considered here upon certiorari, otherwise that writ is to be turned into a writ of error. * * * 'Jurisdiction' is the power to hear and determine—this is the general definition. Jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy. The mere grounds upon which the determination is reached may or may not be correct in themselves. These may be supported by evidence inadmissible when tested by the rules governing the introduction of evidence. The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others; but erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction." C. P. R. R. Co. v. Placer Co., 43 Cal. 367; Andrews v. Pratt, 44 Cal. 318; C. P. R. R. Co. v. Placer Co., 46 Cal. 670; Whitney v. Board, 14 Cal. 499; People v. Burney, 29 Cal. 460; People v. Elkins, 40 Cal. 647; Von Roun v. Superior Court, 58 Cal. 358; Wiggin v. Superior Court, 68 Cal. 402, 9 Pac. 646; Farmers', etc., Bank v. Board, 97 Cal. 326, 32 Pac. 312; White v. Superior Court, 110 Cal. 64, 42 Pac. 480; Quinchard v. Board, 113 Cal. 668, 45 Pac. 856. "Upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive." Whitney v. Board, supra.

The Constitution gives the superior courts and the judges thereof "power to issue writs of * * * habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties." Article 6, § 5. Horning was in the actual custody of the warden of the state's prison in Sacramento county. On his behalf a petition was regularly presented to the superior court of that county for a writ of habeas corpus for his release. The writ was regularly issued, regularly served on the warden, and his return thereon was regularly made and filed. The superior court therefore had jurisdiction of the subject-matter and of the parties concerned. That jurisdiction was in all respects regularly exercised. The authority was regularly pursued. That court made a mistake of law in holding that the petition stated facts sufficient to justify the release of the prisoner. A copy of the judgment of the superior court of Los Angeles county which was alleged to be void was made a part of the petition. It was valid on its face and the facts stated in the petition did not make it void. It was therefore conclusive as to the legality of the detention, and the court erred in holding that it was not. On the hearing an error of law was again committed in deciding that the information was insufficient, and that such defect invalidated the judgment of conviction. But the insufficiency of the petition for the writ of habeas corpus was not a defect which destroyed the jurisdiction of the superior court of Sacramento county to entertain the proceeding, issue the writ, and decide the case. It had power to determine whether the petition was good or bad, and its decision that it was good was an error of law, and not an excess of jurisdiction. A judgment based on a complaint which does not state facts sufficient to constitute a cause of action is not for that reason a judgment in excess of jurisdiction, or void, if the court rendering it has jurisdiction of cases of the kind which the complaint attempts to allege. Crane v. Cummings, 137 Cal. 202, 69 Pac. 984; Hayward v. Pimental, 107 Cal. 389, 40 Pac. 545; Moore v. Martin, 38 Cal. 436; Brush v. Smith, 141 Cal. 470, 75 Pac. 56, quoting with approval from North P. C. Co. v. Thomas, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636, the following: "If the object of a plaintiff can be ascertained from the allegations of his complaint, and the court has power to grant the relief demanded, and jurisdiction of the parties, the judgment is not vulnerable to a collateral attack although the complaint may be bad in substance." This, of course, is based on the ground that a bad complaint does not affect the jurisdiction of the court to hold it good and render judgment thereon for the relief asked.

If that defect did not divest jurisdiction to grant the writ of habeas corpus and release the prisoner, certainly it cannot be contended that the ruling that the information was bad had that effect. It is suggested that the Sacramento superior court was attempting to review the judgment of the Los Angeles superior court, which it had no power to do. But that is not an accurate statement of the ruling in question. The court had power, upon the hearing, to determine the legal effect and validity of any judgment offered in evidence. It had power to err in so doing, and its error was an exercise of the power, and not in excess of it.

There are cases holding that where a court, even of general jurisdiction, is exercising a limited statutory power, and a statute conferring the power declares that it may be exercised upon the presentation of a petition stating certain facts, the failure to allege such facts is fatal to the jurisdiction of the court and renders its judgment and orders in the proceeding void, even on collateral attack. Haynes v. Meeks, 20 Cal. 312, 317; Meeks v. Hahn, 20 Cal. 626; Pryor v. Downey, 50 Cal. 398, 19 Am. Rep. 656; Estate of Boland, 55 Cal. 314. Section 1474 of the Penal Code provides that the petition in habeas corpus must "state in what the alleged illegality" of the imprisonment consists. Counsel contend that this brings the case within the rule just stated, that the petition shows on its face that the imprisonment is legal, and that hence that it gave the superior court no jurisdiction to act. It is sufficient to say, in answer to this point, that the superior court in habeas corpus proceedings is not acting under a limited statutory authority, but under the general jurisdiction given by the Constitution. The statute may regulate the procedure, but it cannot limit or modify the jurisdiction. Defects in mere procedure, where general jurisdiction exists, are errors of law not fatal to the jurisdiction. This case does not come within the rule invoked by counsel.

The conclusion necessarily follows that we have no power in a proceeding in certiorari to annul a judgment of the superior court, or an order of a judge thereof, regularly made after obtaining jurisdiction of the parties, discharging a prisoner lawfully committed to the state prison upon conviction of a crime. There appears to be no lawful method of reviewing such judgment or order, however erroneous it may be. If such review is desired, it can be provided only by legislative act authorizing an appeal by the state or some other mode of annulling such judgment of discharge.

The writ of review is discharged and the proceeding dismissed.

We concur: SLOSS, J; ANGELLOTTI, J.; LORIGAN, J.

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15 Cal. App. 103

HARRIS v. RECORDER'S COURT OF CITY OF CALEXICO et al. (Civ. 944.)

(Court of Appeal, Second District, California. Dec. 20, 1910.)

1. Prohibition (§ 5*)—Subjects—Ministerial Acts.
Issuing execution is a ministerial act, which cannot be arrested by prohibition.
[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 20; Dec. Dig. § 5.*]

2. Prohibition (§ 5*)—Judgment of Superior Court.
A judgment of the superior court affirming a conviction in a municipal court cannot be annulled in a proceeding for prohibition against the municipal court.
[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 30; Dec. Dig. § 5.*]

3. Prohibition (§§ 3, 9*)—Right to Remedy.
Prohibition does not lie to restrain execution on a judgment of conviction by a municipal court affirmed by the superior court, where the petition does not show that the municipal court exceeds its jurisdiction, or that petitioner has not a plain, speedy, and adequate remedy by appeal.
[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 15, 35; Dec. Dig. §§ 3, 9.*]

Application by M. Harris for writ of prohibition against the Recorder's Court of the City of Calexico and another. Application denied.

Conkling & Brown, for petitioner. F. P. Willard, for respondents.

SHAW, J. Application for writ of prohibition. Petitioner was convicted in the recorder's court of the city of Calexico upon a charge of violating a city ordinance, and sentenced to pay a fine of $75. He prosecuted an appeal to the superior court, where the judgment of conviction was affirmed.

The petition alleges that said city recorder threatens to and will, unless restrained by this court, proceed to enforce the judgment so rendered by the superior court by causing execution to issue against the property of petitioner. The issuance of a writ of execution upon a judgment is a ministerial act which cannot be arrested by writ of prohibition. Camron v. Kenfield, 57 Cal. 550. Moreover, the judgment of the superior court cannot be annulled by a proceeding against the inferior court. Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317. While it is alleged in the petition that there is another cause pending in the recorder's court of the same kind and character, it does not appear that petitioner is defendant in such other action, nor that he is charged with a violation of the alleged void ordinance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is nothing in the petition whereby it is made to appear that said recorder's court is exercising judicial functions in excess of its jurisdiction; nor, even if such fact did appear, is it shown that petitioner would not have a plain, speedy, and adequate remedy on appeal from said court.

There is no merit in the petition, and the application is denied.

We concur: ALLEN, P. J.; JAMES, J.

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15 Cal. App. 77

AMERICAN GLOVE CO. v. PENNSYLVANIA FIRE INS. CO. (Civ. 776.)

(Court of Appeal, First District, California. Dec. 19, 1910.)

1. INSURANCE (§ 229*)—CANCELLATION—NOTICE—SUFFICIENCY.

A notice of cancellation of a fire policy was not ineffectual because signed "R. W. Osborn, Manager," instead of in the name of the insurer by the manager, where it was given and received as a notice from the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 501-503; Dec. Dig. § 229.*]

2. INSURANCE (§ 229*)—CANCELLATION—NOTICE—REQUISITES.

A notice canceling a policy need not be in any particular form, it being sufficient if distinct and unequivocal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 501-503; Dec. Dig. § 229.*]

3. INSURANCE (§ 229*)—CANCELLATION—NOTICE—SUFFICIENCY.

A notice by a fire insurer of a desire to terminate its liability, and that the policy would be canceled five days from date was a present exercise of the insurer's right to cancel, and not a mere expression of intention to afterwards cancel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 501-503; Dec. Dig. § 229.*]

4. INSURANCE (§ 232*)—CANCELLATION—SUFFICIENCY.

No affirmative act canceling a fire policy is necessary beyond giving the required notice, the cancellation becoming effective on expiration of the period of notice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500, 504; Dec. Dig. § 232.*]

5. INSURANCE (§ 229*)—CANCELLATION—NOTICE—SUFFICIENCY.

A mistake in a notice canceling a fire policy in designating the date of taking effect does not invalidate the notice as notice of cancellation as of the day when the period of notice actually expires.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 501-503; Dec. Dig. § 229.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the American Glove Company against the Pennsylvania Fire Insurance Company. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Louis H. Brownstone, for appellant. Goodfellow & Eells, for respondent.

KERRIGAN, J. This is an appeal from an order denying plaintiff's motion for a new trial in an action brought by it upon a fire insurance policy issued by the defendant company. The policy covered certain property located in San Francisco, and it was issued November 25, 1905, insuring the property in the sum of $1,500 for one year from November 30th following. It contained among others the following provision: "This policy shall be canceled at any time at the request of the insured, or by the company giving five days' notice of such cancellation." The property insured was destroyed April 19, 1906. The sole question in the case is whether or not the policy was in force at the time of the loss or had been canceled prior to that time by the defendant. The evidence in the case upon the point was briefly as follows: R. W. Osborn was the Pacific Coast manager of the defendant. Ten days before the loss occurred, on April 9, 1906, the following notice was mailed to plaintiff: "San Francisco, April 9th, 1906. Register. American Glove Co., 3648 19th Street, S. F.—Gentlemen: We desire to terminate our liability under policy No. 170062 issued in your favor for $1,500, covering on stock of gloves and machinery. The policy will be canceled on our books on the 14th inst., five days from date. Kindly return the policy to this office, together with the earned premium of $5.15 on that date. The plant being shut down permanently makes it undesirable. Bill inclosed herewith. Yours very truly, R. W. Osborn, Manager. I inclo."

This notice was received by plaintiff on April 11th, eight days before the loss. On April 13th a second notice was mailed to plaintiff, in which, referring to the earlier notice, it was said: "April 13th, 1906. American Glove Co., 3648 19th Street, S. F.—Gentlemen: We are in receipt of a copy of the cancellation notice mailed to you on the 11th day of April, wherein our policy No. 170062 was canceled. We hold your registered letter receipt for said letter, and we herewith beg to confirm said cancellation, and to advise you that no liability exists under the said policy. Please return it to this office in the envelope herewith. Very truly yours, R. W. Osborn, Manager. F. C. I inclo."

This second notice was not received by plaintiff until after the loss had occurred.

Plaintiff first contends that the notice of cancellation was ineffectual because signed "R. W. Osborn," and not "the Pennsylvania Fire Insurance Company, by R. W. Osborn, Manager." With this we cannot agree. There can be no doubt that the notice was both given and received as a notice from the company. It notified the plaintiff that, "we desire to terminate our liability under policy No. 170062," and that five days thereafter the policy will be canceled on "our" books. This language of course referred as the plaintiff must have understood, to the insurance company, which alone had any "liability under policy No. 170062," and on whose books alone a cancellation entry could be made, and on whose behalf the notice was signed by its manager.

The notice need not be in any particular form so long as it is distinct and unequivocal notice that the insurer has canceled the policy. Colonial Assurance Co. v. National Fire Ins. Co., 110 Ill. App. 471. "It is sufficient if the insured has notice that the proper local agent of the company has received instructions that the company will no longer be liable, directions to the agent to terminate the risk and cancel the policy when communicated to the insured being regarded as effective as the most express notice that the policy had been terminated. Springfield Fire Ins. Co. v. McKinnon, 59 Tex. 507." 3 Cooley's Briefs on the Law of Insurance, 2793. In one of the cases just cited—Colonial Assurance Co. v. National Fire Ins. Co.—the managers of the defendant company in New York had sent a letter to its special agent in Chicago asking them to release certain policies. This letter, when shown to the insured by the special agent, was held in itself to be sufficient "notice of such cancellation" within the requirements of the policy, the terms of which were the same in this respect as those of the policy in the present case. A subsequent notice to the insured signed "Worthington & Co., special agents," and much less formal than the one here involved was held sufficient. We have no doubt of the correctness of the finding of the trial court that the notice of cancellation given in this case is sufficient.

Plaintiff in the same connection argues that the notice of April 9th was not a notice of cancellation, but merely of an intention to cancel, and therefore insufficient. But the notice expressed defendant's present "desire to terminate liability." The policy required "five days' notice of such cancellation," and for this reason the form of expression was adopted that the policy "will be canceled on our books on the 14th inst., five days from date." Moreover the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company, desiring then to cancel the policy and to terminate its risk, thereby gave the insured the five days' notice prescribed by the policy, at the expiration of which the cancellation would become effective.

Under many policies of insurance, and especially those considered in the earlier cases, no period of notice of cancellation is required, but it is provided that the insurance may at any time be terminated by the company on giving notice thereof to the insured. When such a provision has been involved it has been uniformly held that the notice given the insured must show a present cancellation and not a mere intention to cancel in the future. Such a case is Van Valkenburgh v. Lenox Fire Ins. Co., 51 N. Y. 465, relied upon by plaintiff. In another case cited by plaintiff, Gardner v. Standard Ins. Co., 58 Mo. App. 611, the agent of the insurance company, having received instructions to cancel a certain policy, wrote to the insured that the company "will cancel the policy I sent you," and that he would send a policy in another company when he received a certain survey. In that case the court said that this letter was never intended by the writer of it to be taken or interpreted as a cancellation of the policy, and "amounted to no more than information coming to plaintiff's ears through any third person of the intention of the company to cancel the policy." It is clear that such cases are inapplicable to the case at bar. Here five days' notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice.

In Davidson v. German Ins. Co., 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, the converse of the question raised by plaintiff was presented. There, under a cancellation clause similar to the one here involved, the trial court had instructed the jury that a notice that "your policy is canceled" was no notice at all, the required form being, "Your policy will be canceled in five days." In holding this instruction to be erroneous the Court of Errors and Appeals said: "The notice is not required to be in writing. It may be verbal or oral. No particular form of notice is prescribed. It is only necessary that the company positively, distinctly and unequivocally indicate to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when this intention is made known to the insured. And it does not matter whether this information is conveyed by the use of the words 'Your policy will be canceled in five days,' or 'Your policy is already canceled.'"

Even where the policy permits immediate cancellation upon notice, an unequivocal notice that the company will, on and after a certain future date, consider the policy canceled is held effective. The assured upon whom such a notice was served would be left in no doubt of the purposes of the company. He could not fail to understand that it was notice of the cancellation of the policy, to take effect on the day named in the notice. Lattan v. Royal Ins. Co., 45 N. J. Law, 453, 458.

It is finally contended by plaintiff that some affirmative act of cancellation by the company, in addition to the notice given by it to the insured, was necessary to terminate its liability, and that the "act of cancellation" mentioned in the letter of April 13th was premature, five days not having elapsed since either the mailing or the receipt of the prior notice, and that consequently the risk was not terminated before the occurrence of the loss. But no affirmative act of cancellation beyond the giving of the notice was necessary. The point under discussion would seem to be settled in this state by the case of Bergson v. Builders' Ins. Co., 38 Cal. 541, 547. There the court had notified the insured that unless the unpaid premium was paid by the 31st of December the policy would be canceled on the following day. The property was destroyed on January 8th, and on that day, but after the fire, the premium not having been paid, the defendant wrote over the note of entry of the policy on its books the word "canceled." The policy provided for its cancellation upon payment by the company to the insured of any unearned premium, but no unearned premium was at the time in the hands of the defendant. The court said: "The plaintiff regards the writing of the word 'canceled' over the note of the entry of the policy in the defendant's books as the cancellation of the policy, and contends that, as this was done after the fire. it came too late. But this is too narrow a construction. The canceling of the policy, as therein provided for, does not mean the physical cancellation of it; for the policy, being in the hands of the insured, was beyond the control of the company. The meaning of the language is that the company might at their election rescind the contract of insurance upon returning the unexpired premium pro tanto. The entry in the books, if it is of any significance, amounts only to evidence that the company elected to treat the contract as rescinded. The company, having notified the insured that, if the balance of the premium was not paid by the 31st day of December, the company would cancel the policy on the following day—that is, treat it as rescinded—and the money not having been paid by the day mentioned, the company had the right to treat it as rescinded from that time. No further act was requisite on the part of the company to effect the rescission. No money was required to be returned to the insured, for none was due them; and notice that the contract had been rescinded was not necessary to be given, for they were already informed that it would be rescinded if they did not pay the premium, and the notice would not have enabled them to have protected themselves in any manner, under the contract, nor to have avoided or obviated the rescission."

That the notice fixed April 14th as the date on which the cancellation would become effective, or that the company prematurely entered an attempted "cancellation," or prematurely notified plaintiff that such "cancellation" had become effective, are wholly immaterial facts. The cancellation was effective on the expiration of the five days after receipt by plaintiff of the notice of April 9th; that is, on April 16th, the notice having been received on the 11th. "A mistake in designating the five days does not impair the sufficiency of the notice as a notice of cancellation as of the day when the period expired. Philadelphia Linen Co. v. Manhattan Fire Ins. Co., 8 Pa. Dist. R. 261. So, when seven days' notice was provided for, if the notice was received seven days before the loss it was sufficient as a cancellation, though not received seven days before the date fixed therein. Emmott v. Slater Mut. Fire Ins. Co., 7 R. I. 562." 3 Cooley's Briefs on the Law of Insurance, 2794.

We find no error in the record, therefore the order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

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15 Cal. App. 43

In re MILLER (Civ. 878.)

(Court of Appeal, Second District, California. Dec. 15, 1910. Rehearing Denied Jan. 14, 1911.)

NEWSPAPERS (§ 3*)—AS TO PUBLICATION—NOTICES—CHARACTER OF PAPER—TIME ESTABLISHED.

Pol. Code, § 4458, requires all official notices and advertising of a city, etc., to be published in a newspaper of general circulation. Section 4460 requires a newspaper, to be considered one of general circulation, to have been established, printed, and published at regular intervals in the state, county, city, city and county, or town, where such publication, notices, etc., are given, for at least one year preceding the date of such publication, or notice. *Held*, that a newspaper which was published in an adjoining city until the annexation of such city to the city in which it seeks to have its status established as a newspaper of general circulation, seven months before the filing of the petition for that purpose, was not a newspaper of general circulation in the annexing city, not having been published there for a year, as required by the statute.

[Ed. Note.—For other cases, see Newspapers, Dec. Dig. § 3.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the Matter of the Application of W. C. Miller, publisher, to have the standing of the San Pedro Daily News, as a newspaper of general circulation, as that term is defined in Pol. Code, § 4460, ascertained and established. From a judgment establishing the status of the paper as prayed, Warren Wilson appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

John D. Works and Lewis R. Works, for appellant. Morton, Riddle & Hollzer, for respondent.

SHAW, J. This is a proceeding brought for the purpose of establishing the character of the San Pedro Daily News as a newspaper of general circulation, published within the city of Los Angeles. Section 4458 of the Political Code requires that all official notices and advertising of a city, a county, or the state shall be published in a newspaper of general circulation. Section 4460 of the same Code defines what a newspaper of general circulation is. Section 4462, following, gives the right to any newspaper, by its publisher, manager, editor, or attorney, to institute a proceeding to have its character determined within the meaning of section 4460. In the last-mentioned section it is provided that to possess the required character the newspaper, among other things, "shall have been established, printed and published at regular intervals in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement." The petition herein was filed in the superior court on June 7, 1910. A contest was made thereto, and at the hearing the petitioner and contestant submitted an agreed statement of facts. From this statement it appeared that all of the qualifications described in section 4460 of the Political Code were possessed by petitioner, except that, while the newspaper had been published at San Pedro for more than two years prior to the filing of the petition, its place of publication was not included within the corporate limits of the city of Los Angeles until the completion of annexation proceedings on August 28, 1909, which was less than one year prior to the filing of the petition. The superior court rendered judgment determining that the newspaper, on behalf of which the petition was filed, possessed all of the required qualifications as a newspaper of general circulation, published within the city of Los Angeles. This judgment is appealed from.

The San Pedro Daily News was not published in the city of Los Angeles prior to August 28, 1909. It was published in an adjoining city, and its publication began to be made within the city of Los Angeles only when, by the annexation proceedings, the place of its publication was brought within the limits of the latter city. The intention of the statute would seem to be to require that the newspaper selected for official public advertising of a city shall be one published within such city, and it shall have been known as a newspaper of such city for a period of at least one year. Its character as a newspaper of the city must not only exist at the time it is used for official public advertising, but that character must have been attached to it for the antecedent period of at least one year. The San Pedro Daily News was not able at the time of the filing of the petition, or at the time of the hearing on the petition, to show that it was qualified in this respect.

The judgment is reversed.

We concur: ALLEN, P. J.; JAMES, J.

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15 Cal. App. 37

KIEFHABER LUMBER CO. v. NEWPORT LUMBER CO. et al. (Civ. 767.)

(Court of Appeal, Second District, California. Dec. 15, 1910. On Petition for Rehearing, Feb. 13, 1911.)

1. CORPORATIONS (§ 215*)—STOCKHOLDERS—LIABILITY.

A stockholder's liability for corporate obligations is based on contract by the corporation for and on account of its stockholders; their personal liability attending that of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826–828; Dec. Dig. § 215.*]

2. CORPORATIONS (§ 506*)—ACTION—PARTIES—JOINDER.

Persons who were stockholders when a corporate debt was contracted may be joined as defendants in a suit thereon.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 506.*]

3. SALES (§ 52*)—IDENTITY OF BUYER—EVIDENCE—WEIGHT.

Evidence *held* to show a sale of accounts to plaintiff corporation, and not to its promoter.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 52.*]

4. CORPORATIONS (§ 406*)—VICE PRESIDENT—AUTHORITY.

A vice president of a corporation has no implied authority to sell its business nor to make any contract outside of the ordinary course of business, unless the by-laws or directors authorize it.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 406.*]

5. CORPORATIONS (§ 428*)—IMPUTED NOTICE—PROMOTERS.

Knowledge of a promoter is not knowledge of a corporation afterwards formed by him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1751; Dec. Dig. § 428.*]

6. CORPORATIONS (§ 428*)—PURCHASES—IMPUTED KNOWLEDGE.

A corporation buying accounts under warranty was not chargeable with knowledge by its promoter of a discount arrangement diminishing the value of the accounts, especially since he did not have such knowledge in mind when as a director he joined in the purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1751; Dec. Dig. § 428.*]

7. SALES (§ 39*)—REPRESENTATIONS—OWNERSHIP.

A statement in a bill of sale that the property sold was that owned by the seller is not only descriptive of the property, but an averment of actual ownership.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 39.*]

8. SALES (§ 38*) — MISREPRESENTATIONS — REMEDIES OF BUYER.

Material misrepresentations concerning the quantity of a thing sold, made to be acted upon, and deceiving the purchaser, authorizes rescission or suit by him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65–77, 85; Dec. Dig. § 38.*]

9. SALES (§ 38*)—REPRESENTATIONS AS TO QUANTITY—RIGHT TO RELY UPON.

Where a matter is not open to observation, a buyer may rely upon the express representations of the seller as to quantity made to influence the buyer's action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 74, 75; Dec. Dig. § 38.*]

10. SALES (§ 279*)—WARRANTIES—SCOPE.

A warranty of property sold, including accounts, against persons lawfully claiming the same, entitles the buyer to recover for a deficiency in the amount of the accounts, arising from an undisclosed discount agreement, though the debtors were not entitled to the discount until actual payment of the accounts.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 279.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Kiefhaber Lumber Company against the Newport Lumber Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

W. W. Middlecoff, H. M. Willis, and Percy R. Wilson, for appellants. Eugene C. Campbell, for respondent.

ALLEN, P. J. The first cause of action is based upon an assigned claim due plaintiff from the Newport Lumber Company (a corporation), the debt being contracted within three years before the commencement of the action and at a time when its codefendant, the Consolidated Lumber Company was the owner of all of the capital stock of the Newport Lumber Company. The other causes of action were based upon the terms of an express warranty growing out of a sale to plaintiff of the assets of the Newport Lumber Company situated at Redlands.

The record discloses that one Kiefhaber was the managing agent at Redlands of the Newport Lumber Company (hereinafter referred to as the Newport Company), which corporation was a subsidiary of its codefendant, the latter owning all of the capital stock of the former; that Kiefhaber, having in contemplation the organization of an independent corporation which should acquire the Newport Company's business at Redlands, entered into preliminary negotiations relative to such purchase. This resulted in the execution of an instrument signed by the vice president of the Newport Company, by the terms of which the Newport Company proposed to sell the property and lumber yards at Redlands owned by it, including a large amount of uncollected accounts, for the aggregate price of $38,800; the receipt of $350 from Kiefhaber was acknowledged, and the balance was to be paid in cash and notes of the Kiefhaber Lumber Company; a bill of sale to be made when the cash payments were made. It was also stated in such proposition that possession of the assets so sold had been delivered. Kiefhaber accepted these terms, and accordingly executed his note for $350 and proceeded, in connection with other parties, to organize plaintiff corporation, upon which organization plaintiff caused to be paid the cash amount stipulated in such written proposal, including the amount covered by Kiefhaber's note of $350, and a bill of sale was duly executed by the Newport Company to plaintiff. In this bill of sale the Newport Company stipulated that it was selling the property owned by it at Redlands and covenanted and agreed to warrant and defend the sale of said property, goods, and chattels against all persons claiming or to claim the same. Among the items entering into the gross purchase price was one of accounts due the Newport Company, amounting to $16,750.20. This sum was shown by the books and a balance sheet present before the parties at the time of the contract to be due the Newport Company from various customers on account of goods theretofore sold and delivered. These books of account so shown were in fact inaccurate in this, that while the goods had in fact been sold and charged upon the books, the same had been sold under an agreement that upon payment thereof a deduction by way of discount should be made by the seller. This discount agreement was previously known by Kiefhaber, but was overlooked and he did not have in mind the same when the sale was proposed or made.

The court finds that the amount of the accounts so reported to be due the seller and contracted to be sold under the bill of sale was $1,047.45 in excess of the sum actually due the Newport Company from its customers, and to that extent the books were inaccurate and the accounts fictitious. The court upon the trial rendered judgment for the amount of the assigned claim, plus the amount of the inaccuracies in the books, the same aggregating $1,362.45, with interest. From this judgment, and an order denying a new trial, defendants appeal.

It is contended that there is a misjoinder of parties defendant. With this we do not agree. The liability of a stockholder is one founded upon contract made by the corporation for and on account of its stockholders, their personal liability attaching to and attending that of the corporation. Kennedy v. Cal. Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163. If a debt be established as that of a corporation, when an action to recover the same is brought the stockholders who were such when the debt was contracted may be joined as parties defendant and appropriate judgments entered in the action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We see no merit in the contention that the sale is shown by the record to have been made by the defendant Newport Company to Kiefhaber, and not to plaintiff. It does not appear that any authority reposed in Wheatley, the vice president of the Newport Company, to execute the original agreement with Kiefhaber, and especially to turn over the corporate property without first receiving payment. The mere fact that he was an officer did not for that reason alone warrant him in selling the entire business of the corporation at Redlands, nor to make any contract outside of one in the usual and ordinary course of business, unless the by-laws or action of the board of directors authorized the same. In addition to this, the instrument executed by Wheatley upon its face demonstrates that the sale was in fact made to plaintiff, it being stipulated that the consideration was to be paid and secured by plaintiff, outside of the nominal cash payment purported to have been made at the time of the execution of the instrument. When the board of directors of the Newport Company came to act in the transaction, as must be assumed from the bill of sale executed under the seal of the corporation, the plaintiff was the recognized purchaser, and to which purchase Kiefhaber is shown to have assented. The instrument first executed in Kiefhaber's name was recognized by all as a tentative proposition made in the interest of and for the benefit of plaintiff when it should complete its organization.

It is further insisted that as to the accounts sold, which were existent and valid as to some amount, the warranty did not justify an action for failure of quantity or quality in property delivered and accepted by the buyer at the time of sale when the title to the thing sold is not in any manner questioned. The sale was based upon a written guaranty of the seller "to warrant and defend the sale of said property, goods and chattels hereby made," etc., "against all and every person whomsoever lawfully claiming or to claim the same." We are not confronted with any question of implied warranty, but as to the effect which should be given the express warranty as above set forth. It is not contended that the plaintiff had any knowledge of the true condition of the various accounts at the time of the sale, unless previous knowledge on the part of Kiefhaber can be said to be knowledge. Aside from the well-established rule that the knowledge of a promoter is not knowledge to the corporation thereafter formed through his efforts, the record shows that whatever knowledge Kiefhaber had in the preceding year as to the discount agreement and the erroneous character of the book entries, such knowledge was not present in his mind when, as a director of plaintiff, he joined in the purchase of the accounts. Further, Kiefhaber was a stockholder in the selling corporation, and therefore his interests were in conflict with those of the purchaser. Under all of these circumstances, we are satisfied that no notice or knowledge of the true condition of the accounts had been brought home to the plaintiff when the contract of purchase was made. The statement in the bill of sale that the property sold was that owned by the seller, not only must be taken as descriptive of the property, but, in addition, as an averment of actual ownership. "Material misrepresentations concerning the quantity of the thing sold, which were made to be acted upon and have deceived the purchaser, will justify rescission or an action; * * * where the matter is not palpable to the observation, the buyer may rely upon the express and positive representations of the seller as to quantity made to influence the buyer's action." Mechem on Sales, § 938.

The discount agreements had the effect to establish the claim on the part of those entitled thereto against the property sold to an amount equal to that found by the court as fictitious entries, and by the express terms of the guaranty plaintiff was protected from the result of such claims when so established. It matters not that the establishment of such claims was by the discount agreements deferred until the time of actual payment of the accounts by the debtors.

The evidence is sufficient to warrant each and every finding of the court, and no bar of the statute of limitations is made to appear.

We find no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. The statement in the opinion heretofore filed in the above-entitled cause is inaccurate wherein it is stated that "Kiefhaber was a stockholder in the selling corporation, and therefore his interests were in conflict with those of the purchaser." The conflicting interest arose through the fact that it was admitted upon the trial that Kiefhaber "was the manager there of the Newport Lumber Company, that he had full powers, practically the general manager of the Newport Lumber Company at Redlands, and had full control of it; there is no question made as to his powers, absolutely none; he had power to do anything, and he had full control, up to the time that they sold out —up to the time that the Newport Lumber Company sold out to the Kiefhaber Lumber Company." Kiefhaber, however, was not a stockholder in the selling company. This admission should dispose of the question involved as to who purchased the business from the Newport Company.

With the correction above noted, we still adhere to our former judgment.

Rehearing denied.

15 Cal. App. 118

GRAY v. MULLINS et al., County Supervisors. (Civ. 931.)

(Court of Appeal, First District, California. Dec. 24, 1910.)

1. MANDAMUS (§ 1*)—NATURE OF WRIT.

The writ of mandate is a prerogative writ, and, to entitle one thereto, it must plainly appear that he is entitled to the relief demanded, and that it is the duty of the inferior board, tribunal, or person to perform the act demanded.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1–3; Dec. Dig. § 1.*]

2. JUSTICES OF THE PEACE (§ 3*)—ELECTION.

Where a township was entitled to two justices of the peace, but only one justice was on the ticket at an election, the two candidates receiving the highest number of votes did not constitute the two justices; but the vacancy must be filled by the board of supervisors.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

3. MANDAMUS (§ 154*) — PETITION — REQUISITES.

Under Court Rules 26 (78 Pac. xi), requiring the petition for mandamus to set forth the circumstances which render it proper that the writ should issue originally from the appellate court, etc., a petition to a District Court of Appeal for mandamus which does not show that any application has been previously made to a lower court, or any circumstances which render it proper that the writ should issue originally from the District Court of Appeal, is not sufficient.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. § 154.*]

Mandamus by William Gray against John F. Mullins and others, as County Supervisors of the County of Alameda, to compel the issuance to petitioner of a certificate of election. Denied.

Austin Lewis, R. M. Royce, and Walker & Moreland, for petitioner.

COOPER, P. J. This is an application for a writ of mandamus to compel the respondents, constituting the board of supervisors of the county of Alameda, to issue to the petitioner a certificate of election; it being claimed that he was duly elected a justice of the peace of the township of Oakland, county of Alameda, at the general election held on the 8th day of November, 1910.

It is hardly necessary to repeat what we have many times said, that the writ of mandate is a prerogative writ, and, in order to entitle the petitioner to such writ, it must plainly appear that he is entitled to the relief demanded, and that it is the duty of the inferior board, tribunal, or person to perform the act which it is claimed such tribunal, board, or person refuses to perform. In the petition in this case it is stated that at the general election held on the 8th day of November, 1910, one James G. Quinn was a candidate for the office of justice of the peace of the said township, and that petitioner was also a candidate for justice of the peace of said township; that Quinn received 15,377 votes and petitioner received 2,858 votes. It is claimed that the township was entitled as a matter of law to two justices of the peace, and that petitioner, having received the second highest number of votes, was entitled to the office of justice of the peace, being one of said two justices. It is not alleged nor shown in the petition that an election was held for the purpose of electing two justices, but, on the other hand, it plainly appears that there was only one justice of the peace voted for, and that the two candidates—Quinn and petitioner—were each candidates for the one office of justice of the peace.

It does not appear to us that, even conceding as a matter of law that the township was entitled to two justices of the peace, that where only one justice was on the ticket and one justice voted for the two persons receiving the highest number of votes would, as matter of law, constitute two justices. No authority is cited to us in support of such proposition. Of course, the usual way would be, where there was only one justice of the peace elected, if it were determined that the township were entitled to one more, for the board of supervisors to appoint a justice of the peace to fill the vacancy. We only refer to this without deciding the question; but it is sufficient for this application to state that it nowhere appears in the petition that any application has been heretofore made to the lower court for this writ, nor are there any circumstances set forth which in the opinion of the applicant render it proper that the writ should issue originally from this court. Such fact is required to be stated in the petition. See Rule 26 (78 Pac. xi) of rules governing the Supreme Court and appellate court.

The writ is therefore denied.

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15 Cal. App. 69

BASS v. LEAVITT. (Civ. 747.)

(Court of Appeal, Third District, California. Dec. 19, 1910.)

ELECTIONS (§ 194*)—BALLOTS—DISTINGUISHING MARKS.

Ballots are not invalid as containing distinguishing marks because the impression of a stamped cross is dim, or on account of ink blotches or blurring, where the defects are apparently undesigned.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Election contest by S. S. Bass against G. B. Leavitt for supervisorship for the Second Supervisor District, County of Lassen. From a judgment for contestee, contestant appeals. Affirmed.

W. M. Boardman, N. J. Barry, and Rankin & Julian, for appellant. Pardee & Pardee, for respondent.

CHIPMAN, P. J. This case has been here on appeal once before the present appeal, and is reported in 11 Cal. App. 582, 105 Pac. 771. At the first trial the court below determined the vote to be a tie. On appeal certain ballots were examined and passed upon by this court, the result of which was to show that contestee Leavitt had a majority so far as the record then disclosed. The judgment was reversed, and the cause remanded for the reason that only certain ballots were brought up for review, leaving the remaining ballots subject to future determination should a retrial take place. At the second trial Leavitt had judgment that he had received a majority of all the legal votes and was duly elected.

The appeal now here involves the legality of ballots numbered 63, 151, 165, 150, 113, 92, 123, 137, 172, all of which were counted for Leavitt and giving him, as found by the court, a majority of three votes. We shall confine ourselves to the single inquiry, Were the ballots drawn in question correctly adjudged to be legal? Following the order in which appellant attacks them, the first is 172. The objection is that no cross appears after the name Leavitt. There is an impression there in the same colored ink as elsewhere used, and of about the same size. Fairly considered, it would seem that the voter used the stamp from top to bottom of the ticket, the ink giving out as he progressed and the impression growing dimmer as he reached the bottom. We think the mark was made by the voter with the stamp and was not intended as a distinguishing mark.

Ballot 151 is objected to because there is an ink mark after the name "Norton," Independence League candidate for presidential elector. This mark shows no evidence of design. It appears to have resulted from careless handling of the ballot in counting.

Ballot 169 is objected to because of a distinguishing mark after the word "No" opposite the words "Senate Constitutional Amendment No. 34." It is apparent that the mark was made with the stamp and the blurring was caused by the hand moving while the impression was being made.

Ballot 92 is objected to on much the same ground as ballot 169, but there is less merit than to the objection to ballot 92.

Ballot 123 is objected to because of a distinguishing mark after the name of Frank K. Murasky. We discover no mark of any kind as claimed; the square is free from any mark.

Ballot 137 has some ink marks or blotches on the back. But these seem more likely to have been made by careless handling at the counting of the ballots than from any purpose.

Ballots 63, 165, 150, and 113 are objected to as containing identification marks. We can discover nothing in these ballots to support the objection.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

15 Cal. App. 62

PEOPLE ex rel. LEAVITT v. BASS.
(Civ. 788.)

(Court of Appeal, Third District, California. Dec. 19, 1910. Rehearing Denied by Supreme Court Feb. 17, 1911.)

1. ESTOPPEL (§ 62*) — ELECTION CONTESTS — ESTOPPEL AGAINST PUBLIC.
The people, not being a party to an election contest, are not estopped on quo warranto on relation of the winner against the loser by the winner's conduct, pending the contest proceedings, in consenting to a special election at which respondent received the larger vote.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. § 62.*]

2. ELECTIONS (§ 32*)—SPECIAL ELECTIONS—AUTHORITY TO CALL.
A board of county supervisors could not call a special election under Pol. Code, § 1067, for a membership thereon pending an election contest, though the parties to the contest consented.
[Ed. Note.—For other cases, see Elections, Dec. Dig. § 32.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Quo warranto by the People, on the relation of George B. Leavitt, against S. S. Bass. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Boardman, for appellant. Pardee & Pardee and U. S. Webb, Atty. Gen., for respondent.

CHIPMAN, P. J. Quo warranto. In the action plaintiff had judgment, from which defendant appeals on bill of exceptions.

Relator, Leavitt, and defendant, Bass, were candidates for the office of supervisor in the county of Lassen at the general election in 1908, Bass being the incumbent and seeking re-election. The result of that election, as declared by the board of supervisors, was a tie vote. Bass, thereupon, on November 14, 1908, filed a contest of the election in the superior court, and on November 25th Leavitt did the same, as provided by section 1124 of the Code of Civil Procedure, enacted in 1907. At the hearing of these contests the court, on January 2, 1909, found the votes for the respective candidates to be a tie. On January 7, 1909, the board of supervisors, pursuant to to section 1067 of the Political Code, ordered that a special election be held and appointed January 19, 1909, as the day for such election. At the meeting of the board both Bass and Leavitt were present and assented to the holding of said election and both became and were candidates at said election. Upon a canvass of the votes by the board of supervisors Bass was found to have received the highest number, and a majority of 13 of all votes cast at said election for said office. Thereupon, to wit, upon January 25, 1909, and pursuant to the order of said board, the county clerk issued a certificate of election to Bass "who does now and ever since the date of its issuance has held such certificate for said office; that on the same day he duly qualified as such supervisor, * * * and thereupon entered into said office and upon the discharge of the duties thereof, and has so continued to occupy said office and discharge the duties thereof." On January 29, 1909, shortly after the holding of said election and after the returns showed that he had been defeated, Leavitt served and filed his notice of appeal and perfected an appeal to this court, from the judgment of the superior court made on January 2, 1909, in the contest. This appeal was determined by this court on October 26, 1909, and the judgment reversed. 11 Cal. App. 582, 105 Pac. 771. Upon the going down of the remittitur and on January 26, 1910, a new trial was held by the superior court of the original contests and upon the issues as originally framed, and on February 8, 1910, the court filed its decision to the effect that Leavitt had received 88 votes and Bass 85 votes at the general election for the office of supervisor of the district, and on the same day judgment was accordingly duly entered and the county clerk was directed to issue to Leavitt a certificate of election, and thereupon the county clerk issued a certificate of election to Leavitt. Demand was made upon Bass by Leavitt to be let into the office for which he had such certificate, but was refused. Thereupon, on April 9, 1910, this proceeding was commenced at the instance of the Attorney General, upon the basis of said certificate, claiming that Bass had usurped, intruded into, and was unlawfully holding and exercising the office and had done so since the date of the issuance of the certificate to Leavitt. Bass filed an answer in the proceeding in which he set forth the facts relating to the special election and Leavitt's participation therein, as above stated, claiming that by his said acts and conduct Leavitt had abandoned his contest then pending in the superior court, and was estopped from resorting to this or any other proceeding to gain possession of said office. The trial court adjudged that "under and by virtue of the judgment given and made * * * on the 8th day of February, 1910 (in the contest action therein pending to which S. S. Bass, the defendant herein, and G. B. Leavitt, the relator herein, were parties), the said relator is, and ever since the date of said judgment has been, entitled to the office of supervisor * * * and that the defendant S. S. Bass be required to forthwith vacate said office and cease to perform any of the duties thereof." At the trial defendant Bass offered to prove the averments of his answer on which he relied to show an abandonment of the contest suit by Leavitt and that he was estopped thereby from availing himself of this proceeding. The court refused to admit the evidence, and this ruling presents the question now before us.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

At the second trial of the contest the facts, now relied upon by Bass as an abandonment of the contest and an estoppel, were not pleaded by him. He submitted to and took part in the trial of the single issue there presented, namely, which of the two candidates had received the most votes at the general election, and from the judgment of the trial court he appealed to this court, which said judgment has this day been affirmed. Respondent now urges that "if, pending the trial of the Bass-Leavitt contest, Leavitt did, consented to, or failed to do anything, whereby he became estopped from saying that he was legally elected at the general election in 1908, then such act, consent, or failure should have been set forth in the contest case, where it would have prevented him from obtaining a judgment in his favor. To raise the question of estoppel here for the first time is to make a collateral attack upon the judgment in the contest case, which is certainly not permissible."

Doubtless it was competent for either party to have abandoned the contest so long as the action was one exclusively of personal concern and to which they alone were parties. The contest could have been dismissed by them after the trial court had found a tie vote, and the parties could have relied wholly on the result of the special election. But neither of them took any steps to disturb the jurisdiction of the court in the contest or to deprive either of the right to appeal from its then pending judgment. So far as we can now know, each of them may have relied upon his right to appeal the case should the special election be adverse to him. The court below retained its jurisdiction until the appeal was perfected and it regained it when the remittitur went down from this court. If, when the contest came on to be heard the second time and meanwhile either of the parties had abandoned the contest or done some act or acts by which he was estopped from being heard, it would seem reasonable that he should have interposed his objections at that contest. The complaining party, however, made no objection to the hearing of the contest at the stage when the action was one of a personal nature, but reserved his attack and now makes it in an action where the people of the state have become interested as parties.

We think there is much force in the point made by respondent. Without deciding it, however, we think the judgment should be affirmed upon the other ground relied on by respondent which he states as follows: "But further than this the matter pleaded does not amount to an estoppel. This proceeding is instituted by the Attorney General in behalf of and in the name of the people of the state. Leavitt is merely the relator—the informant. The people are not bound by the acts or omissions of the relator in another proceeding wherein the people were not parties."

In the case of People v. Lowden, 8 Pac. 66,[1] the "action was in the nature of quo warranto, brought by the Attorney General, on the information of one Fordyce Bates, to obtain a judgment that the defendants were usurping, intruding into, and unlawfully holding a certain franchise to collect tolls under a pretended wagon road corporation." The defendants demurred to the complaint on the ground that Fordyce Bates was one of the original organizers and owners of the wagon road company, and was estopped from making the complaint and from denying the legitimate existence of the corporation he helped to make. The same facts were set up in the answer by way of estoppel. Said the court: "The action is commenced in the interest of the public to redress wrongs which injuriously affect the public. If the defendants have usurped and are unlawfully exercising a franchise, why should an action commenced to redress the wrong be barred because of any prior acts or misrepresentation of the informant? No case of a similar character has been called to our attention where the doctrine of estoppel has been invoked, and we fail to see how it can be invoked here."

In the case of People ex rel. Budd v. Holden, 28 Cal. 124, Budd was a candidate for the same office to which defendant had been declared elected. No contest was instituted, but the Attorney General, on the information of Budd, brought the action on behalf of the people of the state. It was held that the right of an elector to contest the election of any person who has been declared elected does not deprive the people of the state, in their sovereign capacity, of the right to inquire into the authority by which such person assumes to exercise the function of a public office. The counsel for the parties had made certain stipulations by which it was agreed that the case should be tried upon evidence already taken before the referee, and only such further evidence as was expressly agreed to in the stipulation. The court said: "Theoretically, the people alone are interested in the determination of the controversy involved in this case, and no court would be justified in enforcing, as against them, a stipulation made by the relator or his counsel to their prejudice. The action is in no legal sense under the control of the relator. It was brought in the name of the people to enforce their will as expressed at the ballot box, and not merely to redress the wrongs or enforce the rights of the relator." That was a case where the relator in the action undertook to bind the people. In the case here the acts of the relator were entirely apart from and independent of the proceeding in quo warranto. See, also, People v. Sutter Street Ry., 117 Cal. 604, 612, 49 Pac. 736, 738. The court said: "It (the city) has no power to initiate an action to secure a forfeiture. That power is vested in the Attorney General. As it cannot enforce a forfeiture it cannot waive it. The city cannot be estopped in respect to a matter over which it has no power."

In People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, the defendant had been, in another action—Drew v. Rodgers, 34 Pac. 1081[2]—adjudged ineligible by reason of his nonalienage. Subsequently he was elected to the office and duly qualified. Still later the Attorney General brought the action for the purpose of ousting the defendant from the office and declaring the relator, Drew, entitled thereto. The relator was not the same who brought the first action. The judgment roll in the former action was admitted in evidence to prove that defendant, Rodgers, was estopped from proving citizenship. The court held that this was error. Said the court: "The judgment (in the first case) was not between the parties to the present action, nor was it between the relator and the defendant. If the judgment in that action had been in favor of the defendant, the people would not have been precluded in the present action from showing that he was not in fact a citizen at the date of his election, and there would be, therefore, no mutuality in the estoppel of the judgment. It would open the door to collusion to hold that any elector, by contesting the validity of an election, could bind the people by suffering a judgment in favor of its validity." The fact that the case reported in 34 Pac. was brought by an elector other than the relator in the last case against Rodgers does not seem to affect the principle decided. People v. Rodgers was a different case and the parties plaintiff were different from the case of Drew v. Rodgers. So here, the action is by the people who are entirely different parties from those who were parties to the contest and who cannot be estopped by the conduct or acts of Leavitt, either in the original contest or subsequent thereto. He could not, by consenting to the special election, estop the people from disputing the declared result or from inquiring into the validity of the certificate given to Bass.

Section 1123 of the Code of Civil Procedure provides that where it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected, and the person declared elected by the superior court shall be entitled to a certificate of election. Section 1124, Code Civ. Proc., provides for a contest when the body canvassing the returns "declares that no person has received the highest number of votes given for a particular office." Section 1126, Code Civ. Proc., provides that either party aggrieved may appeal to the District Court of Appeal and that "during the pendency of proceedings on appeal, and until final determination of such proceedings, the person declared elected by the superior court shall be entitled to the office in like manner as if no appeal had been taken." The situation contemplated by the statute arose here; the contest was instituted and was pending which resulted in a decision that one of the contestants had received the highest number of votes. The board of supervisors were without authority to call the special election pending the determination of the rights of the contestants by the court.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 67 Cal. xx.

[2] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 100 Cal. xvii.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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15 Cal. App. 57

ARMSTRONG v. GARATE et al.

(Civ. 711.)

(Court of Appeal, Third District, California. Dec. 15, 1910.)

1. Landlord and Tenant (§ 285*)—Ejectment—Evidence.

Evidence, in an action by a landlord for possession, *held* sufficient to sustain a finding in favor of the tenants' right to possession under a verbal agreement.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1197; Dec. Dig. § 285.*]

2. Landlord and Tenant (§ 285*)—Ejectment—Answer—Issues and Proof.

To an action by a landlord to recover possession, the tenants answered that the landlord had leased the land to them by verbal agreement from year to year, "from the first of January, 1905, and for each and every year thereafter to the present time," and the court found that the landlord and the tenants entered into a verbal agreement on February 3, 1909, by terms of which the tenants were to remain in possession as tenants during that year. *Held*, that the allegations of the answer did not attempt to state the precise time at which the agreement was made, and hence was sufficient to admit proof of the making of the verbal agreement of lease for 1909 at any time within that year.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1195, 1196; Dec. Dig. § 285.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by D. D. Armstrong against Eugene Garate and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Rankin & Julian, for appellant. F. A. Kelley, for respondents.

HART, J. This is an action in ejectment. The defendants were awarded judgment, from which, on a bill of exceptions, this appeal is prosecuted. It is not disputed that the defendants held possession of and occupied the land in controversy under a verbal lease from plaintiff, from year to year, from the 1st day of January, 1905, to the 1st day of January, 1909; but plaintiff claims that the lease terminated and was not renewed on the expiration of the year ending January 1, 1909, and charges in his complaint that defendants nevertheless continued in possession of the premises after the last-mentioned date against his wish and consent and without right, and have refused to turn over or deliver to him the possession of said premises.

The principal question submitted on this appeal is whether or not the finding that the plaintiff, following the customary manner in which he had theretofore leased the premises to defendants, on the 3d day of February, 1909, by verbal agreement, leased to the latter said premises for the year ending January 1, 1910. The plaintiff testified, in part, as follows: "I had a talk with Mr. Garate in November, 1908, at my house; myself and Mr. Garate being the only ones present. At this time he wanted to lease the property for a term of years and I wouldn't do that. I made no terms for 1909." On the 7th of February, 1909, plaintiff addressed a letter to the defendants, among other things saying: "On account of fencing the Jones place I don't think I can rent it to you for this year, as I will have to have the fences open so long before I can get it fenced it will probably damage the crop. * * * When I get it fenced I will have to have more rent for it as I am getting more money invested in it." Subsequently the plaintiff sent a written lease, dated May 29, 1909, to defendants and requested them to sign it. This they refused to do, and thereupon plaintiff leased the land to one Fleming, at a rental of $500 per year ($300 in excess of the sum paid by defendants for the land under the former verbal leases), but plaintiff failed to deliver possession of the land to said Fleming because defendants held and refused to give up possession thereof.

The defendant, Amias, testified that he had "an understanding with Mr. Armstrong regarding the leasing of the property on February 3, 1909, for the year 1909. We had the conversation in the banking house of the Bank of Lassen County, after I paid Mr. Armstrong what was due him. I gave him a check for $190.30 or 35 cents, or $190 and some cents. After I gave him the check,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

'and now,' I says, 'Dan, are we square?' and he says, 'Yes.' I says, 'Everything satisfactory?' and he said, 'Yes.' And I says, 'Then we are going on for another year?' and he says, 'Yes.' I says, 'All right, we go on for another year,' and of course there wasn't no more said, although we had a conversation before that over some money matters. It was an important matter for me to know, because we had 250 or 300 head of stock on hand, and had no place in view where we could feed them and take care of them."

The witness Eneboe, for the defendants, testified that he met plaintiff on May 16, 1909, when he "asked him how much he would take for his place, or if he wanted to sell, and he says, 'It is no use to talk about it now.' He says, 'I could not turn them over to you anyhow, because I let the boys [referring to defendants] have them another year.'" Thus it will be seen that there is evidence supporting the finding that the land in controversy was, by verbal agreement, leased by plaintiff to defendants for the year 1909. The testimony of plaintiff contradictory to Amais' testimony only creates a direct conflict in the evidence upon the important question in the case, and, of course, we cannot say that the trial court should have disbelieved Amais and so made a finding against the defendants as to the lease for 1909.

Counsel point out some alleged inconsistencies and admissions in the testimony of Amais, and insist that these should be sufficient to condemn a finding founded on his testimony. But it was for the trial court to pass upon the weight of the testimony, and if said court, as appears to have been the case, could find nothing in the alleged inconsistencies which in its judgment so disparaged Amais' testimony as to render it unreliable or unbelievable, then much less should this court be expected to do so.

The admission which it is asserted Amais made was in saying that "we did not make a verbal lease," but that the lease for the year 1909 was under the "old contract." By this counsel for appellant were made to understand that defendants were holding possession in the year 1909 under the verbal agreement made as to the previous years. But it is evident that Amais did not use the terms "verbal lease" and the "old contract" in their legal sense, but merely thus intended to say that the lease for 1909 was made in the usual or customary manner in which the parties had made their agreements of lease theretofore. In fact, he explained that, after the making of the lease for the year 1905, the parties would, upon the expiration of the term each year, have a verbal understanding that the defendants could have a lease of the land for the ensuing year. He testified that they (defendants) would ask plaintiff if they were "going to run the place for another year?" and that plaintiff would give them an affirmative answer. "We didn't go to work and explain everything, what was on the lease, or anything of the sort," testified Amais. "It was 'Yes' or 'No.'"

There is nothing in the letter addressed to plaintiff by Amias and dated February 23, 1909, necessarily inconsistent with the latter's statement that a verbal lease was made to defendants of the land on February 3, 1909. This letter appears to be a reply to one from plaintiff in which the latter demanded more rent. Amias said in his letter, among other things, "If you wanted to raise the rent, why didn't you say something about it when you told us we could have the place another year?" We see nothing in this statement from which it need necessarily be inferred that Amias had reference to any other time than February 3, 1909, on which occasion he testified that the lease for 1909 was made, notwithstanding the fact that in said letter he also inquired in the same connection, "Why didn't you say something when I paid you the rent for 1908?"

But counsel for appellant contend that while the only issue tendered and tried was whether, as alleged in the answer, plaintiff leased the land in dispute, by a verbal agreement, to the defendants, from year to year, "from the 1st day of January, 1905, and for each and every year thereafter to the present time," the court not only found that the issue as thus stated was sustained by the proofs, but further found that the lease under which defendants now hold possession of the premises was made on February 3, 1909. In other words, it is claimed that the court finds that two distinct leases were made to defendants of the land for the year 1909—the one pleaded in the answer and the other, although not specifically pleaded, proven to have been made on the 3d day of February, 1909. The argument is that the pleaded lease is not proved and that the proved lease is not pleaded, and that, therefore, there is no support for the finding as to either.

But we think counsel are mistaken in their construction of the answer. As we understand the averments of that pleading, the defendants do not undertake to specify therein any particular time at which the verbal agreement of the lease of the land for the year 1909 was made or entered into. The allegation as to the lease merely amounts to a statement that from the year 1905 and in every year thereafter the defendants, by verbal agreement with plaintiff, leased said land, said lease to commence on the 1st day of January of each year for which the premises were so leased. There is no attempt at stating the precise time at which the agreement was made. In other words, the answer does not allege, as counsel's argument assumes, that the lease was made on the 1st day of January of each year.

Nor do the court's findings show that there were two distinct agreements of lease for the year 1909. The court finds the fact as to the number of years during which defendants had by verbal agreement leased the land from year to year as it is alleged in the answer and was proved at the trial, and then finds that on the 3d day of February, 1909, in pursuance of the customary manner in which the parties had in previous years carried on their relations as to the land in controversy, the plaintiff and defendants entered into a verbal agreement by the terms of which the latter were to remain in possession as lessees of said land during the year 1909.

We think the allegations of the answer were sufficient to justify the admission of the proof of the making of the verbal agreement of lease for the year 1909 at any time within said year. If appellant had desired something more specific in the answer as to the precise time at which said lease was made he could perhaps have compelled defendants to have given him more definite information on that question in their pleading by demurring thereto on the ground of uncertainty or some other special ground which might have been good as against the answer. But no demurrer, either general or special, was interposed to the answer, and, as stated, we think it was sufficient for the allowance of proof of any verbal lease made within the year during which such lease was operative.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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15 Cal. App. 105

PATTERSON v. CROWELL et al. (Civ. 841.)

(Court of Appeal, Second District, California. Dec. 21, 1910.)

1. PRINCIPAL AND AGENT (§ 161*) — UNAUTHORIZED ACTS OF AGENT—REPUDIATION BY PRINCIPAL—RIGHT.

Where an investment agent purchased land of a greater value than he was authorized to buy, the principals could repudiate the contract by offering to return anything they had received on condition their money be returned, but they could not claim the benefit of the contract without its obligation.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 614–618; Dec. Dig. § 161.*]

2. PRINCIPAL AND AGENT (§ 171*)—RATIFICATION—IMPLIED RATIFICATION.

Where a principal claims to enjoy the benefits of a contract made by his agent in which he knows his agent exceeded his authority, he ratifies the contract, and assumes its burdens.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 644–655; Dec. Dig. § 171.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. W. Patterson against Mrs. E. J. Crowell and another. From a judgment for defendants and an order denying a motion for new trial, plaintiff appeals. Reversed and remanded.

Tanner, Taft & Odell, for appellant. Simpson, Moody & Simpson, for respondents.

JAMES, J. Action to enforce a vendor's lien on real property for the principal sum of $575.21. Judgment was in favor of defendants. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

In the year 1906 Martin I. Smith was acting for defendants as an investment agent. Smith had invested money of defendants prior to the transaction which resulted in the purchase of the property sought to be held as security for the lien in this case. These investments had been profitable. Upon that subject Van Kirk testified: "He [Smith] had made some other investments for us and made us some money." In the fall of 1906 defendant Van Kirk sent to Mrs. Crowell $2,000 to be placed in Smith's hands for investment. At that time Smith held money belonging to defendants in about the amount of $1,479.25. This sum added to the $2,000 of Van Kirk's made a total of $3,479.25. Mrs. Crowell was authorized to act for Van Kirk. She instructed Smith to invest the total amount of money held by him. Whatever arrangement there was between Van Kirk and Mrs. Crowell as to the share which each would have in any property purchased, or the proceeds therefrom, was a secret matter between the two, so far as the record shows. Mrs. Crowell dealt with Smith both for herself and Van Kirk, with authority from the latter to act as his agent. Smith invested the $3,479.25, or the greater part thereof, in certain lots of land which he purchased from plaintiff. The purchase price was $4,000. This was more money than Smith had in his hands to invest for Van Kirk and Mrs. Crowell, but he agreed with plaintiff that defendants would pay the remainder of the purchase price. He then informed Mrs. Crowell of the investment he had made and also the price to be paid for the property. Smith testified: "Mrs. Crowell went out to see the lots before Van Kirk came from the north, and she was satisfied with the deal." Mrs. Crowell in her testimony said: "He [Smith] told me that he had invested this money in the lots mentioned in the complaint. * * * Smith told me the price was $4,000, and that he had invested the money. Mr. Van Kirk was not in Los Angeles at the time Mr. Smith told me he had invested our money in the lots."

Defendant Crowell did not deny that she was satisfied with the investment on the terms reported to her by Smith. Meanwhile Smith had had the property transferred to one Neal, who was employed in his office.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

He told Patterson, the plaintiff, that Mrs. Crowell wanted to secure a loan of $1,000 on the property, and did not want to sign the promissory note herself; that Mrs. Crowell and Van Kirk were financially good, and would pay the balance due on account of the purchase price. When Van Kirk came back from the northern part of the state, he viewed the property and was told the purchase price was $4,000. He testified that he informed Smith that he would not pay more money than he (Smith) had in his hands for the property, and demanded either the return of the money or delivery of the deeds. The deeds to the property were delivered by Smith to the defendants some months later. The trial court found that Smith was acting as the agent for the plaintiff Patterson, and that there was no agreement on the part of defendants to pay the claimed balance due on account of the purchase price; that the full purchase price agreed to be paid had been paid by them. In stating or quoting from the testimony we have only given that which is uncontradicted and portions of that given by defendants themselves. The case as finally submitted to the trial court stood with an express admission on the part of defendants that they had authorized Smith to act as their agent to invest their money. Pursuant to this authority, Smith had purchased the property described in the complaint, and in so doing attempted to charge defendants with the debt on account of a balance due on the purchase price. In this he exceeded his apparent authority, but Mrs. Crowell, who was acting for her codefendant as well as for herself, "was satisfied." Patterson, the plaintiff, did not employ Smith to sell his property. He was told and understood that Smith was acting for defendants. Viewing the evidence which stands without conflict, in connection with the testimony of defendants, we fail to find support for the finding of the court that Smith was acting as the agent of plaintiff, or that the full amount of the purchase price agreed by defendants to be paid has been paid. If Smith as the agent of defendants exceeded his authority and sought to bind defendants by an unauthorized agreement, defendants upon discovery of this fact might have repudiated the contract by offering to deliver back whatever they had received from the plaintiff upon condition that their money be restored to them. If they were misled at all, they were misled by their own agent. A person cannot retain the benefits of a contract and insist that he is bound only by the obligations thereof to the extent that his agent possessed authority to contract in his behalf. By claiming the right to enjoy the fruits of such a contract, with knowledge of the conditions made and assented to by his agent, he ratifies the contract and assumes its burdens.

As the findings of the court are not sufficiently supported by the evidence, it follows that the judgment and order denying defendants' motion for a new trial must be reversed; and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

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15 Cal. App. 166

SMITH v. SINBAD DEVELOPMENT CO.
(Civ. 882.)

(Court of Appeal, Second District, California. Jan. 3, 1911.)

1. Appeal and Error (§ 1099*)—Subsequent Appeal—Law of the Case.

A decision on appeal that the trial court erred in excluding documentary evidence is the law of the case on a subsequent appeal so that error cannot be predicated on its admission in the second trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. § 1099.*]

2. Corporations (§ 407*)—Contract of Employment—Action of Board of Directors.

Where articles of incorporation formed by two persons designated four persons as the board of directors, and the two forming the corporation became president and managing agent, and the other persons designated as directors, did not sign the articles or know that they were directors until after the managing agent employed plaintiff with consent of the president and then only one knew that he was director, the employment was authorized by the majority of the board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1615-1619; Dec. Dig. § 407.*]

3. Corporations (§ 432*)—Authority to Employ—Sufficiency of Evidence.

In an action for services rendered a corporation, evidence *held* to support a finding that the general manager had authority to act for the corporation in hiring the plaintiff.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by G. L. Smith against the Sinbad Development Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, defendant appeals. Judgment and order affirmed.

See, also, 11 Cal. App. 253, 104 Pac. 706.

Hester, Merrill & Craig, for appellant.
M. E. C. Munday, for respondent.

SHAW, J. Action to recover for three months' services alleged to have been rendered by plaintiff for defendant at an agreed salary of $225 per month. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

The pleadings admit that defendant was duly incorporated. One S. A. McDonald owned certain oil claims in Utah, and in June, 1907, had defendant incorporated under the laws of Arizona for the purpose of developing these claims. The articles of incorporation designated McDonald as president of the corporation and F. G. Downey as secretary and general manager thereof. These two, with A. J. McPherson and S. Piper, designated in said articles as vice president and treasurer, respectively, constituted the board of directors. Neither McPherson nor Piper signed the articles of incorporation, and they had no knowledge that they were connected therewith until after the alleged employment of plaintiff. In August, 1907, and prior to any meeting of the board of directors, Downey, claiming to act in his capacity as general manager of the company, and for and on its behalf, engaged plaintiff to perform certain services for it at an agreed salary of $225 per month.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found: "That plaintiff was engaged to perform services for the defendant by the said F. G. Downey, acting as general manager of defendant, and that between the 1st day of September, 1907, and the 1st day of December, 1907, the plaintiff rendered services to defendant, at its request, in accordance with said employment, in and about the preparations for oil-well drilling operations, about to be engaged in by the defendant, and in the purchase of equipment and machinery for that purpose." "That for the services of plaintiff, the defendant, through its general manager, promised to pay plaintiff the sum of $225 per month." Appellant attacks these findings upon the ground of insufficiency of the evidence, and insists that the acts of Downey as such general manager were wholly without warrant or semblance of authority, and were never ratified by the corporation, and that it is not bound thereby.

It appears that the only persons joining in the organization and incorporation of the company were McDonald and Downey; that neither McPherson nor Piper at the time had any knowledge that they were designated in the articles as directors and officers of the company, and that they nor neither of them ever signed the articles or became a party to the creation of or stockholders in the corporation. We must therefore assume, since the incorporation of defendant is admitted by the pleadings, that two persons may organize a corporation under the laws of Arizona. McDonald himself testified that "they (McPherson and Piper) knew nothing about it until a long time after its incorporation." Certain sections of the laws of Arizona introduced in evidence at the trial require that the articles of incorporation shall, among other things, contain a provision stating "by what officers the affairs of the corporation are to be conducted." The articles of incorporation of defendant provided that "the affairs of the corporation shall be conducted by its board of directors and officers to be elected by the board." That McDonald and Downey were the officers of the corporation, the former its president and the latter its secretary and general manager, is not questioned by appellant. It further conclusively appears from the evidence that these two, at the time of the alleged employment of plaintiff, and up to about September 21, 1907, when Piper joined them in holding a meeting of directors and stockholders, were the only persons who had any knowledge of the incorporation of defendant. With reference to the employment, Downey testified that he met plaintiff in Ventura county, at which time plaintiff stated the terms upon which he would enter the defendant's employ. "I told him," he says, "I would submit the matter to the company. When I came back to Los Angeles I submitted the matter to Mr. McDonald, the president of the company, and he acquiesced in the employment of plaintiff." It thus appears there was evidence tending to show that the acts of Downey as general manager in employing plaintiff were had with the knowledge and consent of McDonald, the president of the company, who, with Downey (for the reason that it is not shown that McPherson ever consented to become a director or stockholder, or that he ever knew that he was named in the articles of incorporation as a director), constituted a majority of the board of directors. The fact that this testimony was contradicted by that of McDonald cannot detract from the value placed thereon by the trial court, when considered in support of the findings.

On November 30, 1907, Downey, in his official capacity as secretary and general manager of the corporation, signed and delivered to plaintiff a writing as follows: "There is due G. L. Smith, for services performed for the Sinbad Development Company, in accordance with terms of hiring, 3 mos., at $225 per mo. & expenses, $675; expenses paid out by Smith, $75. Dated Nov. 30, 1907. [Signed] F. G. Downey, Sec. & General Manager of Sinbad Development Co."

In a former appeal prosecuted by plaintiff in this case (Smith v. Sinbad Development Co., 11 Cal. App. 253, 104 Pac. 706), upon a record not differing materially from the one now presented, it was held that the trial court erred in excluding this document when offered in evidence. The decision in that case must be deemed conclusive against appellant's contention that the court erred in admitting this document in evidence, and also, with the cases hereinafter cited, authority upon which we base our conclusion that there is no merit in appellant's contention that the findings are not supported by the evidence. As was said in the opinion filed therein: "We think the evidence shows that Downey was authorized to act for the defendant, and, acting on its behalf, did employ plaintiff and promise and agree to pay him as alleged." See, also, Streeten v. Robinson, 102 Cal. 545, 36 Pac. 946; Scott v. Oil Co., 144 Cal. 140, 77 Pac. 817; Crowley v. Genesee M. Co., 55 Cal. 273.

For the reasons herein given, and upon the authority of Smith v. Sinbad Development Co., supra, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

15 Cal. App. 97

PEOPLE v. CONBOY. (Cr. 268.)

(Court of Appeal, First District, California. Dec. 20, 1910. Rehearing Denied Jan. 18, 1911; Denied by Supreme Court Feb. 18, 1911.)

Criminal Law (§ 762*)—Instructions—Invading Province of Jury—Opinion or Belief as to Facts—Guilt of Defendant.

Where the jury have not been advised that the evidence was insufficient to justify a conviction, they having returned into court after deliberating 7½ hours, and requested further instructions, it was prejudicial error, in view of the constitutional prohibition against instructing juries respecting matters of fact, for the judge to conclude his instructions by saying: "Now, gentlemen, * * * I suggest to you that there is no reason why 12 honest, intelligent, reasonable men should not reach a conclusion in this case, and I am surprised that you have not done so already, and I want to say to you that you should consider the evidence offered and admitted here, and the law as given you by the court, and decide this case upon that. * * * Now, go out and do your duty"—since these remarks plainly intimated that the court thought the evidence in the case warranted a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1758; Dec. Dig. § 762.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Michael Joseph Conboy was convicted of manslaughter, and he appeals. Reversed and remanded.

J. J. Dunne and Robert Ferral, for appellant. Attorney General Webb, C. M. Fickert, Dist. Atty., and Maxwell McNutt, Asst. Dist. Atty., for the People.

KERRIGAN, J. The defendant was informed against for the crime of murder. He was tried and convicted of manslaughter. Thereupon he moved for a new trial, which was denied, and he was thereupon sentenced to serve a term of seven years in the state prison. This appeal is prosecuted from the judgment.

After the jury had been deliberating upon their verdict for 7½ hours, they returned into court at 11:30 p. m. and requested further instructions. In complying with this request the trial judge concluded the charge with the following remarks: "Now, gentlemen, I think I have read to you about all the instructions you desire upon these points, and I suggest to you that there is no reason why 12 honest, intelligent, reasonable men should not reach a conclusion in this case, and I am surprised that you have not done so already. And I want to say to you that you should consider the evidence offered and admitted here, and the law as given you by the court, and decide this case upon that, and not upon any personal observation or relations or experience that any of you may have had. Now, go out and do your duty." These remarks amounted to a plain intimation that the court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find. If the evidence was insufficient to justify a conviction, it was the duty of the court to thus advise the jury. Not having so advised them, but, on the contrary, having told them that there was "no reason why 12 honest, intelligent, reasonable men should not reach a conclusion" in the case, and having expressed surprise that they had not done so already, and thereupon having admonished the jury to "go out and do its duty," by this conduct it must be held that the trial court impliedly instructed and urged the jury to convict the defendant. Nothing is better known among lawyers than that juries rely with great confidence on the integrity and fairness of judges, and upon the correctness of their views. For this reason a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant.

The case at bar is so completely and fully covered by the case of People v. Kindleberger, 100 Cal. 367, 34 Pac. 852, that further comment would seem unnecessary. There the jury, after having deliberated for an hour, requested further instructions, and the court, in compliance with this request, among other statements said: "In view of the testimony in this case the court is utterly at a loss to know why 12 honest men cannot agree." There it was held that the trial court, not having advised an acquittal, in all probability gave them to understand by the language quoted that it believed the defendant guilty, and that their verdict should so find. The court further held that this conduct of the trial court constituted prejudicial error, which was not cured by subsequently informing the jury that they were the sole judges of the facts of the case and of the credibility of witnesses. The opinion was written by Mr. Justice De Haven, and in holding that the instruction was an invasion of the province of the jury, for the giving of which the case must be reversed, the learned justice said: "Nothing can be clearer than that in this charge the judge informed the jury that he had a fixed and definite conviction in regard to the verdict which they ought to return, and that in his opinion the evidence to support such conclusion was so plain and satisfactory that honest and intelligent jurors, who had heard the testimony, ought not to disagree as to its weight and effect, or at least may have understood from these unguarded remarks that in the opinion of the judge the defendant was guilty, and that such should be their verdict. When upon the trial of a defendant the evidence is clearly insufficient to justify a verdict of guilty, it is the duty of the judge to so inform the jury, and to advise a verdict of acquittal. This power is sometimes exercised by courts, and is one so frequently invoked in the trial of criminal cases that its exercise may be regarded as a matter of common knowledge upon the part of jurors of ordinary intelligence and experience, and this fact is not to be lost sight of in considering the impression likely to have been made upon the jury by the charge of the judge in this case. To any one knowing that it is the duty of the court to advise an acquittal if the evidence is such that, in the opinion of the judge, 12 honest men would have no right to convict, the remarks of the judge in this case could not fail to create the impression that he thought the jury ought to convict upon the evidence before them. But it is not necessary that we should be able to say that the jury must have so understood the charge. Unless it appears that it could not have been so understood, we cannot say that the charge was without prejudice to the defendant. The court has no right, except when advising an acquittal, to give any expression of its opinion as to the weight of the evidence, or to tell the jury that the evidence is so clear that they as honest men ought not to disagree, which is in effect the same as telling them that there is no conflict in the evidence, and that as honest men they can render but one verdict. In a subsequent part of the charge the learned judge did inform the jury that they were the sole judges of all questions of fact and of the credibility of the witnesses, and that the court had no right to trench upon their province in this respect; but the error already noticed in the previous part of the charge was not cured by this subsequent statement. The fact still remained impressed upon the minds of the jurors that there ought to be no disagreement, and that the testimony would justify but one verdict."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Touching the subject of the independence of the jury in the domain of fact, the Supreme Court of Alabama, speaking through the Chief Justice, said: "It is of the highest importance in the administration of justice that the court should never invade the province of the jury, should give them no intimation as to his opinion upon the facts, but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves. We cannot shut our eyes to the fact that juries, especially in cases which are strongly litigated upon the facts, watch with anxiety to gather from the court some intimation as to what the judge thinks should be their finding upon the facts. They do not usually fully comprehend the line of demarcation which separates the duties of the court from those of the jury. It would not readily occur to one uninstructed in the legal profession why the judge, who is a sworn officer of the law, impartial as between the parties, sitting upon the trial of the cause, and who hears all the evidence, might not with much propriety give his opinion as to the result of the facts. Hence the jury, in the most perfect good faith, are ordinarily inclined to give weight to what they suppose to be the inclination of the mind of the judge upon the facts. But it pertains to the judge to declare the law applicable to the case. He has nothing further to do with the facts than as furnishing the basis for his charge; while the jury are the triers of the facts under the law as given them in the charge by the judge, who upon contested questions of fact should sedulously avoid giving the least intimation as to his own opinion." Hair v. Little, 28 Ala. 236.

The Supreme Court in this state in an early case, discussing this matter, said: "The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes in such cases be of great, or even of controlling, influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges." People v. Williams, 17 Cal. 147.

Again, in the later case of McMinn v. Whelan, 27 Cal. 319, referring to this same doctrine, it was said: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other, may destroy the same in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other."

In his work on Constitutional Limitations (7th Ed.) pp. 460, 461, Mr. Justice Cooley on this subject comments thus: "The jurors must be left free to act in accordance with the dictates of their judgment. The final decision of the facts is to rest with them, and interference by the court with a view to coerce them into a verdict against their convictions is unwarrantable and irregular. A judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced. Still less would he be justified in refusing to receive and record the verdict of the jury, because of its being, in his opinion, rendered in favor of the prisoner, when it ought not to have been. He discharges his duty of giving instructions to the jury when he informs them what in his view the law is which is applicable to the case before them, and what is essential to constitute the offense charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the judge, make out beyond any reasonable doubt that the accused party is guilty as alleged." In a note attached to the foregoing case, Judge Cooley remarks: "A judge who urges his opinion upon the facts to the jury decides the cause, while avoiding the responsibility."

If, as stated in the cases from which we have quoted, juries watch with great anxiety to learn what the judge thinks ought to be their finding upon the facts, and, in deference to his opinions and suggestions, readily substitute his decision of the issue for their own, then, in the case at bar, the trial judge, having impliedly urged his opinion upon the facts to the jury, perhaps decided the cause. In any event, "nothing can be clearer than that in this charge the judge informed the jury that he had a fixed and definite conviction in regard to the verdict which they ought to return, and that in his opinion the evidence to support such conclusion was so plain and satisfactory that 12 honest and intelligent jurors, who had heard the testimony, ought not to disagree as to its weight and effect, and we think the jury understood, from these unguarded remarks, that in the opinion of the judge the defendant was guilty, and that such should have been their verdict." People v. Kindleberger, supra. There is a constitutional prohibition in this state, which has been repeatedly followed in the decision of cases, that judges must not charge juries with respect to matters of fact; much less should judges suggest to or instruct juries what their verdicts should be upon the facts.

Other alleged errors are discussed in the briefs. We do not think that any of them are of sufficient gravity to warrant us in reversing the case; and, as the cause must be remanded for a new trial for the error that we have just considered, it is unnecessary to refer to them at length, especially as upon the new trial they may not be repeated.

The judgment is reversed, and the cause remanded for a new trial.

We concur: COOPER, P. J.; HALL, J.

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15 Cal. App. 125

HOFFMANN v. OSBORN. (Civ. 839.)

(Court of Appeal, First District, California. Dec. 29, 1910.)

CONTRACTS (§ 337*) — BREACH — PLEADING — SUFFICIENCY.

A complaint, attempting to allege breach of an agreement whereby plaintiff was to sell property within a certain period and receive any surplus after paying defendant a fixed amount, states no cause of action where a sale by plaintiff within that period is not alleged; recovery not being proper on the ground of refusal to convey to plaintiff.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 337.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by J. C. Hoffmann against W. S. Osborn. Judgment for defendant on demurrer to the complaint, and plaintiff appeals. Affirmed.

F. A. Berlin, for appellant. Edward K. Taylor, for respondent.

KERRIGAN, J. This is an appeal from a judgment by default, entered against the plaintiff after a demurrer to his complaint had been sustained, and he had failed to amend within the time allowed by the court. Plaintiff does not appear to rely upon the first count as a sufficient statement of a cause of action. His brief is confined to a discussion of the matters set forth in the second count. We therefore will not discuss in detail the allegations of the first count. Suffice it to say that it manifestly fails to state a cause of action.

The second count alleges that plaintiff and defendant agreed that the plaintiff should select a lot in Alameda on which defendant agreed to build a cottage according to designated plans; that the plaintiff did select the lot, and that defendant did erect the cottage; that it was agreed that, in consideration of the defendant purchasing the materials and erecting the house, plaintiff should pay him the sum of $1,900. The time, manner, and terms of agreement as to payments are alleged to be as follows: "When house is inclosed and rustic and roof on and ready for plaster $1,000, out of which sum is to be paid $700 for balance purchase price of lot, and deed of which lot is to be put in name of said W. S. Osborn; balance of $1,600 to be paid as follows: $500 when house is completed and ready for occupancy, and the balance of $1,100 when house is sold, and if not sold within 90 days from date of its completion, title to said property to remain in said W. S. Osborn's name, unless time to sell is mutually extended." It is, however, further alleged that the parties agreed that, when the house had reached the stage at which the first payment was to be made, the plaintiff should procure a loan of $1,500 on a mortgage of the property, and out of the proceeds of the loan he was to make the first payment of $1,000 (of which $700 was to go on the purchase price of the lot) and the second payment of $500. The complaint alleges that this was done, the deed being taken in defendant's name and he executing the mortgage; that it was agreed that plaintiff should sell the property at the best price obtainable, and retain the surplus after paying the costs of the lot ($700) and of the building ($1,900); but that, if the property was not sold within 90 days after completion, the absolute title thereto was to remain in defendant, and plaintiff was to have no further interest in the property. The complaint finally alleges a performance by plaintiff of all the conditions, and the tender by him of the balance of $1,100 due on the contract within 90 days after completion of the building, and the refusal of the defendant to sell or convey.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The cause of action which the second count attempts to allege is one for breach of an agreement by which the plaintiff was to sell the property within 90 days after completion of the cottage, and receive whatever surplus there was after payment to the defendant of $1,100. But it does not allege any sale of the cottage by plaintiff within that period. Recovery of the amount claimed is sought on the ground that the defendant failed to convey the property to plaintiff, but this count alleges no contract to convey either oral or written.

The points of the special demurrer are without merit.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

15 Cal. App. 174

MARTIN v. STONE. (Civ. 787.)

(Court of Appeal, Second District, California. Jan. 4, 1911. Rehearing Denied Feb. 3, 1911. Denied by Supreme Court Feb. 23, 1911.)

1. Evidence (§ 445*) — Parol Evidence — Written Instrument.

Plaintiff and defendant were the owners of an option to purchase real estate, and at the time plaintiff negotiated a sale of the option he obtained an agreement from the purchaser, whereby plaintiff was to receive one-eighth of the profits to be obtained on a sale of the property. Defendant, on learning of this arrangement, insisted on an assignment of one-half plaintiff's interest, whereupon plaintiff gave defendant an assignment of half his interest, it being agreed at the time that, in case plaintiff's interest was in fact one-sixth rather than one-eighth, defendant should refund the difference. Defendant having collected from the purchaser of the option on assignment and it having developed that plaintiff's interest was one-eighth, plaintiff sued to recover the excess. *Held*, that parol evidence was admissible to show such transaction and agreement between the parties as against an objection that it varied the terms of the assignment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052–2065; Dec. Dig. § 445.*]

2. Appeal and Error (§ 1073*)—Harmless Error—Judgment—Relief Awarded.

The fact that plaintiff by an amendment to his complaint was awarded a reformation of the assignment to make it express a transfer of one-half of a one-eighth interest was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240–4247; Dec. Dig. § 1073.*]

3. Limitation of Actions (§ 46*)—Computation—Accrual of Cause of Action.

The money having been collected by defendant on the assignment on August 20, 1906, and the action having been commenced within two years thereafter, a plea of limitations was not sustained.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 46.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by George C. Martin against Daniel Stone. Appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. Affirmed.

Frank James, for appellant. W. A. Strong, for respondent.

JAMES, J. Appeal by defendant from a judgment entered against him in favor of plaintiff in the sum of $1,904.46; also an appeal from an order denying defendant's motion for a new trial.

In March, 1903, an option was obtained in the name of defendant from Elizabeth Hollenbeck, whereby the right to purchase 145 acres of land in Los Angeles county was given by the said Elizabeth Hollenbeck. Plaintiff was the owner of a one-half interest in this option. Plaintiff and defendant each endeavored to negotiate a sale of the option, and the efforts of plaintiff in that direction were successful. The option was sold to Strong and Dickinson, real estate brokers. Plaintiff and defendant shared equally in the profits of the sale, which amounted to $75 on each acre of land covered by the option. At the time plaintiff negotiated the sale of the option, he also obtained an agreement from Strong and Dickinson which recited that, in consideration of the opportunity to purchase the option being presented to the real estate brokers, they would pay to plaintiff one-eighth of the net profits to be obtained on the sale of the property. Defendant was not informed of the fact that plaintiff had secured this contract in his own favor until some time after the option had been sold. When he did learn of it, he demanded that he be given an assignment of one-half of the amount of plaintiff's interest so reserved to him by the contract mentioned. The written agreement referred to, made by Strong and Dickinson in favor of plaintiff, was not at hand at the time the demand was made upon plaintiff by defendant, and plaintiff did not then remember whether the agreement gave him a one-sixth interest or a one-eighth interest in the net profits. Defendant insisted that the interest so secured was a one-sixth, and thereupon plaintiff executed an assignment in favor of defendant in the following form: "Los Angeles, Cal., June 22d, 1905. For value received I hereby sell, transfer, and convey to Daniel Stone all my right, title, and interest in and to one-half of my one-sixth interest in and to the Wellington Heights Tract. [Signed] Geo. C. Martin." At the time this assignment was executed, it was orally agreed between plaintiff and defendant that, in the event it was found that the interest of Martin was for one-eighth instead of one-sixth of the profits, the difference between one-half of a one-sixth interest and one-half of a one-eighth interest should be returned to plaintiff by defendant whenever a final settlement was had with Strong and Dickinson. In September, 1906, defendant made a final settlement with Strong and Dickinson and collected on the assignment given him by plaintiff one-twelfth of the profits derived from the sale of the land. It was then found that plaintiff's interest was a one-eighth interest, instead of a one-sixth, in such profits, and therefore the amount collected by defendant was $1,589.52 in excess of one-half of the amount due plaintiff under his contract with Strong and Dickinson. Defendant never accounted to plaintiff for this amount, and this suit was brought to recover it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff in his complaint alleged the facts briefly set out above in a first count, and then added a second count in the form of a cause of action for money had and received for his (plaintiff's) use and benefit. The trial court found all of the facts as they are here stated to be true. There was conflicting evidence as to many of the matters in issue. Under the familiar rule that the findings of the trial court will not be disturbed when made upon substantial evidence, even though there may be positive testimony in conflict therewith, the determination of the trial court as to the facts must be treated as conclusive.

It was competent for plaintiff to show the conversations had with defendant to explain the intent and understanding of the parties with respect to their contract. So far as the terms of the assignment are to be considered they were not varied by the oral testimony at all. Had the assignment purported to transfer all of the moneys to be received from Strong and Dickinson by plaintiff, plaintiff would not have been estopped from showing, under appropriate pleadings, that the money collected under such an assignment was to be held by the assignee as a trustee for the assignor. Here the defendant became plaintiff's agent in the collection of the money in so far as it exceeded in amount that which it was agreed should be paid to him. As between plaintiff and Strong and Dickinson, the assignment carried with it title to the money in favor of defendant. As between plaintiff and defendant, plaintiff was entitled to show the existing relation and the whole transaction, in order to establish the fact that defendant acted as his agent in the collection of a portion of the money. It is always permitted to be shown that the relation of principal and agent exists between two persons, notwithstanding the fact that the agent may hold the apparent legal title to the property of his principal. The court here found that it was understood between plaintiff and defendant that more money might be received on the assignment than it was agreed should become the property of defendant, and that defendant agreed that, if such excess was collected, it should be returned to plaintiff. The findings are in direct response to the issues made by the pleadings and support the judgment.

Before the conclusion of the trial plaintiff, by an amendment to his complaint, asked for, and by the judgment was awarded, a reformation of the assignment to make it express a transfer of one-half of a one-eighth interest, instead of one-half of a one-sixth interest, in the profits to be derived from the sale of the land. It was not essential to a recovery by plaintiff on the causes of action alleged by him that the assignment should be reformed. The instrument of assignment had been presented to Strong and Dickinson by defendant and honored by them, and defendant had received more money thereon than he was entitled to hold. Under his agreement he was answerable to plaintiff for the excess so received over what it was agreed should be retained by him. A reformation of the instrument, which had through the act of defendant been made to serve its purpose fully, could not in any way work prejudice to the latter.

The plea of the statute of limitations was not sustained by the evidence. The money was collected by defendant on the assignment on August 20, 1906. This action was commenced within two years thereafter, to wit, on June 17, 1908.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 170

MERCHANTS' NAT. BANK OF SANTA MONICA v. BENTEL. (Civ. 839.)

(Court of Appeal, Second District, California. Jan. 3, 1911.)

1. Bills and Notes (§ 155*)—Negotiability.

A note payable on demand, with interest, is negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407–410; Dec. Dig. § 155.*]

2. Bills and Notes (§ 284*) — Indorsement of Negotiable Note—Liability.

A blank indorsement by the payee of a negotiable note does not make him a guarantor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 654; Dec. Dig. § 284.*]

3. Bills and Notes (§ 469*)—Actions—Complaint—Requisites.

Under Civ. Code, §§ 3116, 3141, 3148, providing that an indorser of a negotiable instrument warrants that if the same is dishonored he will on notice pay it, and that a negotiable instrument is dishonored when it is not paid on presentment, and that notice of dishonor must be given, a complaint, in an action against an indorser of a negotiable instrument, which omits any allegation of presentation at the place of payment specified in the note, and of notice of dishonor, is insufficient.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1494–1502; Dec. Dig. § 469.*]

4. Bills and Notes (§ 396*) — Demand on Maker—Notice of Dishonor.

To fix the liability of an indorser on a negotiable note, demand on the maker and notice of dishonor on the indorser is necessary.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022–1028; Dec. Dig. § 396.*]

5. Bills and Notes (§ 403*)—Presentation for Payment—Place—Statutes.

Under Civ. Code, § 3131, providing that presentation of a negotiable instrument for payment must be made at the place specified therein, where a letter demanding payment is addressed to the maker at a business building not the place of payment specified, there is no presentation at the specified place.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1081–1090; Dec. Dig. § 403.*]

6. Bills and Notes (§ 419*)—Notice of Dishonor.

Under Civ. Code, § 3143, providing that a notice of dishonor must inform the indorser that the instrument has been dishonored, a mere demand of payment of the indorser is not notice to him that a like demand has been made on the maker, and payment refused.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1129–1137, 1143, 1144; Dec. Dig. § 419.*]

7. Bills and Notes (§ 467*)—Action Against Indorser—Complaint.

A complaint, in an action against an indorser of a note, which avers the purchase of the note, its indorsement and delivery to plaintiff, eliminates any claim of liability outside of that arising on the indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 467.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Merchants' National Bank of Santa Monica against George R. Bentel. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

H. C. Millsap, for appellant. Tanner, Taft & Odell, for respondent.

ALLEN, P. J. Plaintiff by its complaint alleged the execution by one Barlow to defendant of a promissory note, dated July 8, 1906, payable on demand at Barlow & Bragdon's office; interest being provided for in said note. Alleged further that defendant sold, assigned, and transferred said note, and indorsed and delivered the same to plaintiff and guaranteed the payment of the same; that on or about November 27, 1907, and repeatedly since said date, plaintiff has demanded the payment of said note, both of the maker and of defendant, but both have refused and still refuse payment. The answer put in issue the allegation of guaranty, denied the demand upon the maker, and denied the notice of dishonor. The court found in favor of plaintiff upon all of the issues, and judgment was rendered in its favor for the unpaid balance due upon said note. From this judgment, defendant appeals upon a bill of exceptions. In this bill it is specified that the evidence is insufficient to justify the finding of the guaranty, or of the demand upon the maker, or of the notice of such demand to defendant.

The laws of this state making the apparent maturity of a demand note bearing interest one year after its date, the instrument described in the complaint was negotiable. It is not disputed that the indorsement upon the note was in blank. There is no evidence in the record tending to show any contract of guaranty, or a contract other than that created by law on account of the indorsement of negotiable paper. The complaint was sufficient in its allegations as upon a guaranty, but the evidence in the bill of exceptions wholly fails to establish the same. The complaint was insufficient, when considered simply as an action against an indorser upon a negotiable instrument, in that it omitted any allegation with reference to presentation at the specified place of payment and notice of dishonor. "The indorser of a negotiable instrument warrants, inter alia, that if the instrument is dishonored he will upon notice thereof duly given to him, pay the same, with interest." Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620; Civ. Code, § 3116. A negotiable instrument is dishonored when it is not paid on presentment for that purpose. Civ. Code, § 3141. Notice of dishonor, if it be given by mail, must be deposited in the post office in time for the first mail which closes after noon of the first business day succeeding the dishonor. Civ. Code, § 3148.

The finding of the court that demand was made upon the maker of the note is not supported by any evidence. While it is true that under our Code mere delay in presenting a bill of exchange, payable on demand, with interest, does not exonerate any party thereto, and that this section applies to promissory notes as well, nevertheless, demand is necessary upon the maker, and notice of dishonor upon the indorser, in order to fix the liability of the latter. By section 3131, Civ. Code, an instrument which specifies a place for its payment must be presented at such place. The only evidence in the record tending to show demand upon the maker is the statement of an officer of plaintiff that demand for payment was made by letter. Copies of these letters were offered in evidence. They were addressed to the maker at a business building in the city of Los Angeles, not shown to have been the place of payment mentioned in the note, and no presentment of the note at that place or any other place was shown. In addition to this, the same officer concedes upon cross-examination that he knew nothing about either the writing or mailing of the letters; simply that the books of the bank contained copies thereof. There is no evidence tending to show any notice of dishonor, unless a demand upon the indorser for payment should be so construed. Section 3143 of our Civil Code, however, provides that the notice of dishonor must inform the party that the instrument has been dishonored. "An indorser's undertaking is not an absolute one. It is conditional; and notice of dishonor is provided for his benefit. It is intended to protect him from loss which may occur by reason of delay in making demand of payment of the maker, or which he may sustain by having no notice of the fact that his principal has failed or refused to pay." Stanley v. McElrath, 86 Cal. 457, 25 Pac. 17, 10 L. R. A. 545. There is nothing in the record indicating that notice of dishonor was excused. The mere demand of payment of the indorser is not notice to him that a like demand has been made upon the maker and payment refused.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Respondent insists that the indorsement of the instrument constituted a guaranty, under the authority of Tilden v. Goldy M. Co., 9 Cal. App. 9, 98 Pac. 39, and the cases there cited. These authorities have to do with instruments not negotiable in their character, and as to which the sections of the Civil Code above cited have no application. Some stress is also laid by respondent upon the fact that there was evidence tending to show that the amount due upon the note was in fact the debt of the indorser, but the complaint averred the purchase of the note, its absolute sale, indorsement, and delivery to plaintiff, thus eliminating any claim of liability outside of that arising upon indorsement.

On account of the insufficiency of the evidence to support the findings above referred to, all of which were material and necessary in support of the judgment, the judgment is reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; JAMES, J.

159 Cal. 380

NORTH ALASKA SALMON CO. v. HOBBS, WALL & CO. (S. F. 4,924.)

(Supreme Court of California. Feb. 3, 1911. Rehearing Denied March 3, 1911.)

1. SALES (§ 404*)—BREACH OF CONTRACT—REMEDIES.

A buyer, where he knows of the defect in the goods when performance is offered, may refuse to accept the goods and sue for damages for nonperformance, and, where he has paid for the goods in advance, may recover the amount paid as part of the damages, and, where part performance has been made, he may rescind the contract, restore what he has received, and recover what he has paid, or may stand on the contract and take the goods and sue for the breach of warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1146; Dec. Dig. § 404.*]

2. SALES (§ 427*)—BREACH OF WARRANTY—RIGHTS OF BUYER.

A buyer under warranty of quality may recover damages for a breach of warranty, on accepting the goods with knowledge of the defect and paying the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1210–1213; Dec. Dig. § 427.*]

3. SALES (§ 440*)—BREACH OF WARRANTY—EVIDENCE—ADMISSIBILITY.

On the issue whether cans to be manufactured and delivered complied with a warranty, questions referring to other cans not shown to be manufactured in the same manner or by the same process are properly excluded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1268; Dec. Dig. § 440.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the North Alaska Salmon Company against Hobbs, Wall & Co. From an order denying a new trial, defendant appeals. Affirmed.

Titus, Wright & Creed (C. G. Dall, of counsel), for appellant. Naphtaly & Freidenrich and Milton L. Schmitt, for respondent.

SHAW, J. This is an appeal from an order denying defendant's motion for a new trial.

The action was brought to recover damages for the breach of an express warranty in the sale of goods. The plaintiff alleged that in November, 1903, plaintiff and defendant agreed in writing that the defendant should manufacture, sell, and deliver to plaintiff at the premises of the American Can Company in San Francisco 120,000 salmon boxes, the defendant thereby expressly warranting that all said boxes should be of dry stock and free from dampness, and further agreeing to deliver the same between December, 1903, and April 10, 1904; that defendant at the time knew that plaintiff required for its business in salmon canning a large quantity of empty cans packed in dry boxes for shipment to the canneries of plaintiff on Bristol Bay, by vessels to leave San Francisco on April 15, 1904, so as to reach the canneries at the opening of the fishing season of that year, which would end about August 1st; that defendant delivered 93,000 boxes under the contract, from January 5 to March 3, 1904, at the premises of the American Can Company, for which plaintiff paid the contract price on delivery. It is further averred that a large number of boxes were not of dry stock nor free from dampness, and because thereof the cans packed therein became rusty and unfit for use, whereby the plaintiff was damaged in the sum of $15,000. The cause was tried by a jury, a verdict was rendered in favor of the plaintiff for $3,500, and judgment was given accordingly.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The evidence showed the making of the contract, as alleged, that the plaintiff about the same time had engaged the American Can Company to make a large number of cans to be packed in said boxes, and directed the defendant to deliver the boxes to said can company for that purpose, that the defendant knew that the can company was to pack the boxes with the cans for the plaintiff's use during the fishing season of 1904, and that it was a matter of common knowledge that the plaintiff would not be able to procure dry salmon boxes from other dealers or factories in time for the fishing season, if the defendant failed to deliver the boxes, or if the boxes delivered were wet or damp. Plaintiff also proved the delivery of 93,000 of the boxes and payment therefor at the contract price. As the deliveries were made, the boxes were inspected by plaintiff. At the beginning of the delivery a number of the boxes were found to be not of dry stock nor free from dampness, and the defendant was immediately notified thereof and promised that no more of that quality should be delivered. Nevertheless, a large number of the boxes subsequently delivered were not of the quality warranted. They were all, however, inspected by the plaintiff's servants and were taken and used by the plaintiff as cases, within which the cans were packed and shipped to Bristol Bay. The dampness of the boxes caused a large number of the cans to become rusty and unfit for use, whereby plaintiff suffered damages to the amount given by the verdict.

The defendant asked the court to instruct the jury that, if the boxes delivered to plaintiff were damp at the time of delivery and that fact was visible and apparent upon inspection, and that the plaintiff was aware of the said condition of the boxes, but nevertheless accepted them and appropriated them to its own use without notifying the defendant at the time of receiving them, or within a reasonable time thereafter, that they were not accepted as fulfilling the contract, that the plaintiff thereby waived any such defects and could not recover damages on account of them. This instruction was refused, and the court instructed the jury that acceptance by the plaintiff and payment of the purchase price did not relieve the defendant from liability under its guaranty, and that, if they should find that the boxes were wet and damp at the time of delivery and were accepted and paid for by the plaintiff, they should render a verdict for such damages as the evidence should show were caused by the wet and damp condition of the boxes. The defendant contends that the court erred in refusing to give the instruction asked by it and in instructing the jury as above stated.

The main question in the case, and the one which controls the decision upon the merits, involves the right of a buyer of personal property upon an express warranty of quality to recover damages for a breach of such warranty, where he has accepted the goods with knowledge of the defect in quality. The defendant contends that the only remedy of the buyer in the case of an executory contract for the sale of goods with a warranty of quality, where he obtains knowledge of a defect in the quality at the time the goods are offered for delivery, is to reject such goods and insist upon the due performance of the contract, or, if the discovery of the defective quality is made after delivery, to immediately rescind the contract and return, or offer to return, the goods received and sue for the money paid therefor. The general rule applicable to all cases of sales of property is that the buyer has an election of remedies for a breach of a contract of warranty. If he knows of the defect at the time performance is offered, he may refuse to accept the goods, insist on due performance, and sue for damages for nonperformance, if further performance is not duly offered, and if he has paid for the goods in advance, he can recover the amount of money paid thereon as part of the damages. If part performance has been made, he may rescind the contract, restore what he has received, and recover what he has paid. He need not rescind, or reject the goods, however, but may stand upon the contract, and, relying upon the warranty, may take the goods offered and sue for the damages caused by the breach.

In New York the rule is that an implied warranty does not survive acceptance, and that, if the buyer accepts the goods with knowledge of the fault, he thereby waives his right of action for a breach of the warranty (Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; Lestershire v. Ritter, 153 Fed. 573, 82 C. C. A. 527, being a case arising in New York). A case from Georgia is cited by appellant, but as the statute there provides that even an express warranty does not cover patent defects, the decisions of that state are not authority here. In this state the prevailing rule has been followed. In Polhemus v. Heiman, 45 Cal. 573, there was a warranty that wool sold to be delivered in sacks should be free from burs. Upon examination after delivery the wool was found to be very burry. The seller sued for the price, and the buyer set up the breach of warranty in reduction of the price. The court said: "Having a warranty, the defendants were not required to return or offer to return the wool. If it was not what it was warranted to be, they might have done so and thus have rescinded the contract. But they were at liberty to retain it and bring an action for the breach of the warranty, or plead the breach in reduction of damages in any action brought by the vendors for the purchase money." This case is cited and followed in Hughes v. Bray, 60 Cal. 287. In Winans v. Sierra L. Co., 66 Cal. 66, 4 Pac. 956, there was a sale of an engine with warranty that it was suitable for use on a certain sawmill tramway. It proved to be unsuitable in some respects. Upon this point the court said: "We think the court correctly instructed the jury that, when plaintiff discovered that the engine was unsuitable for the tramway, he was not bound to rescind the contract and make no further effort to carry out its purposes. He was at liberty to go on and manufacture all the lumber he could under the circumstances, and endeavor in good faith to carry out the contract; and by so doing he would not release or forfeit any claim for damages he might ultimately sustain by any breach of the contract by the defendant." In Browning v. McNear, 145 Cal. 276, 78 Pac. 723, it is said: "It is the law of this state, as it is generally elsewhere, that where there is a warranty, and it is discovered after delivery that there has been a breach thereof, the vendee may retain the property and bring an action for the breach of the warranty, or may plead the breach in reduction of damages in an action brought by the vendor for the purchase money." As will hereinafter appear, the rule is the same where the discovery is made at the time of delivery. The words "after delivery" in the quotation are of no significance. The distinction was not necessary to the decision in Browning v. McNear.

The appellant insists that the decision in Jackson v. Porter, 151 Cal. 32, 90 Pac. 122, is contrary to this doctrine and decisive of this case. In that action, however, the question of the right of the vendee, after accepting the goods with knowledge of the defects which constituted the breach of the warranty of quality, to sue for or recoup the damages caused by such breach, was not involved or discussed. That was a suit by the vendor for the price of a pump sold with a warranty as to its capacity, which the buyer was to test by trial. An examination of the record in the case shows that the answer did not aver a breach of the warranty, nor claim damages therefor as an offset or in reduction of the price. The defense was that upon trial the pump was found not to comply with the terms of the contract, and that it was not accepted at all. The question was whether or not the buyer had kept it for such an unreasonable time, after knowledge of its defect, as to constitute a waiver thereof, and an acceptance of the pump as it was. In deciding this question it was properly said that, when the property bought is tendered or delivered in fulfillment of such a contract, the buyer must promptly examine it, and, if he finds it defective, must promptly reject it; that if, with knowledge of the defect, he retains it for an unreasonable time, he will be presumed to have accepted it and waived the defect, and that he will then be liable for the contract price. Where no damages are claimed and payment of the price is resisted solely on the ground that the goods were not accepted, because they were not of the quality warranted or agreed upon, and hence that the title had not passed, the fact of acceptance, actual or constructive, with knowledge, is a complete refutation of such defense. But the rule regarding such a defense has no application to the right of a buyer to rely on a warranty, keep the defective goods, and plead the damages in reduction of the price. By such a plea he affirms the sale and his promise to pay the full price, and seeks only to offset the damages in reduction of the price. 30 Am. & Eng. Ency. of Law, 197. In the case at bar the price was paid in full before suit. The completed sale and the original obligation to pay the price is conceded. The breach of the warranty is the sole cause of action.

Upon a review of the authorities elsewhere, we find that the rule adopted in this state is fully supported. In 30 Am. & Eng. Ency. of Law, after giving the rule with respect to executed contracts of sale, the author, on page 186, refers to executory contracts as follows: "The rule in this class of cases is the same as where the contract is an executed one; the buyer's receipt and retention of the articles is not a waiver of his right of action for a breach of warranty. The fact that in such cases the buyer may rescind the contract and reject the article for the defendant's failure to meet the warranty does not alter the rule; the buyer has an election whether he will rescind the contract or, by accepting and retaining the article, confine himself to his remedy by action on the warranty. The cases sometimes cited as opposing this rule are distinguishable as being either cases in which there was no warranty and the buyer's only remedy was in rescission of the contract, or where the warranty was merely an implied one which would not survive an acceptance, or where the contract of sale contained some special provision to the effect that the acceptance and retention of the article should have the effect of a waiver." This statement of the law is supported by a long list of authorities in a large number of the states. An examination of the decisions cited shows that they fully sustain the text, and that the rule applies as fully where the buyer knows of the defect before acceptance, as where he does not discover it until afterward. In Benjamin on Sales (7th Ed.) 960, Mr. Bennett, in his American notes, says: "The mere fact of acceptance and use of the goods, even after knowledge of the defect, does not, in America, prevent a resort to an action upon a warranty. The warranty 'survives the acceptance,' it is said. The buyer need not return the goods, nor offer to do so, nor give any notice in order to sue upon his warranty." Many cases are cited in support of this statement. In 2 Mechem on Sales, § 1395, that author says: "It is well settled, where an express warranty accompanied the contract, that while, by accepting the goods, the buyer may lose his right to subsequently reject them, he does not thereby necessarily lose his right to rely upon the warranty. The express warranty survives acceptance, and, upon the great weight of authority, gives the buyer a remedy, notwithstanding the defects were visible or open to discovery at the time they were received. The buyer may reject them, but he is not compelled to do so. He may retain them and rely upon the warranty." The exception implied by the statement that he does not "necessarily" lose his right to rely on the warranty, in the foregoing section, is explained in the next section, as referring to cases of sales upon condition, where the property is to be taken upon trial and accepted, if found to comply with the contract. In 35 Cyc. 431, the rule is stated in this language: "In most of the jurisdictions the rule is laid down without qualification that the acceptance or retainer of the goods sold does not waive a breach of the warranty, and that it makes no difference whether the contract of sale is executed or executory, the warranty express or implied, or the defect patent or latent." In support of this the author of the article, Mr. Roger W. Cooley, cites cases from 19 of the states of the Union, from the federal courts, and English and Canadian cases. The most accurate and complete statement we have found upon the subject is that of Professor Williston, in his recent work on Sales, section 485 et seq. The following passage shows his views: "The problem is simply this: Does one party to a contract, who has a right to rescind the contract or refuse to go on with it, and who, nevertheless, allows the party in default to continue with the contract and accepts his defective performance, thereby manifest an agreement that the performance so received shall be taken in full satisfaction of all obligations? In the law of contracts, other than contracts to sell or sales, by the clear weight of authority this question must be answered in the negative. If a party in default on a contract is allowed to continue to perform, this is a waiver of any right of rescission or refusal to go on with the contract because of any known default that has already taken place, but the obligation of the party in default is not thereby terminated, nor his liability to pay damages for his insufficient performance. There is no reason why the rule in the law of sales should be different. When insufficient performance is received by the buyer, he should not be debarred from recovering damages because of the insufficiency, unless he has agreed to accept what has been offered him as full satisfaction of all his rights. There seems no ground for saying that the mere fact that he has taken the goods indicates such assent. * * * The weight of authority supports the view here taken." Discussing the subject further, that author continues: "The hypothesis is, therefore, that the goods which the seller tenders in his performance of the contract might have been refused by the buyer on account of the seller's failure to fulfill his obligation. The obligation of the seller may have been stated either in adjective form as part of the description of the goods, or the broken promise may have been in the form of a collateral warranty, or it may have been a warranty implied by law. * * * It is doubtful if the intention of the parties varies with the form in which the promise is put, whether as part of the description of the goods, or as a strictly collateral warranty. No doubt it is possible, however, for the buyer not merely to accept title to the goods offered, but to accept the transfer of title as full satisfaction of all the seller's obligations under the contract. Whether the buyer thus agrees to waive deficiencies in performance is logically and should, it seems, be legally a question of fact in each case. What is here insisted upon is that the mere fact that title to the goods has been accepted does not of itself warrant the conclusion that the buyer has agreed to surrender a claim against the seller, because the latter failed to perform his promise. The view here advocated, that acceptance of title does not as a matter of law indicate a waiver of claims for inferior quality of the goods, is supported by a large number of decisions in this country and is the unquestioned law of England," citing many cases. Section 488. In section 489 the author refers to the difficulties that beset a buyer where the rule is that, if he accepts the goods knowing that they do not come up to the quality warranted, he thereby waives all right of action upon his warranty. Referring to executory contracts of sale, with warranty, he says: "If the property in the goods has not passed, the buyer must not take the goods, if they do not conform to the contract; for if he does so he will thereby extinguish all claims on account of such inferiority. It is frequently a very difficult question to determine whether the property had passed in a given case—a question of doubt even for lawyers and courts. To require a business man offhand to determine whether a contract is executory, or whether the property in the goods has already passed, and impose a severe penalty upon him if he guesses wrong, is certainly an unfortunate state of the law which should not be tolerated, if, as in the matter under consideration, it is not necessary."

The defendant contends that there is a well-recognized exception to this rule in cases where the defects in the articles are obvious, or where the buyer knows of them at the time of the acceptance of the goods. In support thereof he quotes the following passage from 30 Am. & Eng. Ency. of Pl. and Pr. at page 187: "Where the defects in the article are obvious, or where the purchaser has had full opportunity for examination and knows of them, he must, either when he receives the goods or within what, under the circumstances, is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise the breach of the warranty, the contract being executory, will be deemed to have been waived." In support of this the author cites Smith v. Servis, 11 N. Y. Supp. 301,[1] and Locke v. Williamson, 40 Wis. 377. The New York case does not seem to have been considered as a sale with warranty. At most it was only an implied warranty. In that state it is held, contrary to the general rule, that an implied warranty is waived, if, with knowledge of the defect, the article is accepted. But the opposite is the rule there with regard to express warranties. The Wisconsin case supports the text, but it is clearly against the weight of authority. If one who buys goods upon an express warranty of quality must refuse to receive them if he knows they are defective at the time, and waives his right of action on the warranty if he accepts them, the warranty would be useless, since he would have the same right if he had not taken the warranty, and his damages for nondelivery of the goods would be practically the same in one case as in the other, except in the one case where greater damages are allowed by the Code. Civ. Code, § 3314.

For these reasons we are of the opinion that the court correctly instructed the jury, and that the evidence sufficiently sustains the verdict of the jury.

It is claimed that the court erred in sustaining objections to certain questions asked of the witnesses Wall and Hotchkiss. It was the theory of the defendant that the rusting of the cans after they were packed in the boxes furnished by the defendant was not caused by the wetness or dampness of the boxes, but by drops of moisture which were left upon the cans by the American Can Company in manufacturing them. These witnesses testified that they had examined a number of cans made by the can company for the plaintiff and found upon them beads of moisture, indicating that they were damp from some defect in the making of the cans. They then testified that they saw other crates filled with cans which, it is conceded, were not a part of the cans manufactured for the plaintiff. With regard to these they were asked: "What was the condition of these cans as to showing moisture?" Objection was made that the evidence was irrelevant and immaterial, since the cans referred to were not of those manufactured for the plaintiff. This objection was sustained and the ruling was assigned as error. We think the ruling was correct. There was no offer to show, and it did not appear, that the cans to which the question referred were manufactured in the same manner or by the same process as those supplied for the plaintiff. The evidence was clearly collateral and irrelevant to the issue.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

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15 Cal. App. 45

BIBBY v. DIETER. (Civ. 754.)

(Court of Appeal, Third District, California. Dec. 15, 1910.)

1. RECEIVERS (§ 55*)—APPOINTMENT—VALIDITY.

Where a receiver was appointed on an ex parte application, and the order was made without any undertaking being required as is necessary under Code Civ. Proc. § 566, the order was void and could not be validated by any subsequent proceeding.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 94, 400; Dec. Dig. § 55.*]

2. RECEIVERS (§ 58*)—APPOINTMENT—VACATION.

Where a court became convinced that it had exceeded its jurisdiction in the appointment of a receiver, it was proper for it to annul his authority.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 97-102; Dec. Dig. § 58.*]

3. RECEIVERS (§ 55*)—APPEAL—EFFECT.

In an action in which a receiver was appointed, judgment was rendered for defendant, and there was incorporated in the judgment a direction that the order appointing the receiver be vacated. The order appointing the receiver was void, and an appeal was taken from the judgment. *Held* in an action in claim and delivery against the receiver, defended on the ground that he held the property as receiver, that the appeal and stay bond in the other action did not preclude plaintiff's recovery.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 55.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Samuel Bibby against George W. Dieter. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

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[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Hun, 601.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Louis P. Boardman and F. A. Kelley, for appellant. Rankin & Julian, for respondent.

BURNETT, J. The action is in claim and delivery. Defendant denied the plaintiff's ownership and right to the possession of any of the property, and, as a further defense, alleged that he was holding the property by virtue of his appointment as receiver in an action commenced in the superior court of Lassen county by H. H. Wiencke against Samuel Bibby, that his accounts as such receiver have not been settled by said superior court nor has any compensation been allowed him, though he has spent over $200 in caring for said property, that there is another action pending between the same parties, that the plaintiff has not capacity to sue and that the court has no jurisdiction of the action.

On the 24th day of August, 1909, the order was made granting the application of the said Wiencke for the appointment of the said Dieter as receiver in said action. Before the making of said order no bond nor undertaking was fixed or required by said court of said applicant as required by section 566 of the Code of Civil Procedure, nor was any bond or undertaking made, offered, or given before the making of said order. After said receiver had entered on the discharge of his duties and taken possession of the property in controversy, defendant made a motion to vacate and set aside said order. On the hearing of said motion said Wiencke offered to furnish the bond provided and required by said section 566. The motion was thereupon denied and an order made directing the bond to be filed. An application was thereafter made to the court for an order discharging the receiver and directing him to deliver to the plaintiff herein all the property in his possession under and by virtue of said receivership. This came on for hearing on the 8th day of November, 1909, and after reciting that "it appearing to the court that there is no sufficient cause or reason for the continuance of said receivership, and that said defendant is entitled to the possession of said property, and that there is good and sufficient cause for the granting of the order applied for," the court ordered that "said receiver be and he is hereby discharged"; and that he further deliver to said defendant all of said property. Dieter thereupon made application to have this order recalled, vacated, and set aside. This application was denied on the 24th day of November, 1909. On the 26th day of October, previous, judgment was rendered in said action of Wiencke v. Bibby that "plaintiff take nothing by his said action, and that the order of this court made and entered herein on the 24th day of August, 1909, appointing a receiver in said action be and the same is hereby vacated." From the judgment the plaintiff appealed, and the judgment has been this day affirmed by this court. No. 750, 113 Pac. 876. The judgment herein was in favor of plaintiff.

1. There is no merit in the contention that the court failed to pass upon defendant's demurrer to the complaint. The record shows that it was overruled. The grounds of the demurrer were repeated in the answer on the theory that the evidence would disclose that they were well taken but they were expressly negatived by the findings of the court.

2. The only serious contention urged by appellant is, first, that "the order appointing him receiver in the case of Wiencke v. Bibby was a final order and one made within the jurisdiction of the court"; and, second, "the stay bond on the appeal from the judgment in the action in which the receiver was appointed continued the receiver in his appointment and possession."

As to the former, the answer seems to be that the court had no jurisdiction whatever to appoint the receiver. The order of appointment was, therefore, a nullity and under it the appellant had no authority to take possession of the property. Said section 566 of the Code of Civil Procedure provides: "If a receiver is appointed upon an ex parte application, the court, before making the order, must require from the applicant an undertaking," etc. Here it was, as we have seen, an ex parte application and the order was made without an undertaking being required. These inferences, therefore, necessarily follow from the admitted situation: The order is void and it could not be validated by any subsequent proceeding. Davila v. Heath, 109 Pac. 893. It must be viewed, in other words, in the light of the circumstances as they existed at the time, or, as expressed in Hobson v. Pacific States Mercantile Co., 5 Cal. App. 100, 89 Pac. 869, "The validity of the order must be determined by the proceedings upon which it is based." It is equally clear that the jurisdiction of the court to appoint the receiver could be questioned in any action in which the appointment or the alleged receiver's title is involved, for in such case the appointment is an absolute nullity. Am. & Eng. Ency. of Law, vol. 23, p. 1127. Neither can it be gainsaid that when the lower court became convinced that it had exceeded its jurisdiction in the alleged appointment it was proper for it to annul the apparent authority of the receiver and deprive him thereby of the semblance of capacity as the court's representative. Thereafter he would, of course, hold the property as an individual and could not justify by virtue of the void appointment. The foregoing necessarily answers the suggestion that permission to bring suit against the receiver should have been obtained from the court. There was no such suit for the obvious reason that defendant did not sustain that relation to the court.

Appellant is also mistaken as to the effect of the appeal from the final judgment in the original action. That suit was between different parties, and the stay bond prevented any affirmative action to carry the judgment into effect. It could have no bearing upon the void order of appointment, as that order is no part of the judgment appealed from, even if a void order could be vitalized and made operative by taking an appeal. And, as far as the formal order discharging the receiver is concerned, no appeal has been taken from it—assuming that it is appealable. It is true that in the judgment rendered on said October 26th, in the action between Wiencke and Bibby, infra, there is incorporated the direction that the order appointing the receiver be vacated, but appellant cannot complain if we accept his admission "that this was not properly a part of the judgment." Again, this, as well as the order discharging the receiver, may be treated as entirely immaterial. As we have seen, defendant in this action attempts to justify his possession of the property by virtue of his appointment as receiver. By showing, as he had a right to do, that the court had no jurisdiction to make the appointment, plaintiff demonstrated that defendant was unlawfully holding the property, and the effect of this showing could neither be increased nor diminished by any formal order discharging a receiver who never had any authority to act, or by vacating an order that never had any validity. In other words, the subsequent orders in reference to the receivership were rendered immaterial by reason of the want of jurisdiction to make the appointment. When plaintiff showed this want of jurisdiction he successfully met and overcame the claim of defendant to the right of possession and the former by his evidence thereby dissipated even the color of title under which the latter held possession.

No other point seems to demand specific attention. The contentions of appellant, as we view them, are entirely untenable and the judgment is affirmed.

We concur: CHAPMAN, P. J.; HART, J.

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15 Cal. App. 50

WIENCKE v. BIBBY. (Civ. 750.)

(Court of Appeal, Third District, California. Dec. 15, 1910.)

1. Receivers (§ 58*) — Discharge of Receiver.

An order vacating the appointment of a receiver in effect discharges him.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 97–102; Dec. Dig. § 58.*]

2. Appeal and Error (§ 920*) — Presumptions—Appointment of Receiver.

Where error was not shown in the vacation of an order appointing a receiver it was presumably justified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714–3721; Dec. Dig. § 920.*]

3. Receivers (§ 60*)—Authority—Termination.

The rendition of judgment in favor of defendant in an action in which a receiver was appointed, terminated his authority.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 60.*]

4. Appeal and Error (§ 877*)—Parties Entitled to Allege Error.

On appeal by plaintiff in an action in which a receiver was appointed, a contention that the account of the receiver should have been settled and his compensation allowed could not be considered where the receiver was not complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560–3572; Dec. Dig. § 877.*]

5. Appeal and Error (§ 920*) — Presumptions—Receivers.

On appeal it must be presumed in the absence of a showing to the contrary that everything required by law was done in the way of settling a receiver's account, etc., before he was discharged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714–3721; Dec. Dig. § 920.*]

6. Appeal and Error (§ 101*)—Right to Appeal.

An order appointing a receiver is an appealable one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 681–687; Dec. Dig. § 101.*]

7. Receivers (§ 58*)—Vacation of Order.

Where a court without any authority appoints a receiver it may vacate the order at any time without notice to an adverse party.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 97–102; Dec. Dig. § 58.*]

8. Appeal and Error (§ 1071*)—Harmless Error—Findings by Court.

Where the court made findings and conclusions in harmony with a general and special verdict of the jury, and its findings were all included in the general verdict, the defeated party was not injured by the court's action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

9. Trial (§ 352*)—Special Questions.

It was proper for the jury not to answer alternative questions.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 352.*]

10. Appeal and Error (§ 1070*)—Harmless Error—Verdict.

No harm was done plaintiff by the jury's failure to answer a question where on such issue the finding and judgment of the court were in favor of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231–4233; Dec. Dig. § 1070.*]

11. Appeal and Error (§ 1070*)—Harmless Error — Findings — Failure to Answer Interrogatories.

A special interrogatory was whether plaintiff had violated a condition of a lease, which interrogatory was proposed in view of a counterclaim by which defendant asked damages for interference by plaintiff with defendant's enjoyment of certain premises, and it was not answered. *Held*, that plaintiff was not prejudiced, as neither an affirmative nor negative answer could be deemed important in view of a negative answer to another question as to whether defendant had been damaged by any act of the plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231–4233; Dec. Dig. § 1070.*]

12. Trial (§ 349*)—Special Issues.

Code Civ. Proc. § 625, provides that the court may direct the jury to find a special verdict upon all or any of the issues and may instruct them if they render a general verdict to find upon any particular question of fact. *Held*, that it was proper for the court to submit special issues, though it was not done on the agreement of the parties or in response to the request of either party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823–827; Dec. Dig. § 349.*]

13. Appeal and Error (§ 1040*)—Harmless Error—Ruling on Demurrer.

Where defendant set up a counterclaim, and the jury found that defendant was not damaged by the acts complained of in the counterclaim, and the judgment gave him nothing on it, failure to sustain a demurrer to the counterclaim, if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089–4105; Dec. Dig. § 1040.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by H. H. Wiencke against Samuel Bibby. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. M. Boardman, for appellant. Rankin & Julian, for respondent.

BURNETT, J. From the judgment in favor of defendant, the plaintiff appeals on the judgment roll. The action was for unlawful detainer, for damages, and for the appointment of a receiver. It was tried before a jury who rendered a general and a special verdict. By its findings and conclusions of law, the court decided all the issues in harmony with said verdicts of the jury, and judgment was entered accordingly. A receiver was appointed in the action on the 24th day of August, 1909, and this order was set aside and vacated on the 26th day of October, 1909, the date when the judgment herein was rendered. The contentions of appellant are: "First. That the decision of the court in discharging the receiver was erroneously made and the same is against law. Second. That, in the decision of the case, the trial court withdrew the issues of fact or case from the jury, whose province alone it was to decide. Third. The special verdict of the jury in the case does not meet the requirements of the law. Fourth. The trial court should have sustained the demurrer to the answer upon the grounds stated."

As to the first objection, it is to be observed that the order does not in terms discharge the receiver although it may be conceded to have that effect, since it vacates and sets aside the order appointing him. The action of the court cannot be disturbed for the simple reason that error is not shown. It was probably not necessary for the court to make this formal order but appellant has shown no ground for complaint. The presumptions are, of course, in favor of the regularity of the proceedings, and we must assume that the court was entirely justified in making the order. Kahn v. Mattai, 115 Cal. 692, 47 Pac. 698. The evidence is not brought up and hence there is nothing for us to review. If necessary, several reasons could be suggested why the court's action should be considered warranted. Upon the assumption that the order appointing the receiver was void as being in excess of the jurisdiction of the court, it was proper, although not essential, to vacate and set it aside. Again, judgment was rendered in favor of defendant. This of itself would terminate the authority of the receiver who is appointed to hold and preserve the property only during the pendency of the action. The court assuredly would not be justified in continuing the receiver in office after the rights of the parties to the action had been adjudicated, although he could be required to render his account and deliver the property to the person to whom the court awarded it. To the suggestion that the account of the receiver should have been settled and his compensation allowed there is this additional answer to be made, that the receiver is not here complaining and if these considerations should be deemed material, we must presume that everything required by the law was done before this order—treating it as a discharge—was made.

Appellant is also at fault in the following contention: "The order appointing the receiver could have been vacated only on appeal, and could not be reviewed by this court on appeal from the judgment. The portion of the judgment purporting to vacate the order appointing the receiver is by its terms in the nature of a collateral attack by the court on its own order." It is true that an order appointing a receiver is itself an appealable order, but if it appears upon the face of the record to have been made without any authority by the court it may be vacated and set aside by the same court at any time. This is settled beyond any controversy. The rule is stated in Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740, as follows: "The power of a court to vacate a judgment or order void upon its face is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court. While a motion for such action is entirely appropriate, neither motion nor notice to an adverse party is essential. The court has full power to vacate such action on its own motion and without application on the part of any one." See, also, People v. Davis, 143 Cal. 673, 77 Pac. 651, and cases therein cited. But we have already devoted more attention to this point, probably, than it merits, and, besides, it is further considered in the opinion filed herewith in the case of Bibby v. Dieter (No. 754) 113 Pac. 874. It is sufficient to declare in conclusion that the whole contention of appellant as to the receivership is based upon a hypothetical case not found in the record.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It cannot be said that the court withdrew the case from the jury. The fact is that the jury found on all the issues made by the pleadings. What was not covered by the special verdict was included in the general verdict for defendant. The court's findings and conclusions of law were also in accordance with said verdicts. It was not really necessary for the court to make any findings since the verdicts of the jury could be considered conclusive of the whole case. Johnson v. Mina Rica Gold Min. Co., 128 Cal. 522, 61 Pac. 76. But it is equally clear that appellant was not injured by the court's action, since its findings are all included in the general verdict of the jury. Churchill v. Louie, 135 Cal. 612, 67 Pac. 1052. The court, in its findings, recites that "after hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider their verdict, the court having submitted to the jury certain special interrogatories in writing as to the facts at issue in said cause to be answered by them. And the jury, upon their return into court, presented their special verdict on said interrogatories, as well as a general verdict 'for the defendant,' both duly signed by their foreman, which said special and general verdicts the jury, upon a poll thereof, declared to be their verdicts. And now the court having received the special and general verdicts of the jury and having fully heard, seen, and considered the proofs adduced at the trial, finds the facts and conclusions of law herein as follows." Then appears, as already stated, the specific decision of the court as to each of the issues. It is manifestly the same as though the court had made no findings but directed judgment in favor of defendant or had formally adopted the findings of the jury. The result is the same and appellant has no ground for complaint since no question is raised, nor can be, as to the sufficiency of the evidence to support the findings and judgment.

The objection as to the special verdict is that "it is incomplete and defective. To several of the questions which embraced special issues no answer or special finding was made by the jury, nor did they specially find upon other material issues essential to the decision of the case." Certain alternative questions were not answered and properly so. No answer was given to the last special interrogatory, which was as follows: "Has the plaintiff violated the terms and conditions of the lease, and if so by what act or acts?" Otherwise, the findings were complete. The said unanswered interrogatory was proposed in view of a counterclaim set up by defendant in his answer by virtue of which he asked for damages for the unwarranted interference by plaintiff with defendant's enjoyment of the premises. But it is perfectly clear that no harm has been done appellant by the jury's failure to answer the question, for the reason that upon this issue the finding and judgment of the court were in favor of plaintiff. Thus he was given the advantage that would follow from a negative answer to the question. He could neither expect nor obtain anything more. Besides, neither an affirmative nor a negative answer to the question could be deemed important in view of the negative answer of the jury to a former question, No. 4: "Has the defendant been damaged by any act or acts of the plaintiff as set out in defendant's answer and counterclaim?"

It does not appear whether the special issues were submitted to the jury in response to the request of either party or the agreement of both or otherwise. Neither does it appear that any objection was made to the court's action in the matter. But these considerations may be ignored since the course pursued by the court is directly authorized by section 625 of the Code of Civil Procedure, providing that "In an action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." In pursuance of this statutory authority the court submitted to the jury this question: "Has the plaintiff been damaged by any act or acts of the defendant as set out in the plaintiff's complaint?" To which the jury answered, "No." The same answer was returned to the following question: "Has the defendant been damaged by any act or acts of the plaintiff as set out in defendant's answer and counterclaim?" We can see nothing improper in the course pursued.

There is nothing in the cases cited by appellant which lends support to his claims. In McDermott v. Higby, 23 Cal. 489, it seems to have been contended that there was a conflict between the special verdict and the general verdict, but the court, while declaring that where there is such a conflict the special verdict must prevail, held that the special findings did not cover all the issues and therefore the special verdict could not "properly be deemed inconsistent with the general verdict." In re Sanderson, 74 Cal. 199, 15 Pac. 753, involved the settlement of an executor's account and a reversal was sought upon the ground that the court failed to find upon the issues made by the contest. In discussing the question whether issues of fact in probate proceedings for the settlement of an account must be submitted to a jury on demand of a party, the court said: "A special verdict must pass on all the issues by presenting the conclusions of fact bearing on all. Code Civ. Proc. § 624." The court, however, was contemplating a case where no general verdict is rendered and all the issues are submitted to the jury. Manifestly, in such contingency, the jury should present the conclusions of fact as to all the issues. In Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283, the gist of the decision is that the defendant was entitled to a jury trial in an action to determine an adverse claim to real estate when the pleadings show that the plaintiff is in possession, and the answer sets up as a defense a cause of action in ejectment, averring that defendant was rightfully in possession, and was ousted by the plaintiff before the commencement of the action, and that the plaintiff wrongfully withholds the possession from the defendant. In Estate of Keithley, 134 Cal. 9, 66 Pac. 5, it was held that it was proper for the court to submit certain questions to the jury covering the issues growing out of the contest of the will and that together the questions and answers constituted a special verdict. The law is correctly stated in all these cases, but appellant has made a wrong application of them to the facts of the case at bar.

Lastly, it is claimed that the "portion of the answer to which the demurrer is directed does not state a cause of action or a counterclaim as defined in the law, nor is either of the items of damage sought to be recovered proximate or flow from the acts complained of." Here again the question is merely of academic interest. The jury found that defendant was not damaged by the acts complained of, and the court adopted this view and awarded defendant nothing upon his so-called "counterclaim." Hence, it is clear that the error, if any, was entirely without prejudice.

We feel satisfied that there is no ground whatever for interfering with the judgment of the court below, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

15 Cal. App. 89

PEOPLE v. BARTNETT. (Cr. 199.)

(Court of Appeal, First District, California. Dec. 20, 1910.)

1. EMBEZZLEMENT (§ 35*) — PROSECUTION—PROOF—VARIANCE.

St. 1891, c. 264, § 4, authorizes an administrator to deposit with certain corporations for safe-keeping the personal assets of the estate, and provides that the property deposited shall be held by the corporation under the order of the court. The court ordered accused, a special administrator, to deposit certain securities with a trust company to be held by it and paid out under the orders of the court. Accused had theretofore deposited the securities with the trust company, and no new receipt was given to him when the order was made, but he notified the trust company of the order, and formally relinquished control over the securities. An officer of the trust company appropriated to his own use certain of the securities, and the state claimed that accused aided and abetted him in doing so. *Held*, that there was a fatal variance between the allegations of the indictment, which charged an appropriation of the money by accused as special administrator, and the proof, since accused was not guilty of embezzlement as an administrator, even if he aided and abetted the officer of the trust company.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55–59; Dec. Dig. § 35.*]

2. CRIMINAL LAW (§ 678*) — ELECTION BETWEEN ACTS.

In a prosecution for embezzlement as a special administrator, in which it appeared that accused had embezzled securities on distinct dates, so as to constitute separate offenses, the prosecution should have been compelled to elect, at least at the close of the district attorney's statement, as to which particular offense the state would rely on.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678;* Indictment and Information, Cent. Dig. §§ 425–437.]

3. EMBEZZLEMENT (§ 48*)—INSTRUCTIONS—APPLICATION TO ISSUES.

In a prosecution for embezzlement as a special administrator committed on May 13th, and other dates, in which the prosecution elected to stand upon the offense committed on the date named, it was error to instruct that the jury should convict if defendant aided another to dispose of securities described in the indictment; the indictment describing the securities appropriated on May 13th as well as on other dates.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72–75; Dec. Dig. § 48.*]

4. CRIMINAL LAW (§ 823*) — INSTRUCTIONS—CURE OF DEFECTS.

The error was not cured by an instruction that the jury should consider sales of securities at times other than May 13th for the sole purpose of determining accused's intent; such an instruction at most conflicting with the erroneous instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995; Dec. Dig. § 823.*]

5. EMBEZZLEMENT (§ 48*)—PROSECUTION—INSTRUCTIONS—REQUESTS.

In a prosecution of a special administrator, under Pen. Code, § 506, for embezzling funds of the estate, it was error to refuse requested instructions that, in order to convict, the securities embezzled must have been in defendant's possession or control as special administrator at the time of the embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72–75; Dec. Dig. § 48.*]

6. CRIMINAL LAW (§ 833*)—PROSECUTION—INSTRUCTIONS—SUFFICIENCY.

In a prosecution for embezzlement under Pen. Code, § 506, making every executor, etc., who fraudulently appropriates property intrusted to his control to any purpose not in the lawful execution of his trust, guilty of embezzlement, the mere reading of the section to the jury was not a sufficient compliance with requests for an instruction that it was necessary that the securities of the estate embezzled were in accused's possession or control as special administrator at the time of the embezzlement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2015; Dec. Dig. § 833.*]

7. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that a reasonable doubt must arise out of the evidence was erroneous, since it might arise from the lack of evidence upon an issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1904–1922; Dec. Dig. § 789.*]

8. CRIMINAL LAW (§ 369*)—PROSECUTION—ADMISSION OF EVIDENCE—OTHER OFFENSES.

In a prosecution of a special administrator for embezzling securities of the estate on a certain date, it was error to admit evidence of embezzlement on other dates; such embezzlements constituting distinct offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

9. EMBEZZLEMENT (§ 38*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution of a special administrator for embezzling securities of the estate, it was error to admit evidence of statements by accused that his accounts filed as administrator contained discrepancies, and that he refused to state what they were; it not appearing that the discrepancies related to the securities embezzled.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 61, 65, 66; Dec. Dig. § 38.*]

10. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a prosecution of a special administrator for embezzling securities belonging to the estate, testimony as to what another did in selling such securities was hearsay, where witness was not present when the sales were made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. §§ 419, 420.*]

Appeal from Superior Court, City and County of San Francisco; William M. Conley, Judge.

W. J. Bartnett was convicted of embezzlement, and from the judgment of conviction and order denying a new trial he appeals. Reversed.

Gray & Cooper, Thomas J. Geary, and R. Porter Ashe (Samuel M. Shortridge, of counsel), for appellant. Attorney General Webb, W. H. Langdon, Dist. Atty., and Wm. Hoff Cook, Asst. Dist. Atty., for the People.

HALL, J. The defendant was charged, under section 506 of the Penal Code, with embezzling certain bonds, alleged to have been in his possession, care, custody, and control as special administrator of the estate of Ellen M. Colton, deceased. A verdict of guilty was rendered. Defendant moved for a new trial, which was denied, and judgment rendered upon the verdict, whereupon defendant appealed to this court from the judgment and order.

1. It is claimed that, when the embezzlement for which defendant was convicted took place, the bonds were not in the possession, custody, or control of defendant as special administrator of said estate, but had been, previously to such embezzlement, placed in the custody and care of the California Safe Deposit & Trust Company, to be by it held under the orders and directions of the court. That for this reason the charge made in the indictment is not sustained by the evidence. After careful consideration, we are of the opinion that this contention of appellant must be sustained. Section 4 of the act entitled "An act authorizing certain corporations to act as executors," etc. (St. 1891, p. 490, amended St. 1897, p. 424), provides that under certain circumstances the court may order the administrator to deposit with such corporation for safe-keeping such portion or all of the personal assets of the estate as it shall deem proper, * * * "and the property as deposited shall thereupon be held by said corporation under the orders and directions of said court." The court did on the 5th day of December, 1906, make an order in the matter of the estate of Ellen M. Colton, deceased, whereby it "ordered that the said Walter J. Bartnett, the said special administrator of the estate of Ellen M. Colton, deceased, deposit all moneys and securities of said estate now in his hands or which may come into his hands hereafter with the California Safe Deposit & Trust Company, a California corporation, * * * said moneys to be paid out only on the orders of this court, and said securities to be held by said trust company for safe-keeping, under the orders and directions of this court." The securities had, in fact, been deposited with said corporation prior to this date and a receipt given therefor to said defendant, which was filed with said court. No new receipt was given upon the making of the order, but the corporation was promptly informed of the order by defendant, and he thus relinquished to the corporation the custody and control that he theretofore had held over the Colton securities as special administrator. Thereafter the trust company held the custody and possession of the said securities under the orders and directions of the court, and defendant did not have the custody or control of said bonds as special administrator. The district attorney elected to try the defendant for an embezzlement that occurred May 13, 1907. The evidence of J. Dalzell Brown is to the effect that he caused certain of the Colton bonds to be taken from the trust company, of which he was manager, by another officer of the trust company, one Robertson, and sold on said date for the benefit of the trust company or bank as it was styled by the witnesses. It is not claimed that defendant himself sold or disposed of the bonds in question. The theory of the prosecution was that he advised and encouraged Brown to do so. But Brown was not the administrator of the Colton estate, and the Colton bonds were not in his possession or control as administrator, but as the manager of the trust company. In selling the bonds, Brown acted in violation of his

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trust as such manager. If defendant was guilty of aiding and abetting, advising, and encouraging Brown to sell the bonds, defendant was guilty as a principal, with Brown, in the offense committed by Brown. But the offense committed by Brown was not embezzlement by an administrator. It was not the offense charged against defendant. The record presents a case of fatal variance between the proof and the allegations of the indictment, and for this reason the judgment and order must be reversed. We do not see how this vice can be cured by a retrial, which probably makes it unimportant to notice other errors, of which there are disclosed a goodly number, some of which we shall nevertheless point out.

2. The indictment charges the embezzlement of a long list of securities. The district attorney in his opening statement disclosed that he expected to prove in support of the charge that the enumerated securities were embezzled in different parcels and at different times. In other words, he expected to prove several distinct embezzlements, any one of which, if proved, would support the charge set forth in the indictment. At the close of this statement, the defendant requested the court to direct the district attorney to elect which offense he would rely upon as the one for which the defendant would be tried. The request was denied and exception taken. Evidence was given tending to prove an offense committed about two years before the date alleged in the indictment, whereupon the motion to compel the district attorney to elect was renewed and denied, and exception taken. Subsequently, however, the court did compel the district attorney to elect, and he elected to rely upon a sale of certain enumerated securities that occurred May 13, 1907. The court should have compelled an election as early at least as the close of the district attorney's opening statement. People v. Williams, 133 Cal. 166, 65 Pac. 323; People v. Castro, 133 Cal. 11, 65 Pac. 13; People v. Hatch, 109 Pac. 1097. Whether or not the error was cured by the subsequent direction and election need not be decided, as the judgment must be reversed for other reasons, and upon a retrial, if one be had, the court will doubtless follow the rule laid down in the cases above cited, and compel an election at the commencement of the trial.

3. In the indictment the defendant is charged with the embezzlement of a long list of securities. The evidence tended to show that various sales and hypothecations of different portions of the securities had been made at different times, for the benefit of the trust company, by J. Dalzell Brown. In other words, a number of distinct appropriations constituting distinct and separate offenses had been proven. Especially evidence had been given of distinct and separate sales of Colton bonds on May 10, May 11, and May 13, 1907, by Brown or by his direction. It was the sale of May 13, 1907, that had been selected by the district attorney as the offense for which defendant was being tried. The theory of the prosecution was that defendant had aided and abetted, or had advised and encouraged, Brown to sell and dispose of said bonds, and in support of this theory evidence had been given by Brown that defendant in 1905 told Brown to use the Colton bonds for the benefit of the bank, and again about May 13, 1907, asked him why he did not use some of the Colton securities.

Under this condition the court of its own motion instructed the jury as follows: "If you believe from the evidence in this case to a moral certainty and beyond a reasonable doubt that the defendant, W. J. Bartnett, was the duly acting and qualified administrator of the estate of Ellen M. Colton, deceased, and that as such special administrator there came into the control and possession of the defendant the bonds, or any part of them, described in the indictment, and thereafter the defendant deposited the bonds with the California Safe Deposit & Trust Company; and if you further believe to a moral certainty and beyond a reasonable doubt that the defendant, W. J. Bartnett, aided and abetted J. Dalzell Brown, or any other person, to sell or dispose of said bonds or any portion thereof, or, not being present, that the defendant advised and encouraged the said J. Dalzell Brown, or any other person, to sell and dispose of any portion of said bonds on or about May 13, 1907, then it is your sworn duty to convict the defendant." This instruction is clearly erroneous. As before stated, defendant was being tried for an offense committed on May 13, 1907, and we may further add that the district attorney in making his election identified and specified the particular bonds claimed to have been embezzled on that day. The indictment enumerated a long list of bonds, containing many more than those selected by the district attorney. Passing the matters enumerated in that portion of the instruction preceding the semicolon, the jury were told by this instruction that it was their sworn duty to convict the defendant if they found that he aided and abetted Brown, or any other person, to sell and dispose of the bonds mentioned in the indictment, or any portion thereof, notwithstanding that he was upon trial for embezzling the bonds enumerated by the district attorney as having been sold on May 13, 1907, and none other. By the latter part of the charge the jury were authorized to convict if he advised and encouraged Brown or any other person to sell and dispose of any of the bonds mentioned in the indictment on or about May 13, 1907. This would include the bonds sold on May 10th and 11th, as well as the bonds sold on May 13th. The jury were not even required to find that Brown did in fact sell and dispose of any of the bonds. It was sufficient if defendant advised and encouraged him to do so. This instruction was clearly erroneous, and deprived defendant of his right to be tried for but one offense under one indictment. It cannot be said that this instruction was modified or controlled by other instructions. It was a separate and independent instruction, complete in itself, ending with an instruction to convict under the circumstances therein enumerated.

The only instruction that has been called to our attention that may be claimed to qualify the instruction above set forth is one to the effect that the jury may consider evidence of sales of the Colton securities at times other than May 13, 1907, for the sole purpose of determining the intent of defendant, etc. The best that can be said of this instruction is that it is in conflict with the instruction now under consideration. "When the instructions on a material point are contradictory, there should be a new trial." People v. Anderson, 44 Cal. 65; People v. Valencia, 43 Cal. 552; People v. Bush, 65 Cal. 129, 3 Pac. 590; People v. Marshall, 112 Cal. 422, 44 Pac. 718; Estate of Calef, 139 Cal. 673, 73 Pac. 539.

4. The court also erred in refusing to give instructions requested by the defendant to the effect that it was necessary for them to find, before they could convict the defendant, that the securities embezzled were in defendant's possession or control, as special administrator of the estate of Ellen Colton, deceased, at the time of the alleged embezzlement. Several instructions to this effect were asked, and all refused, and no equivalent instruction given. The only one claimed by the respondent as covering the question is one in which the court merely read the section (506, Pen. Code) defining the offense. This was manifestly wholly inadequate to direct the attention of the jury to the principle enunciated in the refused instructions. An instruction which the court gave upon the question of reasonable doubt we think was certainly not an accurate statement of the law, in that it informed the jury that a reasonable doubt must arise out of the evidence in the case. It ignored the manifest fact that a reasonable doubt may very properly arise out of the lack of evidence upon some issue involved.

5. Evidence was admitted over the objection and exception of defendant tending to show various embezzlements other than the one selected as the offense for which defendant was being tried. One concerned 100 Western Pacific Railway bonds, which the district attorney claimed were never brought or sent to California at all. If this theory was correct, they were appropriated two years before the occurrence for which defendant was tried. Two others were hypothecations of bonds in 1905. None of these transactions tended to show motive for the commission of the offense of May 13, 1907, nor did evidence thereof throw any light upon the intent with which the bonds were sold in May 13, 1907. They were simply independent transactions of the same general character as the transaction of May 13, 1907, and had no causal connection therewith. Neither was the evidence of these prior appropriations so interblended with the evidence concerning the sale of May 13, 1907, as to make it necessary to introduce the evidence concerning the prior appropriations in order to make intelligible or clear the evidence concerning the sale of May 13, 1907. The evidence in question was clearly of a collateral matter, and the objection thereto should have been sustained.

6. Over the objection of defendant, evidence was admitted of statements made by defendant that his accounts filed with the court in the matter of the estate of Ellen M. Colton, deceased, contained discrepancies, and that he refused to state what they were. The accounts were not produced, and it does not appear what the discrepancies were, nor that they in any manner related to the bonds which defendant is charged to have embezzled. The matter thus proved simply tended to prejudice the jury against defendant without throwing any light upon the issue being tried. The admission of this evidence was error.

7. Over the objection of defendant, the court permitted J. Dalzell Brown to testify to what Robertson did in selling the bonds through Hutton & Co. Brown was not present, and his testimony in relation thereto was purely hearsay, and the objection thereto on this ground should have been sustained. This testimony related to the sale that was the basis of the charge upon which defendant was tried.

As before stated in the first point discussed in this opinion, there is a fatal variance between the proof and the charge set forth in the indictment, and we do not see how this defect can be cured upon a retrial. We therefore do not deem it necessary to discuss all the points raised in the briefs. To do so would extend this opinion to a great length to little benefit.

For the errors above noted, the judgment and order must be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; KERRIGAN, J

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15 Cal. App. 71

AGOURE v. LEWIS. (Civ. 831.)

(Court of Appeal, Second District, California. Dec. 19, 1910. Rehearing Denied by Supreme Court Feb. 17, 1911.)

1. Landlord and Tenant (§ 130*)—Disturbance of Possession—Liability of Landlord—Breach of Covenant.

Civ. Code, § 1927, provides that agreements of letting upon hire bind the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring against all persons lawfully claiming the same. Defendant on August 29, 1906, leased to plaintiff for 22 months, to commence January 21, 1907, certain land. P. A. was in possession of the land under lawful lease from the owners, and it was determined in litigation to oust him that he was entitled to possession until March 6, 1907. Plaintiff had been a tenant of P. A. but his lease expired in November 1906, but he was permitted by P. A. to occupy a house but instructed by P. A. not to farm the land. He did farm the land and gave defendant his share of the crops as rental under the lease commencing January 1, 1907. During January and February, 1907, P. A.'s cattle got upon the land and did damage to the plaintiff's crop. *Held*, that plaintiff was entitled to damages from defendant as for breach of the implied covenant for quiet enjoyment, as P. A.'s act was the act of one lawfully claiming possession.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470, 471; Dec. Dig. § 130.*]

2. LANDLORD AND TENANT (§ 130*)—DISTURBANCE OF POSSESSION—STATUTE—BREACH OF COVENANT.

Under Civ. Code, § 1927, providing that agreements of letting upon hire bind the letter to secure the hirer quiet possession, etc., it is necessary to show an eviction, in order to recover as for breach of the implied covenant for quiet enjoyment, but it need not be from the whole premises; it is enough that possession has been disturbed to his damage by a person entitled to the use or possession of the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470, 471; Dec. Dig. § 130.*]

3. LANDLORD AND TENANT (§ 130*) — COVENANT FOR QUIET POSSESSION.

The guaranty of the lessor is that he will see that the tenant is not disturbed by any one having a right to the possession and any interference of the tenant by any such person establishes a cause of action in favor of the tenant against the landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 471; Dec. Dig. § 130.*]

4. LANDLORD AND TENANT (§ 130*)—EVICTION — QUIET POSSESSION—COVENANT—FINDING OF COURT.

A finding that, between stated dates, one P. A. had a large number of cattle on a certain portion of a ranch, so leased by him, but that such cattle were not by him kept on the land so leased to plaintiff herein, but did on various occasions escape from their herders and come upon the land so leased by plaintiff, trespassing thereon and damaging the same, amounted to a finding that there was a breach of covenant guarantying to plaintiff the quiet possession of the land leased.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 130.*]

5. LANDLORD AND TENANT (§ 130*)—BREACH OF COVENANT FOR QUIET ENJOYMENT—ACTS OF THIRD PERSONS "LAWFULLY CLAIMING."

Where P. A. appealed from a finding of the court on April 21, 1907, and it was determined on appeal that P. A. was entitled to possession of the leased lands until March 6, 1907, and the court found there was no damage done after said March 6th, P. A. having given bond under Code Civ. Proc. § 945, providing for indemnifying the owner against waste, etc., P. A. was rightfully in possession pending the appeal, and a disturbance of the possession by him was a disturbance by a person lawfully claiming the same within the meaning of Civ. Code, § 1927, creating an implied covenant for quiet enjoyment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470, 471; Dec. Dig. § 130.*]

Appeal from Superior Court, Ventura County; Frank R. Willis, Judge.

Action by John Agoure against J. F. Lewis. From a judgment for defendant, plaintiff appeals. Reversed.

Charles F. Blackstock, for appellant. I. W. Stewart and Orestes Orr, for respondent.

JAMES, J. Plaintiff brought this action against defendant to recover damages for alleged breach of the implied covenant for quiet possession of a lease of real property. Judgment was in favor of defendant. Separate appeals taken from the judgment, and from an order denying plaintiff's motion for a new trial, are presented together.

On August 29, 1906, defendant Lewis, by a written instrument, leased to plaintiff for a term of 22 months, to commence on January 1, 1907, about 350 acres of land, the same being part of Rancho Guadalasca in Ventura county. One Pierre Agoure at that time was in possession of the land, it constituting a portion of a tract of 8,000 acres then being used for pasturage and farming by said Pierre Agoure, and of which he had rightful possession under a lease from the owners thereof. Lewis became the owner of the ranch by purchase in February, 1906, so that at the time he executed the lease to plaintiff he held the fee title. This right of possession of Pierre Agoure under his lease was sought to be terminated by a notice given by Lewis to Pierre Agoure in December, 1906. This notice was given under a term of that lease which permitted the owner, in case of sale, to terminate the leasehold estate by paying to the lessee certain damages which were fixed by the contract. Possession was not yielded by Pierre Agoure pursuant to the notice given to him by Lewis, and the matter became the subject of litigation in an action brought by Lewis against Pierre Agoure to quiet title. It was finally determined that Pierre Agoure was entitled to retain possession of the ranch until March 6, 1907. Lewis v. Agoure, 8 Cal. App. 146, 96 Pac. 327. John Agoure, the plaintiff here, had been a tenant of Pierre Agoure, occupying and using the same land described in the lease given him by Lewis. His lease with Pierre Agoure, however, expired in November, 1906. He was permitted to remain upon the property and occupy a building which he had theretofore used, but with instructions from Pierre not to farm the land. However, he testified that in pursuance of his lease from Lewis he proceeded, in January, 1907, to plow the land and plant his crops. During the months of January and February of that year a herd of about 500 cattle were being pastured on the Guadalasca ranch by Pierre Agoure. It was because of damage done to his growing crops by these cattle that plaintiff brought this action. John Agoure, from January 1, 1907, claimed to be a tenant of Lewis under the lease first mentioned, and was admitted by Lewis to occupy that relation to him during the full term of 22 months, commencing on January 1, 1907. Lewis collected from him the share of the crops agreed upon to be paid as rental, and recognized him throughout that term as being a tenant subject to the conditions of the lease made between the two men.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A consideration of the question as to whether or not the findings of the trial court sustain the judgment will be sufficient to dispose of all of the material contentions made upon these appeals. In this connection, the finding of the court most important to be considered is that numbered as finding 8, which is as follows: "That on the 1st day of January, 1907, and until about the 6th day of March, of said year, said P. Agoure had a large number of cattle on that portion of the Rancho Guadalasca so leased by him, but that said cattle were not by him kept on the said land so leased to plaintiff herein, but did on various occasions escape from their herders and come upon the lands so leased by plaintiff, trepsassing thereupon and damaging the same (but that the intrusion of the cattle upon the land so let to plaintiff did not constitute an eviction of him from said lands either by the said P. Agoure or by the said J. F. Lewis, but were acts of simple trespass committed by the cattle of said P. Agoure)." The parentheses inclosing the latter portion of the finding were inserted by us. That portion of the finding so inclosed was a statement of a conclusion of law, but it indicates that, while the court found that there had been damage suffered by reason of the intrusion of Pierre Agoure's cattle upon the land leased by John Agoure from defendant, the trial judge was of the opinion that such intrusion would not constitute a breach of the covenant for quiet possession, because the tenant was not evicted. If John Agoure suffered damage by reason of having his possession of the leased premises intruded upon, he, of course, would have an action to recover therefor, unless he was himself a trespasser thereon as against both P. Agoure and Lewis. Pierre Agoure had the right to the possession of the land up to the 6th of March, 1907, and he could not become a trespasser thereon; John Agoure could have no action for damages against Pierre in that case, and it matters not whether the cattle came upon the land held by John through mere accident, or whether they were purposely pastured there by or under Pierre's direction. Pierre had a right to pasture them there if he saw fit to do so, because the right of possession of the land was in him and he had never consented to the leasing of the same to John Agoure. As before noted, John Agoure was admittedly holding possession and farming the land under a right claimed to be given him by his lease from Lewis. Lewis could not maintain the position that the relation of landlord and tenant did not exist between him and John Agoure, for he claimed the right to and did receive all of the benefits provided to be received by him under the lease for the full term thereof. Therefore, John Agoure was compelled to look to his lessor if he was to have damages at all. The obligation of a lessor of real property respecting the matter of securing the quiet enjoyment of possession to his tenant is expressed in section 1927, Civ. Code, as follows: "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." In order to constitute a breach of this covenant it is held that there must be an eviction of the tenant, actual or constructive. It is not held, however, that in order to constitute an eviction there must be an actual ejectment or ouster of the tenant from the whole premises. It is enough that his possession has been disturbed to his damage by a person entitled to use or possess the property. The guarantee of the lessor is that he will see that his tenant is not disturbed by any one having a right to the possession, and any interference with the possession of the tenant by any such person establishes a cause of action in favor of the tenant against the landlord. Levitzky v. Canning, 33 Cal. 306; McAlester v. Landers, 70 Cal. 82, 11 Pac. 505; McDowell v. Hyman, 117 Cal. 70, 48 Pac. 984; Agar v. Winslow, 123 Cal. 593, 56 Pac. 422, 69 Am. St. Rep. 84; Jones on Landlord and Tenant, § 354; Taylor on Landlord and Tenant, vol. 1, § 309.

Under the finding of the trial court it must be held that there was a breach of the covenant guaranteeing to John Agoure the quiet possession of the lands leased. The finding is that damage was suffered by reason of the intrusion of the cattle prior to March 6, 1907, but the amount thereof is not fixed. It is insisted by respondent that Pierre Agoure could not be considered as lawfully entitled to possession of the property pending the appeal taken by Pierre Agoure on April 21, 1907, in the case of Lewis v. Agoure, supra, by which judgment it was determined that Pierre Agoure was entitled to the possession of the lands until the 6th day of March only. It is true that the court finds that there was no damage done by Pierre's cattle to the crops of John Agoure after March 6, 1907, and that such finding, being made upon evidence a conflicting nature, is conclusive on this appeal. As the case must be remanded for a new trial, however, it is deemed best that our view on the question last suggested should be here stated. A bond in the sum of $12,000 was given by Pierre Agoure upon his appeal being taken in the case of Lewis v. Agoure, which bond was to indemnify Lewis for the value of the use and occupation of the property and any waste committed, under the provisions of section 945, Code of Civil Procedure. By the giving of this bond Pierre Agoure was rightfully left in the possession of the lands pending the determination of his appeal, being answerable to Lewis for the value of its use, et cetera. His position toward the tenant of Lewis would then be the same during the pendency of the appeal as it had been prior to March 6, 1907. A disturbance of the possession of John Agoure by Pierre Agoure during either of these periods would be a disturbance by a person "lawfully claiming the same," within the meaning of section 1927, Civ. Code.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

BENNETT v. POTTER.

(Civ. 899.)

(Court of Appeal, Second District, California. Jan. 3, 1911.)

1. APPEAL AND ERROR (§ 356*)—TIME FOR APPEAL.

An appeal from a judgment taken more than six months after entry thereof cannot be considered for any purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

2. APPEAL AND ERROR (§ 867*)—MOTION FOR NEW TRIAL—REVIEW.

On appeal from an order denying defendant's motion for a new trial, the sufficiency of the complaint cannot be considered, and neither can the findings be examined for the purpose of determining whether or not they support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

3. CONTRACTS (§ 19*)—OFFER AND ACCEPTANCE.

An offer may be withdrawn at any time before acceptance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 57–60; Dec. Dig. § 19.*]

4. SALES (§ 23*)—OFFER AND ACCEPTANCE—CONTRACT.

Where a purchaser of an automobile signed an instrument providing that, in consideration of the seller having ordered an automobile from an automobile company, the purchaser agree to purchase at a certain price, $75 to be paid down and the balance on delivery, and contemporaneously received a receipt for the $75, a complete offer and acceptance is present from which the purchaser cannot withdraw.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 45; Dec. Dig. § 23.*]

5. SALES (§ 359*)—SALE OF AUTOMOBILE—DAMAGES—EVIDENCE.

One agreed to purchase an automobile at $3,650, $75 was to be paid down and the balance on delivery. Contemporaneously, the purchaser received a receipt for the $75 providing that an old car should be accepted as a payment of $1,000 when the new car was delivered and paid for in full. *Held* that, in an action for the price on the purchaser's refusal to take the new car, in which defendant admitted the writings, a finding that the purchaser should be credited with $1,800, the price obtained on resale, and the $75 paid down, was not supported by evidence where there was an omission to find as to what was done with the old car.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056–1059; Dec. Dig. § 359.*]

6. TRIAL (§ 396*)—FINDINGS—EVIDENCE CONSIDERED.

Evidence to be considered in making up findings of fact, may be that furnished either by the testimony of witnesses or the admissions of parties in their pleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

7. SALES (§ 360*)—TITLE—MEASURE OF RECOVERY.

Where, under the findings of the court, in an action for the price of an automobile which defendant refused to receive on delivery, the title thereto was in the purchaser, the measure of recovery is the contract price as provided by Civ. Code, § 3310.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1060–1062; Dec. Dig. § 360.*]

8. APPEAL AND ERROR (§ 1050*)—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where plaintiff, in an action for the price of an automobile, has no right to resell and recover the difference from the purchaser, because title had passed to the purchaser, and the contract price measured the rights of the parties, whether the resale amounted to a conversion would be immaterial, and the admission of evidence of the sale not prejudicial, where the damages claimed were not in excess of the contract price.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by E. Junior Bennett against Sarah G. Potter. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Appeal from judgment dismissed, but order denying new trial reversed.

Davis, Kemp & Post, for appellant. Edw. L. Payne, for respondent.

JAMES, J. Plaintiff secured a judgment in the superior court for the sum of $1,775, with interest, for alleged breach of contract committed by defendant in refusing to accept and pay for a certain automobile under an agreement for the purchase of the same. An appeal was taken from this judgment, and from an order denying a motion for a new trial. The appeal from the judgment was taken more than six months after the entry thereof and cannot be considered for any purpose. Code Civ. Proc. § 939, subd. 1; Robinson v. Eberhart, 148 Cal. 496, 83 Pac. 452. In reviewing the ruling of the trial court in denying defendant's motion for a new trial, the sufficiency of the complaint cannot be considered, and neither can the findings be examined for the purpose of determining whether or not they support the judgment. Swift v. Occidental M. Co., 141 Cal. 165, 74 Pac. 700; Sharp v. Bowie, 142 Cal. 467, 76 Pac. 62; Coburn v. California Portland Cement Co., 144 Cal. 82, 77 Pac. 771; Jenson v. Will & Finck Co., 150 Cal. 413, 89 Pac. 113.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the appeal from the order denying defendant's motion for a new trial the sufficiency of the evidence to sustain the findings, and the rulings of the trial court in admitting certain testimony over the objection of defendant, are the questions presented for consideration.

On December 26, 1906, defendant signed the following writing and delivered it to plaintiff: "Dec. 26–06. In consideration of the E. Jr. Bennett Automobile Company having ordered from the Wayne Automobile Company one Model 'F' Wayne car, I agree to purchase said car at a total price of $3,650, as soon as ready for delivery to me, and I do hereby make a first payment of $75 on same, $425 due Jan. 1, '07, and balance of $3,150 being due the E. Jr. Bennett Automobile Company upon notice to me that the said car is ready for delivery. [Signed] Sarah G. Potter."

Contemporaneously with the making and delivery of the foregoing writing, there was issued to defendant by plaintiff the following receipt:

"Dec. 26–06. Have this day received from Mrs. Sarah G. Potter of Los Angeles, California, $75, to be applied as first payment on one Model 'F' Wayne car, the total purchase price being $3,650, the balance of $425 due Jan. 1, '07, and the balance of $3,150 to be due when said car is ready for delivery. E. Jr. Bennett Automobile Company, by E. Jr. Bennett.

"Remarks: Mrs. Potter's 'G' car to be accepted as payment of $1,000, when 'F' is delivered and paid for in full. Mrs. Potter is to have the use of an automobile one afternoon a week, until delivery of her own car, after which her car is to be kept for her free as long as necessary, in return for use of same for demonstration and show purposes."

Plaintiff set forth his cause of action in three counts and at the trial elected to proceed under the third count only. The foregoing written instruments in hæc verba were set forth in the third count, and in the answer made by defendant thereto there was no denial of the execution of these instruments. Defendant relied chiefly upon an alleged "countermand" of her order, it being her claim that by the execution of the written instruments set out above she only tendered to plaintiff an offer to purchase an automobile, which offer she might withdraw at any time before acceptance. The notice of "countermand" was served on plaintiff on or about the 23d day of January, 1907. The law as applied to the making of contracts does indeed permit a party making an offer to another to withdraw his offer at any time before it has been accepted by the latter. In this case, however, the contract of the defendant became complete upon the making and delivery of the writing set forth in the pleadings. Defendant's offer to purchase an automobile was accepted by the plaintiff when he received the initial payment and issued his receipt to the defendant. The alleged notice of "countermand" served in January was ineffectual as affecting the rights of plaintiff under his contract.

The court made its findings of fact, which were to the effect that a contract according to the terms of the several written instruments executed on December 26, 1906, between the parties hereto, had been made, and that defendant had refused to accept the automobile agreed to be purchased by her, and that plaintiff resold the same after demand upon defendant to accept the automobile, and that the price obtained therefor was the sum of $1,800, which was the best price obtainable in the Los Angeles market. In the judgment, credit for the amount of $1,800, plus the $75 paid as an initial payment, was allowed against the purchase price and judgment given for the remainder thereof. No finding was made as to whether or not the model "G" car, mentioned in the receipt issued by plaintiff, which was to be taken into account and a credit allowed therefor to the defendant, was ever received or credited; no evidence was offered on that subject. On account of this omission, we think that the finding that only the sum of $1,800 received upon the resale of the automobile and the $75 paid as initial payment should be credited to defendant, is not supported by the evidence. The receipt issued to the defendant by the plaintiff having attached thereto a statement that the defendant's model "G" car should be accepted as payment of $1,000, in our opinion, added a term to the contract of the parties not expressed in the writing signed by defendant alone. The defendant accepted the receipt with that condition stated thereon, and both the paper signed by her and the receipt were treated by the parties and by the court as expressing the terms of one and the same contract. The execution of these papers was admitted in the answer of defendant. Evidence to be considered in making up findings of fact may be that furnished either by the testimony of the witnesses or the admissions of the parties in their pleadings. On his part the plaintiff agreed that the purchase of the automobile was to be for cash in part and in part by the acceptance by him of an automobile from the defendant for which he was to allow her the sum of $1,000. There should have been some evidence to the point, and a finding also, that the automobile agreed to be received and credited on account of the purchase of the new machine was not delivered to plaintiff for that purpose, before it could properly be found that there was a cash balance due plaintiff represented by the difference between the sum of $1,800, for which the new automobile was sold, plus the $75 paid as first payment, and the total amount of the purchase price, to wit, $3,650.

In plaintiff's third cause of action it is alleged, in effect, and the court found, that the automobile agreed to be purchased by the defendant was "delivered to defendant in accordance with the agreement of sale." If title to the property purchased had vested in defendant, then the detriment caused to the seller is determined by the provisions of section 3310, Civ. Code, to be the contract price. The findings were further to the effect that there had been a repudiation of the contract of purchase by defendant and a refusal to make use of the automobile; also, that it remained in possession of plaintiff at all times up to the date when it was resold by the plaintiff. The measure of damages would be different where title had passed to the vendee than it would be where no title had become so vested. If title to the automobile in fact had passed to defendant, no right would be left in plaintiff to resell the property, except under proceedings appropriate to enforce or satisfy the lien given him by section 3049, Civ. Code. It is not found that the automobile purchased was resold by direction or with the permission of defendant. If the amount of the contract price measured plaintiff's damage, and we think it did under the findings of the court, then the measure applied by the court was an improper one, being that furnished by section 3311, instead of section 3310, Civ. Code. See, also, § 1502, Civ. Code. But whether or not the action of plaintiff in selling the automobile amounted to a conversion thereof seems immaterial. Defendant was not prejudiced by the introduction of testimony showing such sale, as the damages claimed were not in excess of the contract price fixed by the agreement of the parties. In the particulars first stated herein, however, we think that the evidence does not sustain the findings.

The appeal of defendant taken from the judgment entered herein is dismissed; the order of the trial court denying defendant's motion for a new trial is reversed.

I concur: SHAW, J.

ALLEN, P. J. I concur in the judgment of reversal. The court finds a sale and delivery by plaintiff to defendant of the motor car. Nothing is found which would indicate a reserved lien of any kind or character. The findings are such that the title passed, under section 1502, Civ. Code. The findings further demonstrate that the possession of plaintiff after delivery was that of an agent and on behalf of defendant only. No authority to sell the car is found by the court. There is nothing in the pleadings indicating any sale under authority claimed or otherwise. The contract as found by the court, all of its terms being considered, was to the effect that plaintiff sold to defendant a car for $2,650 in money, and agreed to take and receive in exchange other property of the value of $1,000. The parties seem to have proceeded to trial upon the allegations of the third cause of action and the answer thereto. There is no averment or finding with reference to any demand upon the part of the plaintiff for the delivery of the property which he agreed to receive in exchange, nor is there any allegation or finding which would justify the court in rendering a money judgment for the price and value of such property. If we consider the allegations of the first and second causes of action, they disclose that the property to be received in exchange was actually turned over and by plaintiff sold. There is, however, no finding with reference to the delivery of this property in exchange. Defendant was entitled to a credit for the agreed price, if the same was delivered and sold by plaintiff, it mattering not how he received it; for, if he converted it, under subd. 1, § 438, Code Civ. Proc., as construed by our Supreme Court in Story & Isham C. Co. v. Story, 100 Cal. 37, 34 Pac. 671, defendant was entitled to have the stipulated price set off against the contract. Under the complaint and answer, the findings being in plaintiff's favor, he was entitled to a judgment for $2,575, being the cash payment less the $75 paid, upon the payment of which defendant was entitled to the motor car. We find allegations in the complaint to the effect that the car possessed no market value from the time of its sale up until shortly before the trial of the cause, and the court finds this to be true. There is nothing in the nature of the action as brought making the value material or an issuable fact, unless it is assumed that the plaintiff anticipated a conversion in the future and was laying the groundwork therefor. In addition to all of this, the findings of the court with reference to value are decidedly inconsistent. It first finds that the property possessed no market value, and then finds it to have been sold for $1,800, which was its market value, in connection with which the bill of exceptions discloses that plaintiff during the time he held the property in his possession sold other cars of his own of similar character for $3,100.

Considering the whole record, it seems unquestioned that the judgment should be reversed and the cause remanded, to the end that, under appropriate pleadings, the trial court might be enabled to render a judgment by which the rights of the parties should be finally declared.

15 Cal. App. 84

WARD v. CALIFORNIA CELERY & PRODUCE CO. (Civ. 834.)

(Court of Appeal, Second District, California. Dec. 19, 1910.)

1. CORPORATIONS (§ 169*) — STOCK — ASSESSMENT—REDUCTION.

In view of Civ. Code, § 349, providing that at any time before the sale of delinquent stock the directors may waive further proceedings for collection and elect to proceed by action to recover the amount of the assessment and the expenses already incurred, or any part thereof, a stockholder cannot complain of the reduction by the directors of the assessment from 10 to 5 per cent.; the reduction being a waiver of a portion of the assessment as originally made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 620–623; Dec. Dig. § 169.*]

2. CORPORATIONS (§ 169*)—ENFORCEMENT OF STOCK SUBSCRIPTIONS—VALIDITY OF PROCEEDINGS—ESTOPPEL.

In view of Civ. Code, § 3515, providing that one who consents to an act is not wronged by it, and section 3518, providing that acquiescence in error takes away the right of objecting to it, a stockholder of a corporation and director, who himself offers a resolution to reduce the amount to be collected on an assessment of stock to 5 per cent., instead of 10 per cent., the amount of the original assessment, was estopped from afterwards claiming that the action of the corporation in reducing the amount of the assessment was invalid, and that the sale of the stock for delinquent assessments was void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 620-623; Dec. Dig. § 169.*]

3. CORPORATIONS (§ 169*) — STOCK — ASSESSMENT—IRREGULARITIES.

In view of Civ. Code, § 340, providing that by the publication of a notice of delinquency by the secretary of a corporation the corporation acquires jurisdiction to sell stock described in the notice of sale upon which any part of the assessment remains unpaid, where the proceedings for the sale of delinquent stock were otherwise regular, the action of the directors in reducing the assessment from 10 to 5 per cent. was, at most, a mere irregularity which would not affect the validity of the sale of the stock for nonpayment of delinquent assessments.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 620–623; Dec. Dig. § 169.*]

4. CORPORATIONS (§ 169*)—STOCK—CONVERSION—ACTIONS—TENDER.

In order to bring an action for conversion of corporate stock by selling it for a delinquent assessment, plaintiff must first pay or tender to the corporation or holder of the stock the amount for which it was sold, in analogy to the rule prescribed by Civ. Code, § 347, prohibiting an action to recover stock sold for delinquent assessment for irregularities in the assessment, etc., unless plaintiff first pays or tenders to the corporation or stockholder the sum for which it was sold.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 620–623; Dec. Dig. § 169.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by J. E. Ward against the California Celery & Produce Company. From a judgment for defendant and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

John E. Daly, for appellant. E. E. Keech and R. Y. Williams, for respondent.

JAMES, J. Plaintiff brought this action to recover damages for the alleged wrongful conversion of 276 shares of the capital stock of defendant corporation. The judgment was that he take nothing by his action, and he appeals from the judgment and from an order denying his motion for a new trial.

Plaintiff was the owner of the number of shares mentioned of the capital stock of defendant corporation on July 28, 1908. At that time he was a member of the board of directors of said corporation. Prior to July 28th, by proper resolution made and notice given, an assessment had been levied of 10 per cent. upon the capital stock of the company, which assessment was made payable on or before July 27, 1908. On July 28, 1908, at a duly called and assembled meeting of the board of directors, the plaintiff offered a resolution, which was unanimously adopted, in the following form, to wit: "Resolved, that this board hereby waives the collection of one-half of the assessment of 10 per cent. upon the capital stock of the corporation duly levied on April 27, 1908, and hereby reduces the amount of said assessment to 5 per cent. of said capital stock, to wit, $5 per share, and the treasurer, secretary, and president are hereby authorized and directed to collect and receipt for said $5 per share of assessment in full satisfaction thereof. Resolved, that in the collection of said assessment the secretary and president are hereby authorized and directed to receive in full payment, or in payment pro tanto, of any such assessment the duly audited, allowed, and unpaid bills or obligations of the corporation held by the stockholders or persons who make such payments." The plaintiff failed to make payment of any part of the amount of the assessment levied against the shares of stock held by him, and on the 17th day of August, 1908, his stock was offered for sale, pursuant to a notice regularly given by the secretary of the corporation. This notice of sale was in accordance with the resolution adopted by the directors on the 28th day of July, 1908, and recited that the amount due on the stock of plaintiff was 5 per cent. of the par value thereof. There was also credited to plaintiff the sum of $396.89 on account of an indebtedness owing by the defendant corporation to plaintiff, leaving a balance of $983.11 due on account of the assessment. No bidders appearing to make an offer to purchase the stock offered for sale to satisfy the amount due on account of said assessment, the president of the corporation bid in the stock, and it was thereupon declared sold to defendant.

The principal contention of the plaintiff made upon this appeal is that the action of the board of directors taken on July 28, 1908, whereby a reduction was made in the amount of the assessment from 10 to 5 per cent. was invalid, and that, as the notice of delinquency and sale thereafter given followed in accordance with this resolution, the sale of the stock was void and without effect. Plaintiff insists that the action taken on and subsequent to the 28th day of July, 1908, was such a departure from a due course of proceeding under the original resolution fixing the amount of the assessment as to make such subsequent proceedings void. He therefore contends that he is entitled to recover the value of the stock sold. Section 349, Civ. Code, provides: "On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof." It is very plain that the board of directors of defendant, at the time the action of July 28th was taken, did not intend to abandon proceedings instituted for the collection of the original assessment. Their action taken on that date, if not valid otherwise, was effective as waiving the right to collect more than 50 per cent. of the amount of the original assessment. If the action on the part of the directors had been to increase the amount fixed in the original resolution levying the assessment, there is no doubt but that such action would have been illegal. But if it was the disposition of the board of directors at that time to collect only one-half of the amount of the original assessment, or any other proportion thereof, such action could hardly be complained of by any stockholder. Much less can the plaintiff here make complaint of that action, because he himself was at the time a member of the board of directors and offered the very resolution by which it was determined to reduce the amount to be collected under the assessment to 5 per cent., instead of 10 per cent., of the par value of the stock. Not only by his acquiescence, but by affirmative action taken by him in inducing to be done the very thing of which he complains, he is estopped from claiming any detriment suffered thereby. Campbell v. Santa Maria Oil & Gas Co., 153 Cal. 284, 95 Pac. 39; Civ. Code, §§ 3515, 3516. Furthermore, in the view we take of the case, the action of the board in reducing the amount of the assessment, if objectionable at all, was at best a mere irregularity. The notice of delinquency published by the secretary, if faulty at all, was faulty only in the particular that it stated that a less amount was due on account of the assessment levied against plaintiff's stock than was actually owing by plaintiff. That his obligation was stated to be less than the amount actually due would not be ground for complaint on the part of the stockholder. Section 340, Civ. Code, provides as follows: "By the publication of the notice (the notice of delinquency published by the secretary), the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale." It is admitted that all of the things were done and notices given which are required to be done and given in cases where corporate stock is sold for delinquent assessments; the only objection being that heretofore stated. It is our opinion that, not only were the proceedings in regular form, but if they were irregular, plaintiff by his conduct estopped himself from asserting any objection to their regularity. And it may be noted, also, that the plaintiff made no tender of any amount due, or claimed to be due, on account of the assessment, before bringing this action. In cases where proceedings such as those taken by the directors of this corporation are in fact irregular, and a sale of stock is made under them, such stock cannot be recovered, unless the party seeking to maintain an action to recover it first pays or tenders to the corporation, or the party holding the stock sold, the amount for which the same was sold. Section 347, Civ. Code. There is no reason why this requirement should not also be applicable to a party such as the plaintiff here, who seeks to recover damages for the conversion of the stock, instead of the stock itself. H. Kraft Co. Bank v. Bank of Orland, 133 Cal. 66, 65 Pac. 143. The objection that the sale at which plaintiff's stock was purchased by defendant was irregularly conducted is without merit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

15 Cal. App. 120

PEOPLE v. DISPERATI. (Cr. 264.)

(Court of Appeal, First District, California. Dec. 28, 1910.)

1. LARCENY (§ 64*)—EVIDENCE—POSSESSION OF STOLEN PROPERTY.

Possession of property recently stolen is not of itself sufficient to justify a conviction of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170–178; Dec. Dig. § 64.*]

2. LARCENY (§ 18*)—RECEIVING STOLEN PROPERTY—CHANGE TO LARCENY.

Where a person merely receives stolen property, knowing it to have been stolen, he

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does not become guilty of larceny under Pen. Code, § 496, by afterwards selling it with intent to defraud the true owner.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 31; Dec. Dig. § 18.*]

3. Criminal Law (§ 112*)—Larceny—Receiving Stolen Property.

The crime of receiving stolen property is not one of the crimes which is triable in any county to which the receiver thereof removes the same under Pen. Code, § 786.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 226; Dec. Dig. § 112.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

E. Disperati was convicted of larceny, and he appeals. Reversed.

See, also, 11 Cal. App. 469, 105 Pac. 617.

Robert L. Hargrove, W. D. Crichton, and W. D. Foote, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was informed against for the crime of grand larceny. Upon his trial he was found guilty as charged, and sentenced to imprisonment for the term of seven years. He prosecutes this appeal from the judgment.

It appears from the record that the property stolen was certain live stock belonging to Miller & Lux in the county of Madera, and that this is the second prosecution of defendant arising out of that transaction. The first trial was had in Madera county, and the defendant was convicted, but upon appeal to the District Court of Appeal of the Third District the judgment was reversed and the cause remanded for a new trial. Thereafter the prosecution of defendant in that county was abandoned, and an information was filed against him in Fresno county on the theory that, after he had committed the larceny in Madera county, he removed the stolen property to the county of Fresno.

The evidence in the case shows that the defendant neither took nor assisted in the taking of the property from the possession of the owner, but that subsequent to the perpetration of the larceny he received it, and later sold it to one Rosconi, and was instrumental in transferring it from Madera, where he had kept it, to Fresno county where Rosconi lived. Aside from the possession of property recently stolen (which of itself in this state is not sufficient to justify a conviction), there is nothing in the case to show that the defendant was guilty of grand larceny, unless, as claimed by the Attorney General, the crime was committed by defendant when he sold the stock to Rosconi. The contention here is, and was the theory of the prosecution in the trial court, that while the defendant in the first instance may have been guilty only of receiving stolen property knowing the same to have been stolen (Pen. Code. § 496), when he afterwards sold that property to Rosconi, with the intent to defraud Miller & Lux of its value, he thereupon became guilty of the crime of grand larceny.

This position we think is untenable, and it was so held on the appeal of the former case. People v. Disperati, 11 Cal. App. 469, 105 Pac. 617. In order to constitute the crime of larceny, it is essential that the accused should have taken, or aided and abetted in the taking of, the property from the possession of the owner. In this case, as before stated, the defendant did not in any way participate in the original asportation of the property, and any subsequent guilty connection with the property would be insufficient to warrant a conviction of larceny. The doctrine is stated thus in 25 Cyc. p. 18: "The first requisite of larceny is taking possession of goods by the thief. Taking and carrying away being essential elements of the crime of larceny, no subsequent connection with the property stolen can make one guilty of theft who was not connected with the original taking." So, as has been held in this state, one who trades for stolen property, having no complicity in the taking, is not guilty of larceny, and his good or bad faith is immaterial. People v. Ward, 105 Cal. 652, 39 Pac. 33. In the appeal of the former case it appears that at the trial the jury was in effect instructed that though the defendant had no connection whatever with the original caption of the property, and had no knowledge of it at the time, nevertheless if he afterwards received it into his possession with knowledge that the same had been stolen, and subsequently participated in the disposition of it, he was guilty of larceny. There the court said that these facts "constitute the crime of receiving stolen property and nothing more." In that appeal the court quotes approvingly from Boyd v. State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908, where it is said: "The prosecution, however, being for theft, and it being absolutely essential in support of that charge to connect the defendant with the original taking to warrant his conviction, without such proof of connection any subsequent connection with the stolen animal, such as a receiver of the same, or as to the party who had illegally altered the mark or brand, would not be sufficient to warrant the conviction for theft. To inculpate a defendant as a principal offender in the crime of theft, the state must show that he had some connection with or complicity in the taking of the property. It does not suffice to prove that subsequent to the taking, and without complicity therein, but, with knowledge that the property had been stolen, he aided the taker to dispose of it." People v. Disperati, 11 Cal. App. 480, 105 Pac. 617. In that case the subject here under discussion is fully covered, and the authorities cited and quoted from, so that further comment is unnecessary.

If there had been evidence in the case legally sufficient to connect the defendant with the original caption of the stock, nevertheless we would be required to hold that the trial court was in error in failing, as it did, to give the jury an instruction embracing the rule of law just discussed. As the case was submitted to the jury they were certainly led to believe that if the defendant was in the first instance guilty of the offense of having stolen property in his possession, and subsequently, knowing that the stock had been stolen, sold it to Rosconi with the intention to permanently deprive Miller & Lux of the same, he was guilty as charged. This, as we have just seen, was improper; and in the former appeal of this case (where, by the way, the prosecution was for stealing stock not all identical with that forming the subject of the present charge, and where possibly the evidence was sufficient to justify a conviction for larceny) the court held that it was error to refuse to give to the jury the following instruction: "The jury is instructed that if you believe that the only part that defendant took in the alleged larceny was that he, after said mules were stolen, aided or assisted the person who stole them in selling or disposing of them, or participated in the profits thereof, then he cannot be convicted of grand larceny, and in such case you will acquit the defendant." In reference to this instruction the court said that as it stated a correct principle of law, and there was evidence to which it would apply, it should have been given. In People v. Del Cerro, 9 Cal. App. 764, 768, 100 Pac. 887, which was also a prosecution for stealing live stock from Miller & Lux, the evidence justified the theory that the defendant Del Cerro had originally entered into a conspiracy to steal the property. The evidence also showed that subsequent to the theft he had the property in his possession, and that he sold it. The court instructed the jury that the defendant was not on trial for receiving stolen property, and that unless they were satisfied that he was actually concerned in the commission of the larceny, or not being present advised and encouraged its commission, they should find the defendant not guilty. There, as here, the jury might have disbelieved that the defendant had anything to do with the actual stealing of the property, and yet they might have been of the opinion that his subsequent conduct in relation to the property made him guilty of larceny. The instruction in that case, therefore, was eminently proper, and for the same reason some such instruction should have been given in this case.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Receiving stolen property is not one of the crimes for which a person may be tried in any county to which the receiver thereof removes the same (Pen. Code, § 786); and, unless there is something in the statement of defendant's counsel that prosecutions for stealing stock from Miller & Lux have become obnoxious to the citizens of Madera county, we are at a loss to understand why the defendant was not prosecuted for receiving stolen property as was suggested in the opinion in the former case. People v. Disperati, supra.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

15 Cal. App. 165

UNION LUMBER CO. v. WEBSTER et al.

(Civ. 897.)

(Court of Appeal, Second District, California. Jan. 3, 1911.)

1. Appeal and Error (§ 706*)—Record—Motion for New Trial—Review.

Where a finding of facts is waived, and no evidence is presented by a bill of exceptions or otherwise, the action of trial court in denying a new trial, based upon affidavits of newly discovered evidence, cannot be reviewed, since the newly discovered evidence may have been cumulative, or might not have affected the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944–2947; Dec. Dig. § 706.*]

2. Appeal and Error (§ 981*)—Motion for New Trial—Discretion of Court.

The action of a trial court in denying a new trial for newly discovered evidence, being within the court's discretion, will not be disturbed on appeal, except for a clear abuse of such discretion, not supportable by any hypothesis.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Union Lumber Company against Mary E. Webster and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

E. L. Foster, for appellants. W. W. Kaye, for respondent.

ALLEN, P. J. This is an appeal from a judgment and an order denying a new trial. Findings of fact were waived, and no evidence is presented, by bill of exceptions or otherwise. The only question argued by counsel for appellant relates to the action of the trial court in refusing to modify its judgment, and in denying the motion for a new trial, which motion was based upon affidavits of newly discovered evidence.

This action of the court in passing upon such motion involved discretion, and will not be disturbed, except in cases where the court's abuse of such discretion is made to appear. For aught in the record, the evidence claimed to have been newly discovered may have been merely cumulative, or of such character that, if taken in connection with the other evidence, it would not have affected the judgment, and therefore would not have afforded a reasonable ground for the granting of such motion. If upon any hypothesis the action of the trial court in disposing of a motion of this kind can be sustained, it should not be disturbed upon appeal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Judgment and order affirmed.

We concur: SHAW, J.; JAMES, J.

15 Cal. App. 149

PETTIT v. FORSYTH. (Civ. 696.)

(Court of Appeal, Third District, California. Dec. 31, 1910. Rehearing Denied by Supreme Court, March 1, 1911.)

1. Contracts (§ 330*)—Actions—Parties.

Where, in an action on a contract binding defendant to pay assessments on corporate stock issued to plaintiff and a third person, the evidence showed that the third person had transferred his stock to defendant before the levy of an assessment which defendant failed to pay, resulting in a sale of the stock for nonpayment, the third person was not a necessary or a proper party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1589–1614; Dec. Dig. § 330.*]

2. Appeal and Error (§ 1036*)—Harmless Error—Erroneous Rulings as to Parties.

A defendant in an action for breach of contract to pay assessments on corporate stock issued to plaintiff and a third person is not prejudiced by the failure of plaintiff to make the third person a party where he had transferred his stock to defendant before the levy of the assessment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069–4074; Dec. Dig. § 1036.*]

3. Contracts (§ 10*)—Mutuality—Respective Interests of Parties.

Where several persons are parties to a contract, some of its provisions may relate solely and separately to one of the parties, and others to another party, and some of the provisions may relate to each party and some to all jointly.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

4. Indemnity (§ 7*)—Construction—Parties.

A contract providing for the organization of a corporation, which stipulates that stock delivered to two persons designated as parties of the second part shall be unassessable, and that, if any assessments are at any time levied on the stock, the same will be paid by the party of the first part, indemnifies each of the two persons against the payment of any assessment though Civ. Code, § 1431, provides that a right created in several persons is presumed to be joint, and not several, and a sale by one of the two persons of his stock to the party of the first part does not prevent the other from insisting on performance.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 8; Dec. Dig. § 7.*]

5. Pleading (§ 403*)—Defective Complaint—Cured by Answer.

The failure of the complaint for breach of contract to pay an assessment on corporation stock to allege that the directors had jurisdiction to levy the assessment because not showing that one-fourth of the capital stock of the corporation had been subscribed as required by Civ. Code, § 331, is cured by the answer, alleging that one-third of the stock was issued to designated persons.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343–1347; Dec. Dig. § 403.*]

6. Pleading (§ 7*)—Presumptions.

Code Civ. Proc. § 1963, subd. 32, providing that a thing once proved to exist continues as long as is usual to things of that nature, is a rule of evidence only, and has no application to a statement of facts in a pleading.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 7.*]

7. Pleading (§ 403*)—Defects in Complaint—Cured by Answer.

The failure of a complaint for breach of contract to pay an assessment on corporate stock resulting in the sale of the stock to allege the value of the stock at the time of sale is cured by the answer alleging value at that time.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343–1347; Dec. Dig. § 403.*]

8. Contracts (§ 337*)—Complaint—Sufficiency—Ownership.

A complaint for breach of contract to pay an assessment on corporate stock resulting in a sale of the stock, which alleges that the stock was "sold away from" plaintiff, is demurrable for failing to specifically allege ownership of the stock.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1682–1690; Dec. Dig. § 337.*]

9. Pleading (§ 7*)—Complaint—Matters of Presumption.

A complaint for breach of contract to pay an assessment on corporate stock, which makes the contract binding defendant to pay assessments levied for the purposes of carrying on the business of the corporation and paying expenses thereof a part of the complaint, and which alleges that at the procurement of defendant an assessment on the stock was levied, and that defendant failed to pay the same resulting in a sale of the stock, is demurrable for uncertainty for failing to aver that the assessment was levied for the purposes specified in the contract, but is not wholly insufficient because it may be assumed that the assessment was levied for a purpose authorized by Civ. Code, § 331, authorizing assessments for such purposes.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 7.*]

10. Contracts (§ 337*)—Complaint—Alleging Breach.

A complaint for breach of contract to pay an assessment on corporate stock resulting in the sale of the stock for nonpayment should set forth the steps leading from the assessment to the sale, and should state the proceedings had in making the assessment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1682–1690; Dec. Dig. § 337.*]

11. Appeal and Error (§ 1170*)—Harmless Error—Erroneous Rulings on Pleadings—"Prejudicial."

Where, at the trial, all the ambiguities in the complaint were removed by the evidence received without objection, except the objection at the beginning of the trial to all the evidence as irrelevant and immaterial on the ground that the complaint did not state sufficient facts, the error in overruling a demurrer to the complaint, defective for uncertainty, was not prejudicial within Code Civ. Proc. § 475, requiring the court to disregard errors not affecting substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4542; Dec. Dig. § 1170.*]

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12. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the verdict as reduced by the court was amply justified by the evidence, the error, if any, in the instructions on the measure of damages, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228; Dec. Dig. § 1068.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by George Pettit, Jr., against William Forsyth. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

L. L. Cory, for appellant. W. D. Foote, M. K. Harris, and J. H. Miller, for respondent.

PER CURIAM. This case is here on appeal from the judgment, on the verdict of a jury, in plaintiff's favor, and from the order denying defendant's motion for a new trial. A general and special demurrer to the complaint was interposed and overruled, which gives rise to the principal questions now before us, and calls for a sufficiently full statement of the pleading thus attacked.

The complaint sets forth that on December 31, 1895, defendant, "as party of the first part, and plaintiff and one John D. Sprower, as parties of the second part," entered into an agreement which is attached to the complaint as "Exhibit A"; that on June 24, 1896, the same parties entered into another contract which is attached to the complaint as "Exhibit B"; and on June 26, 1896, they entered into a still further contract which is attached to the complaint as "Exhibit C"; that "thereafter and heretofore, in pursuance of said agreement (Exhibit B), a corporation was formed under the laws of the State of California, known as the Forsyth Seeded Raisin Company, with a capital stock of $100,000, divided into 1,000 shares of the par value of $100 each"; that pursuant to said agreement "B" on or about April 12, 1899, there "were issued and delivered to this plaintiff" 167 shares of the capital stock of said corporation, of which on April 19, 1899, "plaintiff was the owner and holder of 152 shares * * * so issued to him, and said shares were of the value of $15,200"; that "on said date, at the procurement of defendant, an assessment of $6 per share, including said 152 shares so owned and held by plaintiff, was levied upon the capital stock of said corporation, payable on May 22, 1899," on which last-named day "said stock of plaintiff's became delinquent on account of the nonpayment of said assessment, and thereafter, on June 12, 1899, was duly advertised and sold to pay said delinquent assessment, and at said sale said stock was sold away from plaintiff, and he was wholly unable to pay said assessment, or any part thereof, and the whole of said stock became and is lost to him"; that plaintiff and said Sprower have duly performed all the conditions on their part to be performed by said agreements A, B, and C; that prior to the sale of said stock plaintiff requested defendant "to pay the assessment so levied thereon, but defendant neglected and failed to pay the same, or any part thereof, to plaintiff's great damage, to wit, his damage in the sum of $15,200."

Exhibit A purports to be between Wm. Forsyth of Fresno, Cal., of the first part, and George Pettit, Jr., and John D. Sprower, both of Brooklyn, N. Y., of the second part, in which "first party" agrees to advance money "for the manufacture by the parties of the second part" of certain machines for seeding raisins, to be delivered in New York and thence taken to Fresno by first party. In consideration of such advance by first party, "the parties of the second part agree to apply for letters patent * * * before the manufacture and delivery of the said machines to party of first part." It was further agreed that "the parties of the second part—one of them—" should go to Fresno to superintend the running of the machines, and they also agreed not to make these machines for persons other than first party, money advanced by first party was to be charged to the business of seeding raisins, and first party and second parties were to "share alike in the profits in the business of seeding raisins." "The party of the second part shall be entitled to draw not to exceed $150 per month for living expenses; said amount to be charged against his share in the business." (Presumably referring to person who was to go to Fresno.) This contract bears date December 31, 1895, and was to continue three years from its date. On the 24th day of June, 1896, the contract, Exhibit B, was entered into. It purports to be "between Wm. Forsyth, * * * party of the first part, and George Pettit, Jr., and John D. Sprower of Brooklyn, New York." It refers to the contract of December 31, 1895, and states that it is deemed best to form a corporation under the name of the Forsyth Seeded Raisin Company, with a capital stock of $100,000, divided into 1,000 shares of $100 each, for the purpose of dealing in the articles mentioned in said first contract; also, that it is deemed best to modify the terms of said contract, and that "the contract heretofore made by the parties hereto shall be transferred and assigned to said corporation." "Now, therefore, in consideration of the premises, it is mutually understood and agreed by and between the parties hereto: (1) That said first party will, at his own expense, incorporate said company upon the lines aforesaid, that the second parties will take and subscribe for and receive one-third of the capital stock of said company. Said stock so delivered to said second party shall be unassessable, and if any assessments are at any time levied upon said stock for the purpose of carrying on the business of the corporation and paying the necessary expenses thereof, the same will be borne by said first party." First party was to hold one-third of the stock and the other third was to "be sold and disposed of to the best advantage, so as to interest parties in the said corporation and the purposes thereof. (2) Said first party is thereupon to transfer unto said corporation so to be formed, the contract heretofore made between the parties hereto," and first party was to be released from further obligations thereunder and when assigned to said corporation said contract "shall be continued for the further period of forty-seven years from and after the termination thereof as specified in said contract." (3) One-third of the stock of the corporation was to "be sold by first party upon such terms and prices as may be agreed upon, but in no event for a less sum than ——— per cent. of the par value thereof." (4) Upon the assignment of said first contract to the corporation, second parties relinquished "any claim to any compensation and to any profits to be paid them, or either of them, under or in pursuance of the terms of said contract, but, in lieu thereof, are to receive their proportion of the profits as the owners of a portion of the capital stock of said corporation."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Two days later, to wit, June 26, 1896, the parties entered into contract, Exhibit C, wherein reference is made to contracts A and B, by which latter it is stated in Exhibit C that "the party of the first part should receive one-third of the capital stock of said corporation, and the parties of the second part should together receive one-third of the capital stock of said corporation." "And whereas said parties of the second part have agreed to assign to said corporation the whole right, title, and interest in a certain application for letters patent, serial number 577,386, filed January 30, 1896, reserving a license to themselves and another; and whereas George Pettit, Jr., one of the parties of the second part, has been requested to go to California to superintend the putting up and operating of said raisin-seeding machines and other work connected with the business of said corporation: Now, therefore, in consideration of the premises, the party of the first part agrees to use his influence and the votes of his shares of stock to have" Pettit appointed as an officer of the corporation at a salary of $1,200 per annum, and "to use his influence and the votes of his shares of stock * * * in the interest of the parties of the second part, or either of them, and to vote with them on all questions affecting their rights or privileges in said corporation, and the parties of the second part in like manner agree to use their influence and votes in the interest of the party of the first part, and to vote with him on all questions affecting his rights or privileges in said corporation." The demurrer is for want of sufficient facts; also, that the complaint is ambiguous, in that it does not appear therefrom what the market value of plaintiff's alleged stock was at any time, or whether it had any value at the time of the alleged assessment, or sale thereunder; that it is uncertain, in that it does not appear therefrom "how, by whom, or in what manner any assessment was ever levied upon the capital stock of said corporation, nor in what manner nor by whom any stock of said company was alleged to have been sold." As further ground defendant "does specially demur to said complaint for the reason that the same wholly fails to show that each and all the steps and proceedings taken and ending in the alleged sale of said stock were not so had and taken with the full knowledge, notice, and consent of the plaintiff." Also that there "is nonjoinder of parties plaintiff, in this: that John D. Sprower is a necessary party plaintiff herein."

1. Appellant contends that by its terms Exhibit B is a joint contract, and hence plaintiff alone cannot maintain the action. In stating his position he declares: "By its express terms the defendant did not agree to pay any assessment which might be levied against any stock belonging to Mr. Pettit personally, but his only agreement was to pay any assessment which might be levied upon the stock delivered to Pettit and Sprower under the agreement." It is insisted that plaintiff, under the contract, has no right "to enter court to bring any action without in some manner bringing in Mr. Sprower on whom the right was conferred jointly with himself." The objection assumes a twofold aspect, one relating to the cause of action, and the other to the necessary parties to the proceeding. Considering the latter consideration first, it may be said that the evidence shows without any conflict that Sprower has no interest in the subject-matter of the action, and therefore is not a necessary or proper party plaintiff. Before the assessment complained of was levied, Sprower had disposed of all his interest in the stock, and it had become the property of appellant. No cause of action could be established in his favor, as he was not injured by an assessment levied upon property that belonged to another. It is true that this does not appear by the complaint, but it is manifest that it would have been idle to attempt to state a cause of action in behalf of Sprower which was diametrically opposed to the evidence. In any event, it is clear that appellant was not prejudiced by the failure to make Sprower a party to the action. The only contention in this connection worthy of serious discussion is that it was the intention of the parties that Forsyth should protect the stock only while it was the joint property of Pettit

and Sprower, and therefore, since it appears that the ownership had been severed before the assessment was levied, no cause of action is stated. It will be conceded that if the contract, properly construed, indemnifies each of the parties of the second part against the payment of any assessment on the stock, it is of no consequence, as far as this action is concerned, that Pettit and Sprower joined in one contract with Forsyth, instead of executing separate instruments. It is also true, as stated by appellant, that, "when several persons are parties to a contract, some of the provisions may relate solely and separately to one of the parties and others to another party," and, he might have added, some of the provisions may relate to each party and some to both jointly.

What did the parties intend in the contract before us? Did they have in view the restricted purpose contended for by appellant, or was their design to protect the separate interest of each in the stock? It is to be observed that Mr. Forsyth agrees that "said stock so delivered to said second party shall be unassessable, and, if any assessments are at any time levied upon said stock for the purpose of carrying on the business of the corporation and paying the necessary expenses thereof, the same will be borne and paid by said first party." There is no doubt as to what "said stock" refers to. It was the stock to be issued to Pettit and Sprower. And, when Forsyth agreed to pay any assessment levied on said stock, the conclusion is irresistible that he intended to pay any assessment that might be levied on any of said stock. "Said stock" certainly includes every share of it. Furthermore, he is to pay the assessment that may be levied at any time—not simply during the joint ownership of Pettit and Sprower. A fair construction of the language used is entirely inconsistent with the narrow view taken of the contract by appellant. Besides, it seems unreasonable that the parties of the second part should agree that this important provision of the contract should be operative only while they were the joint owners of the stock. According to appellant's theory, the moment there was a severance of interest, either by the act of the parties or by operation of law, the party of the first part became relieved of any liability to pay any assessment on any of said stock. We do not think this was contemplated by the parties, and it is opposed to the natural and reasonable import of the terms used in the contract. It is likewise opposed to the construction put upon the contract by the parties themselves by the manner in which the certificates were issued. It is true that one certificate was issued to Pettit and Sprower jointly, but on the same day it was canceled by certificate No. 14 issued to Forsyth, trustee, for 314 shares and by certificate No. 15 for 15 shares sold by Pettit to E. J. Baber. Afterwards the 152 shares in controversy were issued to plaintiff in cancellation of shares that had been transferred to Forsyth. The haste of the parties to sever the shares issued to Pettit and Sprower is hardly consistent with the view of the contract urged upon us by appellant. We may admit that section 1431 of the Civil Code is applicable, which provides that "an obligation imposed upon several persons or a right created in favor of several persons is presumed to be joint and not several * * * and can be overcome only by express words to the contrary," but we think the presumption has been overcome by the words of the contract, and, since plaintiff alone has sustained injury by reason of the violation of his agreement by Forsyth, the action was properly brought by Pettit. The authorities cited by appellant upon this point we deem inapplicable to the facts of the case, and we therefore pass them by without specific attention.

2. It is alleged in the complaint that, "at the procurement of defendant, an assessment of $600 per share, including said 152 shares so owned and held by plaintiff, was levied upon the capital stock of said corporation, payable on or about the 22d day of May, 1899"; that it was sold on said day and plaintiff's said stock became delinquent on account of nonpayment of said assessment, and thereafter, on June 12, 1899, "was duly advertised and sold to pay said delinquent assessment," which he was unable to pay, and was "sold away from plaintiff" and "the whole of said stock became and was lost to him." The evidence showed that the stock was sold and bid in by the corporation. It is contended that these allegations are insufficient to show that the directors had jurisdiction to levy the assessment because they fail to show that one-fourth of the capital stock of the corporation had been subscribed, as required by section 331 of the Civil Code; citing San Bernardino I. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487, where it was held that "unless one-fourth of the capital stock had been subscribed, the directors had no authority to levy the assessment on which the action was brought." But we think defendant has cured the error by alleging in his answer that one-third, to wit, 334 shares were issued to plaintiff and Sprower, which was more than one-fourth, and satisfied the statute. Vance v. Anderson, 113 Cal. 532, 45 Pac. 816.

3. There is no distinct allegation of ownership or of the value of the stock belonging to plaintiff other than of date "on or about April 19, 1899," and the stock was sold June 12th following. The rule that "a thing once proved to exist continues as long as is usual with things of that nature" (subdivision 32, § 1963, Code Civ. Proc.) might apply to show that proof of ownership at a previous date is evidence from which the ultimate fact of ownership at a subsequent date might be

shown, but this is a rule of evidence, and has no application to a statement of facts in a pleading. Whether the rule would also apply to the question of value may be doubted, for it can hardly be said that the value of corporation shares is a thing of such nature as is usual to continue. Quite the contrary, shares of corporations are subject to frequent and radical fluctuations in value.

Defendant admits in his answer that on or about April 19, 1899, "plaintiff was the owner and holder of 152 shares of the capital stock which were issued to him as aforesaid, but not in pursuance of the terms and provisions of said agreements; and denies that said shares were of the value of $15,200 or of any value whatever in excess of the sum of $760. And said defendant alleges in that behalf that said capital stock of said corporation was on or about the 19th day of April, 1899, and at the time the shares of stock so alleged to be owned by the plaintiff were sold as alleged in plaintiff's complaint, of the value of $5 per share." Here is an issue tendered as to the value of the shares at the time they were sold and would, under the rule in Vance v. Anderson, supra, cure the error. But the answer does not so plainly cure the failure to aver ownership at that time. By a liberal construction of the complaint, however, it may be said that such issue is presented. Respondent contends that the averment that "said stock was sold away from plaintiff" implies ownership at that time, for the reason that, unless he was the owner, it could not be "sold away from" him, nor could he have been damaged by the sale of "said stock." In alleging value of this same stock at the date of its sale, defendant impliedly admits its ownership in plaintiff at that time, for defendant refers to the stock claimed by plaintiff. These matters however, present a condition of defective allegation rather than entire absence of averments of facts necessary to be stated. The demurrer ought, in our opinion, to have been sustained, and the plaintiff required to make his averments more specific in respect of the particulars mentioned as well as the averments relating to the levy of the assessment, but it is apparent from the record that no injury resulted to appellant by the action of the court, and, where there is no injury, there is no ground for reversal. Code Civ. Proc. § 475. Besides, at the trial, all uncertainty or ambiguity in the complaint was entirely removed as to the facts thus defectively pleaded, and it clearly appeared that appellant suffered no substantial injury therefrom.

4. It is further claimed that the complaint is insufficient in its averments of facts because it does not allege any breach of defendant's agreement to pay assessments on plaintiff's shares of stock. It must be conceded that the complaint here, as elsewhere, is lacking in definiteness. The pleader should have shown by clear averment that the assessment was levied for the purposes mentioned in the agreement B, thus showing that, when defendant failed to pay the assessment, he violated the condition upon which his liability depended. Henry v. City of Sacramento, 116 Cal. 628, 631, 48 Pac. 728; Cox v. McLaughlin, 63 Cal. 196. But, while we think the complaint obnoxious to demurrer for uncertainty, it is not wholly insufficient in its averments of facts. The contract B is part of the complaint, and by its terms defendant agreed to pay all assessments levied "for the purpose of carrying on the business of the corporation and paying the necessary expenses thereof." The statute (Civ. Code, § 331) provides that assessments may be levied for these purposes. The complaint averred that "at the procurement of defendant (who was president of the corporation and its principal stockholder, as the evidence showed) an assessment * * * was levied upon the capital stock of said corporation," etc. It may be assumed that the assessment—and there was but one—was for a lawful purpose and we think that the averments, though not definitely stating which one of the statutory purposes was referred to in the complaint, are sufficient to show that the purpose mentioned in the agreement was the purpose referred to in the pleading. The averments as to the assessment should have been more specific and some of the steps leading from the assessment to the sale should have been set forth and a more specific statement given as to the proceedings had in making the assessment and not the statement of a mere conclusion. At the trial the proceedings taken by the corporation in making the assessment were proven, and it appeared therefrom that it was made for purposes falling within the terms of contract, Exhibit B. The resolution passed by the directors reads: "That it is proper and necessary at this time to levy an assessment upon the subscribed capital stock of this corporation for the purpose of raising funds to rebuild its packing house and plant (which had been destroyed by fire), and establish itself in business," which may reasonably be held to be "for the purpose of carrying on the business of the corporation and paying the necessary expenses thereof." The complaint is verified, and there is no denial in the answer that an assessment was made as alleged in the complaint, nor was there objection made to the evidence establishing the fact, except the objection made at the beginning of the trial to all evidence as irrelevant and immaterial on the ground that the complaint did not state sufficient facts.

The Supreme Court, speaking of section 475, Code Civ. Proc., said in San Jose Ranch Co. v. San Jose, etc., Co., 126 Cal. 322, 58 Pac. 824: "When from the record we can see that the injury is not substantial, it is not such a grievance as courts will redress. We therefore say in such case that the party complaining has not been injured. He is not an aggrieved party in such sense that he needs or can obtain a correction of the error." This was said by Judge Temple in an opinion holding that: "Unless some very restricted meaning can be given to the amendment to section 475, it is plainly unconstitutional." There is still a presumption of prejudice arising from error (Short v. Frink, 151 Cal. 83, 90 Pac. 200), citing Rulofson v. Billings, 140 Cal. 452, 74 Pac. 35, and other cases, but the court has not hesitated to say, since as well as before the amendment to section 475, that the error is without prejudice when it can declare with reasonable certainty from the record that the error was not prejudicial, and that the "party complaining or appealing sustained and suffered no substantial injury, and that a different result would not have been probable if such error * * * had not occurred or existed." The rule has been applied, as the section directs, to defects in pleadings, to instructions, decisions, judgments—in fact, to practically every phase of the proceedings in a case. It is entirely clear to our minds that defendant suffered no prejudice or substantial injury by the overruling of his demurrer. Should the case go back simply to have the complaint amended in the particular just noted, the proofs would be the same for they are undisputed matters of record. These observations will apply to the motion for nonsuit, which was denied, as it was founded upon the grounds set forth in the demurrer.

5. It is contended that the evidence is insufficient to justify the verdict and judgment. The argument proceeds mainly upon the assumption that defendant's agreement was to protect the joint stock of plaintiff and Sprower, and that "he never agreed with the plaintiff personally to protect his stock from any assessment levied against him individually." We have already considered this point, and reached the conclusion that the purpose was to bind Forsyth to pay any assessment that might be levied on any of the stock while in the hands of either of the parties of the second part. If this is the proper construction of the contract, then it disposes of this objection to the verdict and judgment. It is by no means easy to follow the mutations of the shares issued by the company as shown by the record. We have been at some pains to search out the ultimate facts shown in the numerous manipulations which the shares underwent, and to determine whether the 152 shares now involved were issued to plaintiff pursuant to the contract. The company was incorporated July 23, 1896; number of shares 1,000; value $100 each. The capital stock was increased September 14, 1897, to 2,500 shares of $100 each. All the additional shares were issued to Mrs. Forsyth for money paid to the company by her or Col. Forsyth. This increase of stock, however, is immaterial to any issue in the case and did not in any way affect defendant's liability under his contract. Certificate No. 1 was issued to defendant, Forsyth, for 980 shares, 20 shares less than the whole number. Certificate No. 2 was issued July 29, 1896, to plaintiff, Pettit, for 5 shares to qualify him as director, and the other 15 shares presumably went to the other persons acting as directors. It is not important to trace them. September 23, 1897, certificate No. 13 was issued to Pettit and Sprower for 329 shares, which with the 5 shares issued to Pettit (certificate No. 2) made 334 shares, conceded by defendant to be the number to which they were entitled under the contract. On the same day (September 23, 1897) certificate No. 13 was canceled by certificate No. 14 issued to Forsyth, trustee, for 314 shares, and by certificate No. 15 for 15 shares sold by Pettit to E. J. Baber, who was secretary of the company and a director, and the certificate was issued to him, and on the same day No. 15 was canceled and reissued, as No. 16, to Forsyth. May 2, 1898, certificate No. 14 was canceled by issue of certificates Nos. 24 and 25. No. 24 was for 100 shares issued to Baber; reissued as certificate No. 26 to Bank of Central California as pledgee, to secure $500 borrowed for Pettit's use; No. 26 was reissued, after the debt was paid, as certificate No. 30 to Forsyth; No. 30 was reissued to plaintiff as certificates Nos. 32 and 33 for 50 shares each. This accounts for 100 shares of certificate No. 24. Certificate No. 25, for 214 shares, remaining of the 329 after sale of 15 shares, was issued to Forsyth as trustee. This certificate was canceled by issue of certificate No. 28 to John M. Chapman for 167 shares, representing Sprower's one-half of the original 334 shares, and Chapman assigned the certificate to Forsyth. This left in Forsyth, trustee, 47 shares which were represented by certificate No. 29. On April 12, 1899, certificate No. 29 was canceled, and in lieu thereof certificate No. 34 was issued to plaintiff for 26 shares and certificate No. 35 for the 21 shares remaining of the 47 shares and also for the 5 shares originally issued to him, thus canceling certificate No. 2 which, with the 21 shares, made 26 shares in certificate No. 35. Thus we trace 167 shares issued to Chapman, being Sprower's half of the 334 shares; and we trace 152 of Pettit's shares to him which, with the 15 sold to Baber, make his 167 shares. Plaintiff never had absolute control of any shares until these 152 shares were issued to him. He testified that he had no recollection of ever having actual possession of the five shares, although finally they came to him in certificate No. 35. He testified that Forsyth refused to issue any shares to him until after the patent mentioned in the contract was issued, and, in fact, these 152 shares were not issued until

after the patent had issued and some time after Pettit had ceased to be a director. There was evidence from which the jury might well have concluded, as they no doubt did, that the shares issued to Pettit and Sprower were never received by them, and the record shows that all but 15 shares were reissued to Forsyth as trustee, and the 15 came to him the same day through Baber. Defendant introduced an assignment executed by Pettit and Sprower of these shares to Baber and also an assignment by Pettit to Forsyth of all his interest in the shares of the company. But these transactions were satisfactorily explained as not intended to convey the title and that all the time Forsyth was acting as trustee in so holding the shares. It was several months later when finally Forsyth, as president, and Baber, as secretary, issued to Pettit the shares in question and then for the first time Pettit came to his own.

The evidence shows that Forsyth himself severed whatever of interests Pettit and Sprower held together, and became the owner of Sprower's half, and in issuing to Pettit the shares in question he gave full recognition to Pettit's ownership in severalty. In a letter written by Forsyth to Pettit, December 17, 1898, he said: "You originally had 16,700 shares (referring obviously to the par value and not to the number of the shares), so that, if you had your stock clear now, you would be entitled to $1,020 of the insurance money." Forsyth finally issued the shares in question, and his explanation as a witness was that he gave the stock to Pettit as an inducement to go to New York and testify in an anticipated lawsuit. Pettit denied this on the witness stand. The evidence otherwise contradicted Forsyth's statement, and showed that Pettit got just what he was entitled to under his contract with Forsyth.

6. The court, by instruction No. 1, told the jury that, if they found the evidence to be as suggested in the instruction, defendant "would be liable to plaintiff for such damages as were suffered by plaintiff." In other instructions the jury were told that they were to determine the value of the stock at the time of the assessment; that, if they should find that the stock had been increased to 2,500 shares, a verdict for plaintiff should not be for "a greater interest or proportion of the capital stock of said corporation than 152 shares bear to 2,500 shares." The jury were also told that "in fixing the value of the said 152 shares of stock you may take into consideration the value of the assets of the company at the time of the assessment sale. It is admitted by the defendant that at said time the tangible assets of the company were $25,000, and that in addition to this the company owned the so-called Pettit patent, and it will be for you to determine the value of this patent. When you determine the value of the patent, you must add that value to the $25,000, and the aggregate will be the value of the assets of the corporation. From this data you will be able to determine the value of the 152 shares of the plaintiff." There was evidence that the patent was of the value of $100,000. It is now contended that the jury were misled by the first instruction and rendered a verdict greatly in excess of the amount justified by any evidence. The verdict was for $15,200, on which judgment was entered accordingly. Under the instructions it was a simple mathematical proposition to determine the value of the 2,500 shares of the corporation, with assets of $125,000, to be $50 per share, or $7,600, and this, defendant contends, was the greatest amount that should under the instruction have been awarded as damages, whereas the jury rendered a verdict of nearly twice that amount. On defendant's motion for a new trial the court denied the motion on condition that plaintiff "within 20 days waive and remit of the judgment herein the sum of $7,581.76, with legal interest thereon from October 25, 1907." Plaintiff filed his consent in writing that such remission be made, and thereupon the motion for a new trial was denied. If it be conceded that the instructions were not clearly understood by the jury, the judgment as it stands is without prejudice to defendant.

Other alleged errors of law relate to points already disposed of adversely to defendant.

The judgment finds support in the evidence, and is therefore affirmed, as is also the order denying the motion for a new trial.

15 Cal. App. 108

DAVIS v. RAWHIDE GOLD MINING CO.

(Civ. 725.)

(Court of Appeal, Third District, California. Dec. 22, 1910.)

1. BILLS AND NOTES (§ 151*)—CONSTRUCTIVE TRANSFERABILITY.

In an action involving labor checks or drafts, evidence *held* to show that they were transferable after payment by the drawee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 381, 382; Dec. Dig. § 151.*]

2. COURTS (§ 343*) — FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—STATE STATUTES.

Where a plaintiff, in an action removed to the federal court, assigns his cause of action, the federal court will give effect to Code Civ. Proc. § 385, providing that, on the transfer of a plaintiff's interest, the action may be continued in the name of the plaintiff or the transferee.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 919; Dec. Dig. § 343.*]

3. SET-OFF AND COUNTERCLAIM (§§ 18, 39*)—SUBJECT-MATTER — CLAIMS DUE FROM PLAINTIFF'S ASSIGNOR.

Plaintiff's assignor, having two claims against the defendant, assigned one to plaintiff and the other to V. The claims amounted to about $1,700 and $3,600, respectively. Actions on each claim were begun in the state court about the same time, but the V. case was removed by the defendant to the federal court. The defendant pleaded a valid set-off, consisting of a claim due from plaintiff's assignor. Before the trial of plaintiff's case, V. reassigned to plaintiff's assignor, and to defeat defendant's set-off the plaintiff showed that his assignor had that claim against the defendant which more than equaled that set-off. *Held* that, even if there was a suit pending upon that claim, the plaintiff was entitled to use it to rebut defendant's set-off, for the pendency of a prior action, even though it has progressed as far as verdict, will not prevent the use of claim as a set-off in an action by the defendant in the former action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 23, 71, 72; Dec. Dig. §§ 18, 39.*]

4. Set-Off and Counterclaim (§ 18*)—Subject-Matter — Claims Due from Plaintiff's Assignor—Evasion of Jurisdiction of Federal Court.

The action of plaintiff, in rebutting defendant's set-off by showing that his assignor was the owner of a valid claim upon which a suit was then pending in the federal court, was not an attempt at the evasion of the jurisdiction of that tribunal, the effect being only to remand the defendant to relief by counterclaim or set-off in the action in the federal court, but not to deprive that court of its jurisdiction by reducing the amount below the requisite amount.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 18.*]

5. Pleading (§ 167*) — Replication—Statutory Provisions.

By virtue of Code Civ. Proc. § 462, providing that any new matter in the answer in avoidance or constituting a defense or counterclaim must be deemed controverted, an assignee against whom the defendant pleaded a set-off consisting of a claim due from his assignor, may show at the trial that his assignor has another valid claim against the defendant in excess of the set-off pleaded against him.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 167.*]

6. Set-Off and Counterclaim (§ 18*)—When Allowed—Assigned Claims.

Where an assignee purchased claims without knowing that the defendant had claims against his assignor, he may defeat a set-off based on such claims by showing other indebtedness due to assignor from the defendant.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 23; Dec. Dig. § 18.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by John C. Davis against the Rawhide Gold Mining Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Affirmed.

C. M. C. Peters and S. M. Shortridge, for appellant. Rowan Hardin and J. B. Curtin, for respondent.

CHIPMAN, P. J. This is an action to recover the amount represented by certain 68 checks or drafts drawn by defendant, payable to sundry persons, of which said checks or drafts Charles Zany, plaintiff's assignor, was drawee. These checks read as shown by the following example:

"Not Transferable. No. 1055.
"Quartz, California, Jan. 29, 1909.
"Office of the Rawhide Gold Mining Co.:
"Pay to F. Nelson only $30.25
"Thirty 25/100 Dollars
"Due for labor for the month of Jan. 1909.
"The Rawhide Gold Mining Co.
"C. E. Lang.
"To C. Zany:
"Quit. Quartz, Cal."

Across the left-hand margin words "App. Mine." appeared, and the check was indorsed on back as follows: "F. Nelson. Chas. Zany, John C. Davis." The aggregate total of the 68 checks was $1,714.60.

A general demurrer to the complaint was overruled, and defendant answered: Denied that defendant had agreed to pay the sums represented by said checks to Charles Zany; denied that Zany had sold or assigned said drafts to plaintiff, or that plaintiff is the owner or holder thereof; denied that the amount claimed, or any amount, is now due on said drafts, or that defendant has failed or neglected to pay the same. In answering further, it was alleged: That each of said drafts was, at all times mentioned in said complaint, known by plaintiff to be nonnegotiable and nontransferable by their terms, and "by express agreement between said Charles Zany and said defendant." As a further and separate defense, averred: That within two years last past said Zany was indebted to various persons in the sum of $1,896.52 for goods, wares, and merchandise sold and delivered, and for labor rendered to said Zany; that prior to the assignment of the drafts referred to in plaintiff's complaint, plaintiff had knowledge that said Zany was indebted to defendant in the sum of $1,896.52, as aforesaid, and that said various persons had assigned to defendant all of their several claims against said Zany, and defendant is the owner and holder thereof; that plaintiff is not and never was the real owner or holder of said drafts, as alleged in said complaint, or any sum of money represented thereby, and the action was commenced and is prosecuted by plaintiff as agent of said Zany and for his sole and exclusive benefit. Defendant prays that the demand of defendant against said Zany be set off against and deducted from plaintiff's demand; that plaintiff take nothing, and that defendant have such other relief as may be legal and equitable.

The court made the following findings:

"(2) That on or about the month of February, 1908, the defendant made and entered into an agreement with one Charles Zany, whereby it was agreed that defendant should pay its employés at the App Mine in Tuolumne county in checks or drafts drawn in favor of such employés upon said Charles Zany, and said Charles Zany agreed to pay each of such checks or drafts when the same were presented to him by the employés of defendant, and that all money so paid by said Charles Zany for defendant should be paid by defendant to said Charles Zany as soon as Charles Zany had paid time checks or drafts amounting to $500, and that defendant's officers and agents and said Charles Zany referred to said method of payment as by checks or drafts, and said checks or drafts are one and the same instrument and will be mentioned as such in these findings.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"(3) That prior to the commencement of the above-entitled action, and within two years prior to the commencement of said action, and during the months of December, 1908, January and February, 1909, the said defendant, in accordance with said agreement mentioned in finding 2 hereof, issued its checks or drafts or various amounts to its various employés, all of which said checks or drafts were drawn payable by said Charles Zany, the total of which said checks or drafts issued during said months by defendant and to be paid by said Charles Zany amounted to the sum of $2,116, and that all of said checks or drafts so issued during said months and amounting to said sum of $2,116 were by said various employés presented to and were paid by said Charles Zany."

That prior to the commencement of the action and for a valuable consideration Zany sold and assigned and delivered the checks or drafts in question (being checks or drafts referred to in the findings), and plaintiff is the owner and holder thereof in the amount of $1,714.60, which said sum is a valid indebtedness of the defendant incurred within two years prior to the commencement of the action; that none of said checks or drafts have been paid and the whole of said sum of $1,714.60 is due and owing to plaintiff from defendant, and that prior to the commencement of the action plaintiff demanded payment thereof from defendant. That all of said checks or drafts referred to in plaintiff's complaint, and at all times mentioned therein, were known to plaintiff to be nonnegotiable instruments, but said checks or drafts are instruments transferable by assignment and indorsement. "And said checks or drafts were not known by plaintiff to be nontransferable by their tenor and terms, or by express agreement between said Charles Zany and said defendant." That the legal title to said checks was sold and transferred to plaintiff and in and to the sum of money represented thereby.

Upon defendant's set-off the court found: That Zany was indebted to various persons as alleged in the answer, and that their claims were assigned to defendant prior to the assignment of said checks to plaintiff, but that defendant was, at the time of the trial and now is, owing to Zany over $1,896.52, and more than enough to fully pay said indebtedness assigned to defendant against said Zany, and said indebtedness of defendant was by valid assignment acquired by said Zany on the 22d day of June, 1909, from a creditor of defendant; that prior to the assignment of said checks by Zany to plaintiff, as alleged in the complaint, plaintiff did not have knowledge, nor did he have knowledge at the time the answer of defendant was filed, that Zany was indebted to said various persons in the sum of $1,896.52, or that said persons had assigned said claims to defendant, or that defendant was the owner and holder of the said demands; that plaintiff is the real party in interest and prosecutes this action for his own benefit, and the action was not commenced by him as agent or representative of said Zany.

As conclusions of law the court found: (1) That the checks or drafts aforementioned are instruments transferable by assignment. (2) That they were duly assigned to plaintiff. (3) That defendant is not entitled to offset the demand of plaintiff for the sum of $1,714.60, or to any amount, by reason of the indebtedness assigned to defendant by creditors of Zany. (4) That plaintiff is entitled to judgment for the sum of $1,714.60, and his costs herein.

Judgment was accordingly entered, from which and from the order denying its motion for a new trial, defendant appeals.

There are three questions presented by appellant, namely: (1) In view of the form of the checks and the alleged agreement as to nonassignability, did plaintiff acquire title to them? (2) Should the defendant's set-off have been allowed? (3) Did plaintiff succeed in avoiding defendant's alleged set-off?

It appears from the evidence, without conflict, that defendant was operating the so-called App mine and arranged with Zany, plaintiff's assignor, to board the men working at the mine for an agreed compensation. A further arrangement was made by defendant with Zany, by which Zany was to advance money to pay checks or drafts drawn on him by defendant to pay the men working at the mine, and, whenever these checks thus paid amounted to $500, Zany was to return them to defendant and defendant was to give him a check on the bank, where it had an account. It appeared also, without conflict, that there was a further arrangement between Zany and defendant, by which Zany was to send to defendant before pay day a list of names and amounts due Zany from each miner for board, and these amounts would be deducted by defendant and its check or draft on Zany was given to the miner for the balance. It is claimed, and it is so alleged by defendant in its answer, that these checks were made nontransferable "by their tenor and terms, and by express agreement between said Charles Zany and said defendant," and that this agreement was to the effect that the checks paid by Zany were not to be redeemed or paid by defendant, unless, upon settlement at the time presented, there was a balance due Zany, and to the extent only of such balance. In their dealings with each other, defendant would at times have some bills or claims against Zany from persons furnishing him goods, and these were adjusted at settlement periods. Plaintiff claimed that the agreement was that defendant should pay the amount due as shown by the checks, regardless of any accounting or settlement; that the reason for making the checks nontransferable and payable "only" to the payee named was to compel the payee to go to Zany for his money, who could then deduct from the check any sum due him from the payee for goods or liquors furnished him by Zany; that so far as Zany was concerned the checks were assignable, and that the form of the checks was adopted for his protection alone.

1. Much attention is given by counsel to the question whether or not the checks or drafts in their form were capable of being assigned, or of conferring any right whatever upon plaintiff as assignee of the drawee. The law on the subject is shown in the briefs with commendable fullness, but, of course, with the customary disagreement of counsel as to what the law really is. In view of the evidence, conflicting on the point though it is, we find it unnecessary to enter upon a discussion of the question. The cause was tried upon the theory that there was an agreement between defendant and Zany as to their intention in using the phraseology adopted in drawing the checks or drafts, and this was the real question to be determined. The evidence fully justified the court in finding that the checks were, in accordance with the agreement of the parties, assignable by Zany, the drawee, though by their terms made nontransferable. They were so treated by the defendant and Zany on several occasions, and there is evidence that the president of defendant corporation told Zany that he could negotiate them. Plaintiff testified that he bought and paid for checks $1,313.10 on the 18th day of February, and $401.50 on February 23, 1909, and that he demanded payment from defendant and was refused, and no part of the amount due on the checks has been paid.

2. It is conceded that in their form they were not negotiable paper, and that plaintiff took them subject to any defenses properly interposed by defendant. It was alleged in the answer, and is now claimed, that Zany became indebted to various persons in the sum of $1,896.52, for goods, wares, and merchandise, and for labor rendered Zany, and that prior to the assignment of said checks to plaintiff said various persons to whom Zany was indebted as aforesaid, sold, assigned, and transferred to defendant each and every of said claims, and that prior to said assignment to plaintiff by Zany the plaintiff had knowledge that Zany was indebted to said various persons, and that said persons had sold and assigned said claims to defendant. The court found these alleged facts to be true, except as to plaintiff's alleged knowledge of said indebtedness of Zany to said various persons and the assignment to defendant, as to which the court found, on sufficient evidence, that plaintiff had no knowledge up to the time of filing the answer. The court also found that "at the time of the trial of said action defendant was and now is owing to Charles Zany over $1,896.52, and more than enough to pay said indebtedness assigned to defendant against said Charles Zany, * * * which said indebtedness so held by said Charles Zany against said defendant was by a valid and legal assignment duly acquired by said Charles Zany on the 22d day of June, 1909, from a creditor of said defendant." The findings assume that defendant showed a valid set-off, but that it was fully covered by an indebtedness of defendant to Zany, in excess of the claims held by defendant against him. It appeared that Zany, on December 5, 1908, with defendant's knowledge and consent, executed an assignment to one Ben Valverde of "all moneys, debts, dues, accounts, time checks, board bills, and accounts due or owing" to Zany from the defendant, including by its terms the checks in dispute. This assignment to Valverde does not seem to have prevented Zany from presenting checks to defendant for payment as before, but defendant, having knowledge of the assignment, required Valverde's indorsement. On February 16, 1909, Valverde reassigned to Zany all his "interest in any time checks and money due thereon," assigned to Valverde by virtue of the assignment of December 3, 1908, including the checks in dispute, so that, when Zany subsequently assigned them to plaintiff, Valverde no longer had any claim upon them, and Zany was free to do with them as he willed. It further appeared by the testimony of defendant's bookkeeper, Lang, that the board bill due Zany from defendant for January, 1909, amounted to $1,559.15 and for February, $1,495.40. The witness testified: "No part of either of these sums has been paid. If these amounts were not assigned to anybody, that would be the amount coming to Mr. Zany, less the orders. That would be the correct amount due Mr. Zany, if he hadn't assigned the same, and there were no offsets." These two sums amount to $3,054.55, more than enough to offset the claims of the various persons assigned to defendant and included in its set-off, amounting, as claimed, to $1,896.52.

On February 23d Valverde commenced an action against defendant in the superior court to recover on the assigned claims he still held, amounting to $3,592.85, being claims for board of the men working at defendant's mine. It was shown that this action did not include the checks assigned to plaintiff, but it did include the claims embraced in plaintiff's set-off to defendant's set-off. The complaint in the present action was filed March 27, 1909, and the answer May 1, 1909. The trial began on July 27, 1909, but on June 21, 1909, Valverde reassigned to Zany all claims and all interest therein assigned to him on the 5th day of December, 1908, and also "any and all causes of action commenced by me (Valverde) on any of said accounts so assigned to me as aforesaid, and I do hereby authorize said party of the second part (Zany) to collect the same, using any and all lawful means, whether in my name or otherwise, so to do, hereby ratifying any and all acts of said party of the second part taken in the premises."

It appeared that, on motion of defendant in the action brought by Valverde in the superior court, the cause was transferred to the United States Circuit Court prior to June 22, 1909, and defendant's contention now is that the reassignment by Valverde to Zany of the claims involved in the suit in the federal court was ineffective and could not defeat defendant's set-off pleaded in this action. Counsel for plaintiff state, in their points and authorities, that after Valverde reassigned his claims to Zany, the latter filed a supplemental complaint in the United States Circuit Court in said action, "in which complaint he admitted all of the legal claims which defendant holds against him and asked that they be deducted from the original demand in said action, and as the case then stood, the Circuit Court was deprived of jurisdiction. Whereupon a motion to dismiss the action without prejudice, so that said action could be commenced in the state courts, was granted on March 25, 1910. It is then stated that Zany, on April 1, 1910, "recommenced an action on said subject-matter in the superior court of Tuolumne county, and in said action admits all the valid claims held by defendant, which said valid claims amount to $1,619.27 and are the same claims which defendant sought to set off against plaintiff's claim in this action on appeal. Defendant filed an answer to said action on the 31st of May, 1910, and the case is at present (plaintiff's brief was filed June 30, 1910), set for trial for July 6, 1910."

In their reply brief, filed July 11, 1910, counsel for defendant do not deny this statement or challenge its correctness, but content themselves with a rebuke to counsel for plaintiff for devoting "many pages of their ill-tempered brief to an idle and unwarranted statement of matters admittedly not contained in the record." We do not approve of the practice complained of, but it seems to us that the statement above set forth is of such a character as to have called for a distinct and unequivocal denial, if not true.

We are asked to decide the point made by defendant on the assumption that the action commenced by Valverde against this defendant is now pending in the United States Circuit Court; defendant claiming that "the whole case—parties and subject-matter—was in the Circuit Court, subject to its exclusive jurisdiction," and hence no valid reassignment by Valverde to Zany was possible. We think the court would be justified in treating the question as moot. But, as the same point might be urged in view of the pendency of the action in the state court, we will consider it. Disregarding the foregoing alleged facts: The federal court would give effect to section 385 of the Code of Civil Procedure, which provides, in case of a transfer of plaintiff's interest, the action may be continued in the name of the original party, or in the name of the party to whom the transfer is made. U. S. Comp. St. 1901, p. 684; Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629. See Lindsay v. Stewart, 72 Cal. 540, 14 Pac. 516, as showing that the plaintiff could plead as defensive matter items which were included in a then pending action in the justice's court, where the parties were reversed. Steele v. Sellman, 79 Md. 1, 28 Atl. 811, is cited, in which the court said: "The principles governing the defense of set-off are, in this respect, distinctly applicable to this subject, and it was held, so early as in the time of Lord Mansfield, that the pendency of a prior action for defendant's claim did not prevent his using it as a set-off—not even if his prior action had progressed to a verdict." It does not seem to us that there is any evasion of the jurisdiction of the federal court sought by plaintiff. The effect of his set-off is to remand defendant to its relief by counterclaim or set-off in the Valverde action, and not to deprive the federal court of jurisdiction.

3. That plaintiff could avail himself of the defense to defendant's set-off, we have no doubt. Any new matter in the answer in avoidance or constituting a defense or counterclaim must on the trial be deemed controverted by the opposite party (section 462, Code Civ. Proc.); and the plaintiff may, in avoidance of defendant's set-off, show a counterbalancing indebtedness of defendant to plaintiff's assignor. This was expressly held in Hart v. Cooper, 47 Cal. 77.

At the time plaintiff purchased the liabilities of defendant he had no knowledge or notice of any claims held by defendant against his assignor, Zany, nor until defendant pleaded them in his answer. He was not, therefore, precluded from using the indebtedness of defendant to his assignor by way of avoidance. 25 Ency. of Law, p. 604; St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876.

No other assignment of error seems to call for notice.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

159 Cal. 398

HENNESSEY v. ALLEGHANY MINING CO. et al. (S. F. 4,901.)

(Supreme Court of California. Feb. 14, 1911.)

CORPORATIONS (§ 189*) — ASSESSMENTS — ACTION TO SET ASIDE—COMPLAINT.

A complaint in an action to adjudge that an assessment by the directors of a corporation is invalid, which alleges that the assessment was not made according to law, that it was void because no order therefor was made as required by law, specifying when and where and to whom the assessment should be paid, that the order prescribed conditions and delegated to unknown persons powers as to the indebtedness of the corporation and the liquidation thereof, and extended to members of the corporation privileges, is demurrable for failing to set forth the order, to state what matters were unauthorized, what conditions were imposed, what powers were delegated, and to whom privileges were extended.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by J. A. Hennessey against the Alleghany Mining Company and others. From a judgment for defendants, rendered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Louis P. Boardman, for appellant. Wm. J. Herrin, for respondents.

PER CURIAM. A transfer of the cause to this court was ordered after judgment in the District Court of Appeal. Further examination has satisfied us of the correctness of the views expressed by the District Court of Appeal, and the opinion of that court is hereby approved and adopted. The judgment appealed from is affirmed.

The opinion referred to reads as follows: "This is an appeal by plaintiff from a judgment entered against him upon sustaining the demurrer of defendants to the complaint.

"Plaintiff did not ask leave to amend his complaint, but takes the position simply that the court erred in sustaining the demurrer. Upon this point appellant says, among other things: 'The appellant * * * has not asked to be heard upon the question of amending his complaint, and these questions are no part of the case. * * * This appeal is taken from the order and judgment as made, and is based on the sufficiency of the complaint. As appellant considered his complaint quite sufficient, there is no reason why he should have asked leave to amend.' We therefore address ourselves simply to the question, Did the court err in sustaining the demurrer to the complaint?

"The complaint is in two counts, and was brought to have it adjudged that a certain assessment by the board of directors of the defendant corporation was invalid, and that the sale of the stock of plaintiff for such assessment was illegal and void, and that the certificates issued to the purchasers be delivered up and canceled. The entire complaint and each count thereof is a confused jumble of argument, conclusions of law, and allegations of fact. The demurrer was directed to each count of the complaint, and is both general and special. In so far as the demurrer is special, it is mainly directed to the allegations of paragraph 3 of each count of the complaint. This paragraph is substantially the same in each count, and in the first count is as follows: 'Plaintiff alleges that said alleged assessment sought to be levied by the said board of directors as above set forth was not made or levied according to law, and that the same was and is null and void, and conferred no authority upon said corporation, or any of the officers thereof, to proceed to collect said assessment or to enforce any sale of the capital stock of said corporation for any alleged delinquency arising thereon; that said alleged assessment was inoperative and void, in this: That no order for said assessment was made or passed by said board of directors on said date, in the form and manner required by law, specifying when and where and to whom said assessment should be paid; that the alleged order for the levy and collection of said proposed assessment contained matters and things not authorized by law for such purposes, and prescribed certain conditions, and purported to delegate to certain persons unknown and not mentioned therein certain powers respecting the accounts and outstanding indebtedness of said corporation and the liquidation thereof, and the application of the same in respect to said assessment, which powers belong to and are conferred by law upon said board of directors, and are to be exercised by them, and not otherwise; that said order prescribing the alleged levy of said assessment also extended to certain members of said corporation, and particularly to certain of said board of directors privileges and preferences respecting certain alleged claims and demands of said directors against said corporation, and the payment thereof, contrary to law and not within the power of said board of directors in making a lawful order for any assessment, or the collection thereof, upon the capital stock of said corporation, as hereinafter more particularly alleged.'

"In the corresponding paragraph in the second count, instead of alleging that the assessment was null and void, it is alleged that it was irregular, but, in so far as it attempts to allege any facts, it is the same as the paragraph above set forth.

"It was objected by demurrer as to each count, 'that said complaint and paragraph 3 is uncertain in this: It does not appear, nor can it be ascertained therefrom, what were the things and matters not authorized by law, which were contained in said order, or what were the conditions prescribed, or the powers delegated by said order, or who were the certain members of said corporation, or the certain members of the board of directors, to whom privileges or preferences respecting claims against the corporation were extended, or what were those privileges or preferences.'

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"This objection is manifestly well taken so far as the allegations of paragraph 3 are concerned. All the allegations thereof are of the most general character, and most of them are inexcusably connected with, and qualified by, conclusions of law.

"The order for the assessment is not in terms set forth in the complaint, but the pleader has attempted to interpret its effect. We are therefore not aided in our understanding of the allegations above set forth by the terms of the assessment order. The concluding words of paragraph 3 'as hereinafter more particularly alleged' can only be read as qualifying that portion of the paragraph following the last semicolon. So, although other portions of the complaint may be looked to for ascertaining more particularly what the pleader referred to in that portion of paragraph 3 following the last semicolon, the allegations preceding stand unaided by anything elsewhere contained in the complaint. The complaint is therefore entirely uncertain as to what matters and things the order contained that were not authorized by law, and as to what conditions were prescribed and what powers were delegated thereby. Neither does the complaint anywhere mention or name either the members of the corporation or any of the board of directors to whom it is alleged that privileges and preferences were given."

BEATTY, C. J., not participating.

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159 Cal. 392

In re HITE'S ESTATE. (S. F. 5,307.)

(Supreme Court of California. Feb. 14, 1911.)

1. TAXATION (§§ 856, 895*) — INHERITANCE TAXES—NATURE—"NET SUCCESSION."

While the inheritance tax prescribed by St. 1905, c. 314, is not a tax on property as such, but upon the privilege of succession, the amount of the tax as to any beneficiary is to be determined according to the value of the "net succession"; that is, the value of such property as remains to him after satisfying lawful charges.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1673, 1714–1721; Dec. Dig. §§ 856, 895.*]

2. TAXATION (§ 895*)—INHERITANCE TAXES—COMPUTATION.

The value of property lost through misappropriation by an executor must be included in computing an inheritance tax under St. 1905, c. 314, since it passes immediately upon decedent's death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714–1721; Dec. Dig. § 895.*]

3. TAXATION (§ 895*)—INHERITANCE TAXES—COMPUTATION.

An inheritance tax under St. 1905, c. 314, is assessable on the value of the property when decedent died; subsequent increase or decrease in value being immaterial.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714–1721; Dec. Dig. § 895.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John R. Hite, deceased. From an order fixing an inheritance tax, the administrator and others appeal. Affirmed.

Titus & Creed and E. W. McGraw, for appellants. Hartley F. Peart (U. S. Webb, Atty. Gen., of counsel), for respondent.

PER CURIAM. This is an appeal from an order fixing the amount of inheritance tax due under the inheritance tax act (St. 1905, p. 341) from the various beneficiaries under the will of deceased. The appeal is by residuary legatees and by the administrator with the will annexed. The lower court in fixing the amount of tax included in the valuation of the estate upon which the tax should be computed the sum of $98,991.10 left by the deceased, which had never come into the possession of the administrator with the will annexed, but which, according to the showing made by the record, had been appropriated to his own use within a year of his appointment by the executor of the will of deceased. By reason of such misappropriation, the executor having been without bonds or other security, and being impecunious and insolvent, the whole of said sum was lost to said estate, as was found by the lower court. By the order of the lower court the tax on this amount was imposed wholly on the residuary legatees. The correctness of the court's action in so including the $98,991.10 in computing the tax and in assessing the same against the residuary legatees is practically the only question presented by this appeal.

The exact question thus presented has apparently never before arisen in this or any other state. It was held by this court in Estate of Kennedy, 157 Cal. 517, 108 Pac. 280, that property lawfully diverted in due course of administration from the beneficiaries under the will of a deceased or the law of succession, for the payment of expenses of administration, and the debts of decedent, and in making such provision as is authorized by law for the support of the family of decedent, including property exempt from execution set apart to the family and also a homestead so set apart, does not pass by will or by the intestate laws of the state within the meaning of our inheritance tax law, and is therefore not to be included in fixing the tax to be paid by the beneficiaries. The basis of this conclusion was that the property given by will or devolving under the law of succession passes to the devisee, legatee, or heir at the death of the deceased subject to these burdens, and that so much thereof as is lawfully diverted from the beneficiary under the will or the law of succession in due course of administration never does actually pass to him. It was held, in accord with the general current of authority in states having a substantially similar statute to ours, that "the provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee or heir." The rule applied was that stated in Estate of Gihon, 169 N. Y. 443, 62 N. E. 561, as follows: "The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts and rightful claims of third parties are paid or provided for. It is on the net successions to the beneficiaries." While the tax imposed by the act is not a tax on property as such, but a tax upon one for the privilege of succeeding to property, the amount of the tax as to any beneficiary is to be determined according to the value of the "net succession"; that is, the value of such property as remains for him after the satisfaction of such charges and burdens as may lawfully be satisfied in due course of administration. It is only such property that can be properly said to actually pass to the beneficiary.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexe

This is the full extent of the ruling in the Kennedy Case. It appears to us to be the full extent of the rule in the various cases cited in the opinion in that case, and also in the cases relied on by learned counsel for appellants here. No decision has been cited or found by us that appears to authorize the conclusion that property illegally diverted by an executor or administrator and thus lost to the beneficiary has not passed to the beneficiary within the meaning of the act or that the value of such property so diverted may be deducted in fixing the amount of the tax. The distinction between such a condition and the condition existing in the Kennedy Case and analogous cases is very clear, and to our minds it requires the inclusion of the value of the property so illegally diverted in the determination of the amount of tax. In the cases referred to we have as it were a taking upon condition, the condition being that if any of the property is necessary for debts of deceased, expenses of administration, etc., the same shall be used for such purposes and shall not go to the beneficiary, and the property so lawfully diverted therefore never passes to the beneficiary. But the condition covers only such property as is lawfully diverted in due course of administration, and subject only to this condition the property passes to the beneficiary at the moment of death of the testator or intestate. While the extent of the residuary estate cannot be definitely ascertained until the final accounting of the executor or administrator, it vests in the beneficiaries at the instant of death. See In re Graves' Estate, 242 Ill. 212, 89 N. E. 978; Pierce v. Stevens, 205 Mass. 219, 91 N. E. 319; Civ. Code, § 1341. And the question whether property is subject to the tax is to be determined on the conditions existing at the time of death. Pierce v. Stevens, supra.

It is thoroughly settled that the tax is to be assessed on the value of the property at the time of the death of the testator or intestate, and that subsequent appreciation or depreciation in value is immaterial. See Hooper v. Bradford, 178 Mass. 95, 59 N. E. 678; In re Van Pelt's Estate, 63 Misc. Rep. 616, 118 N. Y. Supp. 655; In re Viventi's Estate (Sup.) 122 N. Y. Supp. 954; In re Sanford's Estate, 66 Misc. Rep. 395, 123 N. Y. Supp. 284. The right of the state to the tax accrues at the moment of death, and is measured as to any beneficiary by the value at that time of such property as then actually passes to him. We can perceive no warrant in the inheritance tax act for holding that the destruction or loss of a part of the property before actual delivery of possession to the beneficiary can affect the question of amount of tax, any more than would a material depreciation in its value affect it. The state is in no way legally responsible for any act of an executor or administrator causing such loss or destruction, and the beneficiary's loss in such a case is simply the character of loss that accrues to any owner of property that is lost or destroyed. In the case of the ordinary tax on property, it would not be claimed that the loss or destruction of the property after the tax had accrued, but before its collection, would affect the taxpayer's liability. There is no material difference between such a case and the case at bar. The residuary legatees here are seeking to take under the will of deceased all the residue of his property after the payment of debts, expenses of administration, and other legacies. We have here no question of the effect of a renunciation of a legacy. The residuary legatees are enforcing the provisions of the will in their favor. Under that will, the residue of the estate vested in them at the instant of death of their testator, and the amount of succession tax which they are required to pay must be determined upon the conditions existing at that time.

So far as we can see, there is nothing in the authorities opposed to the conclusion that the $98,991.10 should be included for the purpose of determining the tax. In the Kennedy Case the language used in the opinion impliedly limited the noninclusion of property diverted in course of administration to such property as was lawfully diverted, and this is apparently true of all the other cases involving a similar question. In a few of the cases we find the term "distributable assets" or "what remains for distribution," but, when such terms are used, the connection clearly implies that the surplus over lawful diversion is meant. Property not lawfully diverted does actually pass at the death. In the Estate of Liss, 39 Misc. Rep. 123, 78 N. Y. Supp. 969, where the question of deducting reasonable funeral expenses was presented and decided in favor of the deduction, the court said: "Of course, if the funeral expenses are manifestly improper, so that in the accounting of an executor or administrator the executor or administrator would not be permitted to charge for the same, the mere fact that the executor or administrator has expended that amount is not sufficient to authorize this deduction, but, if it is a reasonable expense, then it should be deducted." In the same case, considering the question of the deduction of certain taxes on the property of the estate, it was said: "If the executors were bound to pay and did pay these taxes, then the personal estate was depreciated by this amount, and therefore did not pass to the next of kin, and consequently is not subject to the tax." These statements are in line with our conclusion. What was said in Estate of Roosevelt, 143 N. Y. 120, 38 N. E. 281, 25 L. R. A. 695, about it not being assumed that the Legislature intended the citizen to pay a tax upon an interest he may never receive, was said with reference to a purely contingent estate, one that might never vest. The claim sustained in Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, was simply that the federal inheritance tax act did not make subject to taxation a gift which, even if technically vested in title, was yet subject to be defeated in possession or enjoyment by the happening of a contingency stated in the will, and that as to such a gift no tax could be imposed until the time when, by the happening of the contingency stated, the right to possess or enjoy had accrued. Whenever property actually vests in the beneficiary under the terms of a will, he receives it within the meaning of those decisions which declare that the amount of the tax is measured by the sum or property received by the legatee.

We see no force in the claim of the administrator with the will annexed that it cannot deduct the tax so far as the $98,991.10 is concerned from the other property in its hands which constitutes part of the residuum of the estate and belongs under the provisions of the will to the residuary legatees. The residuary legatees are bound to pay as a condition to receiving possession of the residue of the estate a succession tax determined on the basis hereinbefore stated, and the administrator with the will annexed is expressly authorized and obligated to deduct the whole tax of any such legatee from the property in its possession belonging to him under the residuary clause of the will.

The case is doubtless a hard one on its facts so far as the residuary legatees are concerned. The amounts that will actually come into their hands already heavily depleted by the large shortage of the executor are still further depleted by the deduction from the remainder of the amount of the tax on the portion unlawfully diverted. But our conclusion appears to us to be the only logical one under the provisions of our inheritance tax law.

The order appealed from is affirmed.

BEATTY, C. J., not participating.

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15 Cal. App. 127

PAYNE v. OAKLAND TRACTION CO.

(Civ. 757.)

(Court of Appeal, Third District, California. Dec. 31, 1910.)

1. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where the facts are undisputed and the plaintiff's negligence clearly appears therefrom, or when the uncontradicted evidence for plaintiff is such that the only reasonable construction to be drawn therefrom is that the injured person did not exercise such care as a man of ordinary prudence generally exercises in like positions of danger, the issue of his negligence is for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333–336; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 68*)—CONTRIBUTORY NEGLIGENCE—DUTY OF PLAINTIFF—DUE CARE.

A person cannot recover for injuries sustained by an accident, if he could have avoided the accident by reasonable diligence on his part.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 92–95; Dec. Dig. § 68.*]

3. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW.

If plaintiff's own evidence discloses that he could have avoided the accident by the exercise of reasonable care, or that the employment in which he was engaged when injured was beyond the scope of his duties, and that he voluntarily and without request or suggestion from his employer or one in authority undertook the task, the question of negligence is one of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 285*) — NEGLIGENCE—QUESTION OF FACT.

If the evidence for plaintiff in an action against his employer for injuries is conflicting, or if there is some evidence of negligence of defendant, and that plaintiff was not guilty of contributory negligence, to which the cause of his injuries may directly or proximately be imputed, the question is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

5. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—ACTS WITHIN SCOPE OF EMPLOYMENT—QUESTION FOR JURY.

Where a motorman on leaving his car in the car barn went down into a pit in the barn, at the request of a car repairer, to assist in repairing the defective brakes, it was a question for the jury whether he was within the scope of his employment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000–1009; Dec. Dig. § 284.*]

6. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW.

Even if it was not the duty of a motorman to assist a car repairer in fixing brakes on his car, and his action in so doing was purely voluntary, yet, where there was no rule or custom of the company forbidding motormen or conductors from entering the pit, when requested to do so, to assist in correcting any difficulty about their cars, and motormen frequently went into the pit for that purpose, he was not negligent as a matter of law in so doing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

7. MASTER AND SERVANT (§ 90*)—INJURIES TO SERVANT—ACTS WITHIN SCOPE OF EMPLOYMENT—DUTY OF MASTER.

Where a motorman went into a pit to help fix his car brakes at the request of a car repairer, whether strictly within his duty or not, he had a right to return, and defendant was bound to exercise reasonable care while so doing, to avoid injuring him by the negligence of a coemployé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.*]

8. MASTER AND SERVANT (§§ 286, 289*)—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action by a motorman, who descended into a pit in a car barn at the request of the car repairer to assist in fixing brakes on his car, which were out of order, and in ascending the steps from the pit was struck and injured by another car, evidence *held* to present a question for the jury whether he exercised due care, or whether defendant's negligence was the direct cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 286, 289.*]

9. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CHOICE OF TWO WAYS—QUESTION FOR JURY.

In an action by a motorman, who descended into a pit in a car barn to assist in fixing the brakes of his car, and who chose one of two stairways for ascending, evidence *held* to present a question for the jury whether he was guilty of negligence in his choice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

10. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTS WITHIN SCOPE OF EMPLOYMENT—INCOMPETENT SERVANT.

In an action by a motorman for injuries from being dragged by a car in a car barn, where the car that dragged him was being operated by a conductor, evidence *held* to present a question for the jury whether the conductor was negligent in moving the car, and whether defendant was negligent in the first instance in permitting the conductor, under the circumstances, to take the place of the motorman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010–1050; Dec. Dig. § 286.*]

11. MASTER AND SERVANT (§ 141*)—INJURY TO SERVANT—RULES—NECESSITY.

It is the duty of a railroad company to exercise reasonable care to safeguard and protect their employés, while discharging their duties, against negligence of coemployés, or their own negligence through the operation of cars or other machinery, and to that end to make reasonable rules for the government of their employés in the performance of their duties as such.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 283; Dec. Dig. § 141.*]

12. MASTER AND SERVANT (§ 286*)—RULES—NECESSITY—QUESTIONS FOR JURY.

It is only where it appears beyond dispute that the situation did not demand rules, or in which the evidence shows that no rule could have prevented the accident, that the courts could declare as a matter of law that the master was not bound to have established rules.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032–1050; Dec. Dig. § 286.*]

13. MASTER AND SERVANT (§ 286*)—RULES—NEGLIGENCE.

Where a street car company employed a large number of men around a car barn into which cars were transferred continually over a transfer table over a pit, it was a question for the jury whether defendant was negligent in failing to promulgate a rule requiring warning to be given of the starting of cars prior to starting them in the car barn, and whether, if negligence is thus shown, the injuries of plaintiff, who was caught underneath a car, were proximately caused thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032–1050; Dec. Dig. § 286.*]

Appeal from Superior Court, Alameda County; I. W. Harris, Judge.

Action by E. W. Payne against the Oakland Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harmon Bell, for appellant. Stanley Moore and H. H. Orrick, for respondent.

HART, J. This is an action for damages for personal injuries in which plaintiff obtained a verdict against the defendant for the sum of $3,000. From the judgment entered upon said verdict and the order denying the defendant a new trial, the latter presents these appeals.

It appears that for nearly five years prior to the day of the accident in which plaintiff sustained the injuries constituting the subject of this action—the 23d day of September, 1906—he was employed by the defendant as a motorman on its street car lines in the city of Oakland. About the hour of 5:40 o'clock a. m. on the day mentioned, plaintiff took his car out of the defendant's car barn, situated at the corner of Telegraph avenue and Fiftieth street, in said city of Oakland, drove it to East Oakland, and then returned with it to the car barn. On this trip, he observed that the brakes on the car had been set so tightly that it was with considerable or unusual difficulty that he was able to manipulate them, and therefore, upon reaching the barn on his return trip, ran his car into said barn for the purpose of having the brakes slackened or properly adjusted.

A general outline or plan of the car barn is shown by a diagram which is incorporated into the record as an exhibit in the case.

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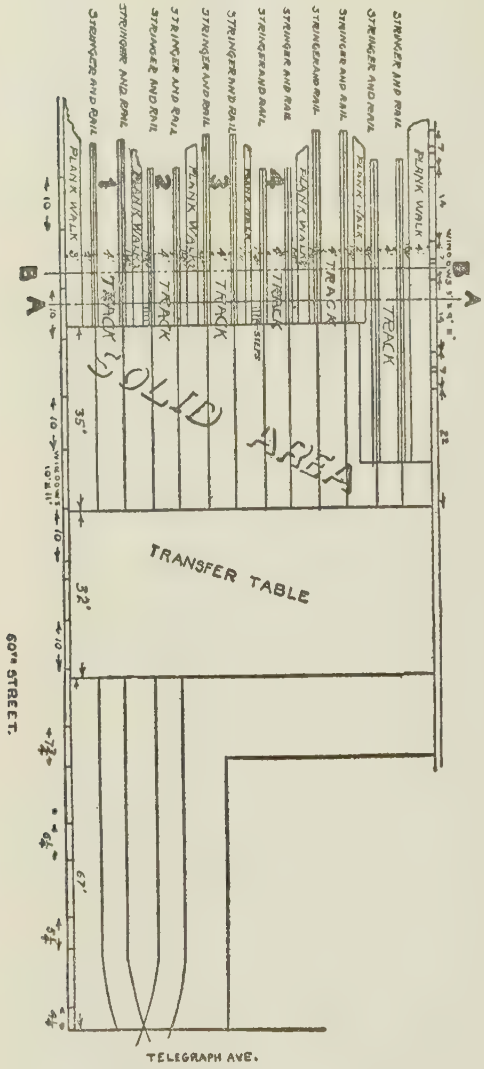
*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

This diagram is here reproduced in order to a clearer understanding of the evidence of which the verdict is predicated.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PLANK WALK 2
PLANK WALK 4
1
2
3
4
TRACK
TRACK
TRACK
TRACK
TRACK
TRACK
STEPS
B
A
B
A
WINDOWS
SOLID AREA
TRANSFER TABLE
35'
32'
67'
10
10
10
10
22
14
60th STREET.
TELEGRAPH AVE.

It will be observed from the foregoing diagram that there are two tracks (designated by the figures 1 and 2) leading into the said barn through the Telegraph avenue or easterly entrance thereof to the "transfer table," and extending across the portion of the barn lying on the westerly side of said "transfer table." These tracks are laid on a solid flooring (marked on diagram "solid area") on the westerly side of the "transfer table" for a short distance and extend over a "pit," located at the extreme westerly end of the barn, where they terminate. Paralleling these two tracks and within a few feet therefrom and from each other, and extending from the transfer table on the west over and across the "solid area" and the pit, are several other tracks, two of which are, respectively, designated on the diagram by the figures 3 and 4. The transfer table is used to transfer cars from tracks 1 and 2, as designated on the diagram, to the tracks paralleling tracks 1 and 2. The use to which the pit is put is to enable workmen engaged in repairing and oiling the cars and adjusting the brakes to get underneath such cars for that purpose, and thus to facilitate such work. The tracks extending over and across the pit are supported by a trestle, and between said tracks and extending across the pit are plank walks. The pit is of a uniform depth of four feet, four inches. Adjoining the southerly side of the south rail of the track marked 2 on the diagram, and likewise adjoining the south rail of track 4, are situated stairways, each of which consists of four steps. These stairways constitute the only means of descension to and ascension from the pit.

According to the testimony of plaintiff, the facts with respect to the accident may be summarized as follows: On returning to the car barn for the purpose stated, plaintiff ran his car into the barn across the transfer table, thence over the pit, on the track on which entrance into the car barn was made. The plaintiff explained to the car repairer (Danielson by name), in charge of the car barn at the time, that the brakes required readjustment. Danielson requested plaintiff to go down into the pit for the purpose of assisting in the correction of the difficulty. Plaintiff objected to doing as thus requested, saying that he did not care to go down into the pit, because he would "get all grease." Danielson replied that he was "short-handed that morning, and 'all I want you to do,' he said, 'is to hold these bars; hold the slack of the brake bars.'" Plaintiff, having reached the car barn on schedule time and anxious to avoid delay in getting his car out, thereupon entered the pit and assisted Danielson as the latter had requested. He remained in the pit thus employed for about five or six minutes. The work of adjusting the brakes having been completed, plaintiff then started to leave the pit by the stairway at track designated as 4 on the diagram. At this time plaintiff noticed that the transfer table, which was customarily moved in front of the track over which it was intended to run a car out of the barn, was in front of track 2, on which a car stood, though not over the pit. Tracks 1 and 2, as we have seen, extend from the street into the barn; hence those tracks were used more frequently than were the other tracks in the barn. In this connection plaintiff explained the reason which led him to undertake to leave the pit by the stairway situated near track 4, instead of ascending by the stairway near track 2, which was nearest to the point at which he stood when assisting in adjusting the brakes, as follows: "I did not go up the stairway that was there closest to track 1 or track 2, because that track No. 1 and track No. 2 are both tracks that go out of the car house, and they were turning the transfer table back and forth and switching cars on those two tracks, and sometimes they would back one car up to get another car out ahead of it. I didn't want to get out there, because they might back a car out on that place." He therefore left the point at which he had been working and started toward the stairway near track 4, stooping down as he walked under the tracks and the plank walks lying between tracks 1 and 4. At the time he started to ascend the stairway, situated near track 4, there was standing on said track, at a distance of approximately six feet from said stairway, a large, closed, vestibuled car, equipped with an air brake, known as the Christiansen brake. As the plaintiff was walking along the bottom of the pit in the direction of the stairs at track 4, he saw the car standing on said track, and that it was motionless, and, so far as he could observe, there was no one in the car. As he started to ascend the stairway, he again looked at the car and satisfied himself that it stood on the track "dead," by which we understand the plaintiff to have intended to say that to all appearances the car was unconnected with the electrical current for propelling it, and unoccupied by the motorman and conductor or by any other person. In this connection plaintiff testified that from the bottom of the pit it was impossible to see a person in front of the car. "One would have to get out of the pit before he could see a man on the car," he said. He further testified that it would be impossible to see the motorman on the car from the lower step of the stairway he was ascending, but that from the top step he might see "the top" of the motorman; "he might see his hip." As to the degree of light in the pit at the time plaintiff was therein, there is a variance between the testimony of plaintiff and that of witnesses for defendant. Plaintiff testified that, while it was "daylight out of doors," it was shady and dark in the pit. He could not recall whether there were electric lights burning in the pit at the time; but there were cars standing on the tracks in the barn, and they "shut off the lights." He had, however, mounted two or three steps of the stairway on his way out of the pit, when the said car on track 4 was suddenly started in motion, and before plaintiff could get out of the way the car ran into him from behind, and his body was caught between the fender and the top of the steps. He was dragged along by the car for a distance of 5 or 6 feet, when the car was stopped for an instant, and then started forward again, dragging him a distance of from 12 to 15 feet before the car was brought to a standstill. The result of being thus caught and dragged about was the fracturing of plaintiff's collar bone and two ribs, and contusions on the body. Dr. Stratton, who attended and examined plaintiff immediately after the accident, stated that plaintiff was also suffering from suffocation, or a condition technically characterized as "traumatic asphyxia," due to a crushing of or jamming in of the chest wall, so that respiration is prevented for quite an interval of time, to produce which condition "there must be very extreme pressure." Just previously to the trial of this cause—nearly two years after the injuries so described were received by plaintiff—Dr. Stratton examined plaintiff and still found "evidence of the fracture of the collar bone and also evidence of the fracture of the ribs on the right side, where I noted the contusion at the time at the Receiving Hospital." The doctor further declared that plaintiff is "now suffering from neurasthenia or nerve exhaustion, a weakened state of the nervous system." The plaintiff also testified that he had continuously up to the time of the trial felt the effects of his injuries; that he was unable to do the work that he was capable of doing prior to the accident.

The foregoing statement as to the circumstances under which the accident occurred is, as before stated, principally educed from the testimony of the plaintiff. We will have occasion to refer to other testimony in the course of the discussion to follow.

The complaint, among other things, charges that the employé of defendant in control of the car which ran into and injured plaintiff "was incompetent and inexperienced in the operation thereof, and said incompetency and inexperience were well known to defendant at all times herein mentioned, and could to it have been well known by the exercise of ordinary care"; that "said employé then and there failed and neglected to sound a bell or gong or warn plaintiff when said car was put in motion," etc.; that "defendant negligently and carelessly failed and neglected to adopt or promulgate or enforce any rule requiring its employés, or other persons, taking cars out of its said car house, or operating its said cars over said pit, to sound a gong or bell or give proper notice and warning to persons in said pit and in the vicinity thereof. Such rule was at all times a necessary and proper rule." The answer, after denying all the material allegations of the complaint, sets up the defenses that plaintiff's own negligence contributed proximately to the cause of his injuries, and that said injuries were received solely by reason of the negligence of a fellow servant.

At the close of plaintiff's case, the defendant presented a motion for a nonsuit on numerous grounds, which are, however, reducible to two propositions, viz.: (1) That the evidence failed to disclose negligence on the part of the defendant; (2) that the accident, and consequently the injuries complained of, were proximately caused by plaintiff's own inexcusable negligence. This motion was denied by the court, and it is now claimed: (1) That the court erred in denying said motion; (2) that the court erred by refusing to direct the jury to return a verdict for defendant on the grounds upon which the motion for a nonsuit was urged; (3) that the court erred by submitting to the jury certain instructions upon the ground that there was not received into the record any evidence to which they were pertinent.

The questions submitted by the first and second of the grounds as they are thus stated merely present the propositions whether defendant was guilty of negligence, and whether the plaintiff was guilty of negligence which contributed proximately to the cause of his injuries. Whether the court erred in refusing to grant the motion for a nonsuit must, obviously, depend upon the proposition whether plaintiff's testimony failed to disclose negligence on the part of the defendant, but, on the other hand, showed that the injuries sustained by plaintiff were occasioned proximately by his own carelessness and negligence. Appellant contends that such is the effect of the evidence produced by plaintiff, and if this be true, of course, it was the duty of the court to grant the motion for a nonsuit, for in such state of the testimony the question as to the effect of the evidence would be one of law for the court, and not for the jury, to determine.

The rule as we have thus attempted to state it is thus clearly and concisely expounded in the case of Kenna v. Central Pac. R. R. Co., 101 Cal. 31, 35 Pac. 332: "When the facts are undisputed, and the plaintiff's negligence clearly appears therefrom, or when the uncontradicted evidence on the part of the plaintiff is such that the only reasonable construction that can be drawn therefrom is that the injured person did not exercise such care as men of ordinary prudence usually exercise in positions of like exposure and danger, the issue of negligence is a question of law to be determined by the court. There is no issue of fact to be submitted to the jury, but it is the duty of the court to grant a nonsuit," citing a number of California cases.

No one will dispute the rule, founded in common sense, that a person cannot recover for injuries sustained through an accident, if he could have avoided such accident by the exercise of reasonable care on his part (Thompson on Negligence, vol. 1, § 1249, and Shade v. Bay Counties Power Co., 152 Cal. 10, 92 Pac. 62), and that, if his own evidence discloses that he could have avoided the accident by the exercise of reasonable care, or that the employment in which he was engaged at the time he was injured was beyond the scope of his duties as an employé of defendant, and that he voluntarily and upon his own responsibility, without request or suggestion to do so by his employer or one in authority over the work, assumed the performance of the task, the question of negligence becomes one of law for the decision of the court, and a motion for a nonsuit under such circumstances should be allowed. See Vinson v. L. A. R. R. Co., 147 Cal. 479, 82 Pac. 53; Thompson v. Cal. Const. Co., 148 Cal. 35, 82 Pac. 367; Douglas v. S. P. Co., 151 Cal. 242, 90 Pac. 538; Shade v. Bay Counties Power Co., supra; Brett v. Frank & Co., 153 Cal. 274, 94 Pac. 1051. On the other hand, if the evidence produced by plaintiff is conflicting; if there is some evidence introduced on his behalf disclosing negligence in defendant and showing that plaintiff was not guilty of that degree of contributory negligence to which the cause of his injuries may directly or proximately be imputed—then the question presented is one of fact and for solution by the jury, and in that state of the record, manifestly, the conclusion of the jury is binding upon reviewing tribunals.

Upon the question of plaintiff's alleged negligence, the first contention of appellant is that plaintiff was engaged in discharging no part of his duty as a motorman, and therefore acted beyond the scope of his employment when in the pit assisting the car repairer to adjust the brakes upon his (plaintiff's) car.

It is secondly contended that there was ample light in the pit by which plaintiff, by the exercise of ordinary care, could easily have determined, before starting to leave the pit, whether there were cars standing on any of the tracks extending over the pit, and whether there was a likelihood that they would or might be started at any moment.

Thirdly, it is claimed that plaintiff, in attempting to leave the pit, was grossly negligent in choosing the stairway situated near track 4, on which the car that struck him was standing, in the place of going up through the stairway situated near track 1, near which he was engaged in assisting the car repairer, and which was the more convenient and the less dangerous means of exit.

Of course, these were all matters for the jury to determine, but as to the first of the propositions suggested by appellant—that plaintiff was engaged in the performance of no part of his duty as a motorman when aiding the car repairer to adjust the brakes—we may say that we are not prepared to declare that it was not his duty, under the circumstances, to thus assist the car repairer. It was certainly his duty to get his car out on schedule time, and to do whatever was reasonably necessary to accomplish that fact. But we think that it is immaterial, under the circumstances of this case, whether or not, in assisting Danielson at the latter's request, plaintiff was engaged in employment strictly within the sphere of his duty as a motorman. Assuming it not to have been his duty to have thus assisted the car repairer and that his act in so doing was purely voluntary, the important facts remain: (1) That there was no promulgated rule or custom of the company enjoining motormen or conductors from entering the pit when requested to do so, or they deemed it necessary to do so, to assist in correcting any difficulty about their cars; (2) that plaintiff entered the pit for the purpose of assisting the car repairer in adjusting the brakes on his car, at the request of the car repairer, who said that it was necessary to secure plaintiff's assistance, because "we are short-handed" that morning; (3) that plaintiff did not become, nor was he, a trespasser by reason of going into the pit; (4) that the accident did not occur while plaintiff was engaged in so assisting Danielson; (5) that motormen frequently went into the pit to assist the car repairer in fixing or repairing their cars. Having gone into the pit for the purpose stated, whether strictly in the line of his duty or not, it was, of course, his right to return, and the duty of defendant to exercise reasonable care in protecting him while so doing against injury as the result of the negligent acts of his coemployés.

The sole questions here, then, apart from some points urged as to certain instructions, are whether the plaintiff exercised due care in attempting to emerge from the pit, and, if so, then whether defendant's negligence was directly the cause of the injuries inflicted upon plaintiff.

We must be able to declare that the evidence, as it is presented here, discloses that plaintiff's conduct in undertaking to return from the pit by way of the steps situated near track 4, instead of attempting to ascend by way of the steps near track 1, itself constituted an act of culpable negligence, or that the evidence shows that he did not exercise the degree of care and circumspection with which he was charged in ascertaining, before he started to leave the pit by way of the stairs at track 4, whether the car on said track was a "dead car," and that it would probably not be put in motion at that time, before we are authorized to declare, as a matter of law, that plaintiff was not entitled to recover. But we are not, as to either of the propositions suggested, justified by the record in announcing any such conclusion. It cannot be said, under the evidence here, that plaintiff was, as a matter of law, guilty of negligence which proximately contributed to the cause of the injuries he received, merely for the reason that he chose one stairway in preference to the other as a means for effecting his exit from the pit. There is nothing in the evidence from which it appears that either stairway was dangerous per se. One was, according to the evidence, abstractly viewing them, as safe as the other as a means of exit. As seen, his reason for taking the stairway near track 4 was because track No. 1 and track No. 2 are both tracks that go out of the car house, "and they were turning the transfer table back and forth and switching cars on those tracks, and sometimes they would back one car up to get another car out ahead of it. I didn't want to get out there, because they might back a car out on that place." Thus it will be seen that plaintiff, basing his judgment upon all the conditions existing as he viewed them, reached the conclusion that for the reason stated by him it might be safer to undertake his exit by way of the steps located near track 4 than to do so by way of the steps near track 1. There is nothing in the evidence, as it appears here, showing that plaintiff made up his mind hastily or without due regard to the situation generally, as it presented itself to him. To the contrary, we should say that, accepting as correct, as the jury presumptively did, his description of the conditions and circumstances surrounding him at the time, he displayed very good judgment in taking the stairway near track 4 in preference to the other stairway.

The cases cited by counsel to this branch of the discussion are not pertinent to the facts here. The rule announced in those cases and which counsel invokes here is tersely stated as follows: "If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way with knowledge of the danger constitutes contributory negligence." 28 Cyc. p. 52; Douglas v. S. P. Co., 151 Cal. 251, 90 Pac. 538; Bailey on Personal Injuries, §§ 1123, 1124; Hoffman v. American Foundry Co., 18 Wash. 287, 51 Pac. 385. But, as indicated in the quotation, the person injured must have had knowledge of the danger, or that there was another and safer way which he might have taken of which he had knowledge; otherwise contributory negligence cannot be laid at his door for the sole reason that it happened that he took the dangerous way. 29 Cyc. p. 520; Well v. Moran Bros., 55 Wash. 102, 104 Pac. 172; Missouri, etc., Ry. Co. v. Hawley (Tex. Civ. App.) 123 S. W. 726; Lewis v. Texas, etc., Ry. Co. (Tex. Civ. App.) 122 S. W. 605; Lyon v. Charleston, etc., Ry. Co. (S. C.) 66 S. E. 285; Dossett v. St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273. In the last-named case the following language fits the facts of the case at bar as to the point we are considering: "* * * It is sufficient to say upon this point that there was no *apparent danger* in reaching or stepping across the plane of the action of the nigger. While the nigger rested in its slot and was not in use, there was no more danger in reaching across than there was in walking around. The place was *apparently safe. It was, in fact, safe when respondent chose that way. There was no real danger, unless the sawyer should put the nigger in operation. When he did so, the place became dangerous, but not until then.* * * *" (Italics ours.) And the same is true here. Intrinsically and apparently, as a means of entering into and of exit from the pit, one stairway was as safe as, or no more dangerous than, the other. They were both installed and used equally for that purpose. If there could arise any difference between the two in point of safety or danger, it was not in the stairways themselves or because of their situation, but solely because of extraneous circumstances or conditions existing in the car house at the particular time when their use became necessary. It involved, therefore, purely a matter of judgment with plaintiff, formed and acted upon in view of all the surrounding conditions, as to which of the two ways of exit was the safest, and the jury were authorized to find that this represented the exercise of an honest judgment, for it certainly cannot be assumed that plaintiff would have selected the way for making his exit which his judgment would have told him was the more dangerous of the two ways to be used for that purpose. As is said in the Washington case from which we have just quoted, so it is true here, so far as we are able to determine from the record before us, that the stairway taken by plaintiff "was, in fact, safe when respondent chose that way," and became dangerous only by the act of some one on the car which stood on track 4, apparently "dead."

It is manifest, from the state of the record, as thus explained, bearing upon the charge that plaintiff was guilty of contributory negligence, the question whether plaintiff acted with due care or negligently, before starting to leave the pit and attempting to ascend the steps, was one entirely for the jury to determine. According to his testimony, before starting up the stairway, plaintiff looked in the direction of the car to determine whether, from appearances, it might probably be moved at that time. When he made up his mind to return from the pit, and when in the act of starting up the stairway, the transfer table was not in front of the car on track 4. "I did not see anybody on that car," said plaintiff; "* * * the transfer table was over near in front of my car." It "was running there all the time to the track that went out of the car house." His cross-examination might appear to have weakened his testimony on this point; still, as suggested, it was for the jury to finally say, from a fair consideration of his testimony as a whole, whether as to this matter he exercised under all the circumstances appearing, the care with which he was charged. It will be remembered that, while the day was bright outside the car house, the pit was as plaintiff put it, somewhat "shady"; that is, it was not as light in the pit as it was upstairs or on the outside of the barn. This, as plaintiff stated, was partly due to the fact that there were cars standing on the several tracks, thus shutting out, to a great extent, the natural light from the outside. There is, it is true, some conflict in the evidence on the condition of the pit as to light at the time, yet, as is true of all questions of fact where there exists a conflict in the evidence addressed thereto, the question as to the condition of the pit with respect to lightness or darkness, was one solely within the right of the jury to settle.

We have now considered the charge that plaintiff's injuries would not have been received but for his own negligence, and we are satisfied, as is evident from what we have thus far had to say, that the jury were justified by the evidence in finding these facts: (1) That plaintiff was requested by the car repairer to enter the pit and assist in adjusting the brakes of his car; (2) that plaintiff entered the pit for that purpose, at the car repairer's request; (3) that plaintiff, in attempting his exit from the pit, exercised due caution, care, and judgment, under all the conditions and circumstances by which he was surrounded, and that therefore the injuries inflicted upon him were not proximately caused by any fault or negligence upon his part. The consequence of the foregoing views is that, if plaintiff's injuries were the result of negligence at all, it must have been the negligence of either the man at the motor of the car that struck him or the negligence of the defendant.

Counsel for respondent assert that the man who moved the car at the time of the accident was incompetent to handle the motor; that by reason of inexperience, he was incapable of properly handling a car with what are known as the Christiansen brakes. We find no direct evidence which fully justifies this statement. This man was the conductor of the car and in the absence of the motorman therefrom at the time, he (said conductor) started the car preparatory to taking it out of the barn. He testified, as did the foreman, that he frequently moved the car from the barn, and he further testified that he had, on numerous occasions, as a mere matter of practice, stopped and started cars manipulated by means of the Christiansen brakes. While his experience in handling such brakes was undoubtedly very limited, there was, aside from that fact, no direct testimony disclosing want of ability in him to properly and without danger of accidents stop and start cars equipped with brakes of that character. But, from the manner in which he handled the car after hearing the cry by plaintiff when the latter was pinned between the fender and the steps, the jury could have well inferred that he was without sufficient experience to manage a car by means of the Christiansen brakes. There is, however, very little ground by which a serious doubt may be supported that the conductor heedlessly and without due or proper care or attention moved the car towards the steps by which plaintiff was making his way from the pit. If the car barn was as light as appellant contends that the evidence shows it to have been when the accident occurred, the conductor, it seems to us, ought to have been able to see plaintiff, as he was ascending, without the slightest difficulty. But the conductor declared that he did not see plaintiff, and knew nothing of his presence near the track over which he was moving the car until he heard his cry. The jury were from these circumstances justified in concluding that the conductor was not only negligent or did not use reasonable care in moving the car, but that the defendant was negligent in the first instance in permitting him, under the circumstances, to take the place of the motorman, experienced in manipulating the Christiansen brakes, in moving the car out of the barn.

But the vital question as to the charge of negligence against the defendant is whether or not the corporation was primarily negligent by its failure to establish, publish, and enforce a rule requiring warning to be given before the starting of cars in and from the car house, and was by such negligence proximately responsible for plaintiff's injuries.

The undisputed evidence discloses that the car barn was a place where there was constantly employed a considerable number of men in various capacities. Cars were, of course, constantly run into the car barn and were transferred from one track to another, as the exigencies of each case required. Indeed, it is very clear from the testimony that the transfer table was in use pretty much all the time. There was hardly a day that there were not some of the employés in the pit engaged in some sort of employment in connection with the repairing of the cars. We have seen that there were but two ways by which men having business in the pit could get in and out thereof. These ways were, as has been shown, situated in such close proximity to the car tracks that, manifestly, no one could either descend into or ascend from the pit with safety when the cars were moving on the tracks near which they were situated. In short, danger of accidents in the car barn, under conditions as they were shown to exist, was obvious. In other words, unless there was at least ordinary care exercised in the manipulation of the cars in the barn, there was great probability of some one receiving serious injury or losing his life by being run into by the cars when transferring and moving them about in the barn, and such danger was one which could reasonably be anticipated under the circumstances. The evidence shows—indeed, it is admitted by counsel for appellant —that the defendant, up to the time of the accident in which plaintiff was injured, had not only not practiced, but had never promulgated, any rule with reference to giving any warning preliminarily to starting its cars when in the car barn and about to be moved from track to track, as it was requisite to do in order to get them out of the barn. And it is in evidence and undisputed that, as a matter of fact, before moving the car which struck and injured plaintiff, no warning of any character whatsoever was given just prior to starting it. It is the duty of railroad companies to exercise reasonable care in the matter of safeguarding and protecting their employés, while engaged in the discharge of their duties as such, against the negligence of coemployés or their own negligence through the operation of cars or other machinery and, to that end, make, promulgate, and enforce reasonable rules for the government of their employés in the performance of their duties as such. Abel v. Delaware, etc., Co., 128 N. Y. 662, 28 N. E. 663; Slater v. Jewett, 85 N. Y. 73, 39 Am. Rep. 627; Hartvig v. N. P. L. Co., 19 Or. 522, 25 Pac. 358; Merrill v. Oregon Short Line R. Co., 29 Utah, 264, 81 Pac. 85, 87, 110 Am. St. Rep. 695; Polaski v. Pittsburgh Coal Dock Co., 134 Wis. 259, 114 N. W. 437, 14 L. R. A. (N. S.) 952; Doing v. New York, etc., Ry. Co., 151 N. Y. 579, 45 N. E. 1028; Dowd v. New York, etc., Ry. Co., 170 N. Y. 459, 63 N. E. 541; Berandino v. New York, etc., Co., 136 App. Div. 577, 121 N. Y. Supp. 49.

The question here, then, is: Was the failure of defendant to promulgate and enforce a rule requiring warning of the starting of cars in the car house to be given in some proper manner or by some appropriate means preliminarily to so starting them, negligence? And, if so, was such negligence the proximate cause of plaintiff's injuries?

It is, of course, a matter of common knowledge that a place in which there is a large number of railroad cars incessantly moving, turning, switching, and side-tracking is, at best, a dangerous place in which to work, and it requires in such places the exercise of very great care at all times to prevent serious accidents. Of course, employés in such places have a duty resting upon themselves to exercise great care to avoid accidents while discharging their duties. On the other hand, as before declared, a duty equally as imperative rests upon the master to adopt and enforce all means reasonably necessary for the protection of his employés against the consequences of the negligence of coemployés while discharging their duties as such. In case of railroad corporations or other establishments whose business operations require the employment of extensive and complicated machinery, it is proper and requisite that rules should be prescribed, promulgated, and enforced for the government of the employés to the end that accidents may be avoided. And, in almost all cases of negligence, the question whether it is the duty of the master to promulgate and enforce certain rules by which employés are to be guided in the discharge of their duties as such, for the purpose of preventing accidents, is one of fact for solution by the jury.

The plaintiff in the case at bar, therefore, very properly submitted, for determination by the jury, as an issue of fact, the question whether, under the circumstances disclosed, the defendant was guilty of negligence by its failure to establish, promulgate. and enforce a rule requiring warning to be given of the starting of cars prior to starting them in the car barn, and whether, if negligence was thus shown, the injuries of plaintiff were proximately caused thereby. Necessarily, this question was one of fact and, therefore, one for exclusive decision by the jury. In other words, it was for the jury to say, from the evidence exposing the situation or conditions existing in the car house at the time and at all times, whether such a rule was reasonable, practicable, and necessary for the proper protection of the employés whose duties were either wholly or in part to be performed in said house from injury or perhaps death. It is said in one of the cases already cited: "When dangerous work is to be done, the care should be proportionate to the danger, and reasonable precautions taken to protect human life. The principle that servants assume the risks of the business is qualified by the duty of the master to protect them from unnecessary hazards, including the negligence of fellow servants, by making such reasonable rules as the situation requires, citing Abel v. Canal Co., 128 N. Y. 662, 28 N. E. 663. The evidence authorized the jury to find that the defendant had not discharged its entire duty in this regard, and that some further regulation was required to protect the car repairers from the danger arising from the practice of kicking cars, which for years had prevailed in the yard. A rule prohibiting the running of a train without an engine attached to control it upon a track occupied by standing cars when repairers are at work on them, or forbidding the kicking of cars on a track thus occupied, would doubtless have prevented the accident which resulted in the death of the plaintiff's intestate. If we cannot say, as a matter of law, that some such rule was reasonable and practicable, the jury could so find as a matter of fact." Dowd v. New York, etc., Ry. Co., supra. "The duty of the master," say the New York Court of Appeals, in Berrigan v. N. Y., Lake Erie & W. R. Co., 131 N. Y. 582, 30 N. E. 57, "and the degree of care which he is called upon to exercise is measured by the ordinary law of negligence, having regard to the danger to be apprehended, and whether or not the case is one calling for the establishment and enforcement of rules is usually a question for the jury." See Devoe v. N. Y. Cent. & Hudson River R. Co., 174 N. Y. 1, 66 N. E. 568. It is only where it appears beyond dispute that the situation was not one demanding rules, or one in which the evidence shows that no rule could have prevented the accident, that the courts may declare, as a matter of law, that the master was under no obligation to have established rules. Berrigan v. N. Y., Lake Erie & W. R. Co., supra; Sparks v. Wisconsin Central Ry. Co., 139 Wis. 108, 120 N. W. 858; Redman v. Norfolk, etc., Ry. Co., 150 N. C. 400, 64 S. E. 195; Steber v. Chicago, etc., Ry. Co., 139 Wis. 10, 120 N. W. 502; Hill v. Boston Ry. Co., 72 N. H. 518, 57 Atl. 924; St. Louis & S. F. R. Co. v. Nelson, 20 Tex. Civ. App. 536, 49 S. W. 710; McCoy v. N. Y. Central Ry. Co., 185 N. Y. 276, 77 N. E. 1174.

But, as before declared, this is very clearly not a case wherein it can be said, as a matter of law, that such a rule as is under consideration here should not have been enforced, or that the accident could not have been prevented had such a rule been put in operation and practice. As stated, the question here was one of fact for the jury, and their verdict, which necessarily embraces a finding that the negligence by which plaintiff sustained his injuries was imputable to the defendant and consisted largely in its omission to promulgate and enforce a rule requiring that warning be given before starting or moving cars in the car house, is binding upon this court.

Counsel for appellant cites a number of cases in which it has been held that the blowing of whistles or ringing of bells in switchyards would tend to create confusion in the mind of a person, rather than serve as warnings of danger. But an examination of those cases shows that the conclusion thus announced was based upon the particular facts of the particular case. For example, in Ryan v. Northern Pac. Co. et al., 53 Wash. 279, 101 Pac. 880, it is said: "The fact that whistles were not sounded and bells were not rung did not tend to show negligence, because under the conditions there, where numerous cars were running backwards and forwards, such sound would only create a confusion, and would afford no protection." Thus it will be observed that the court bases its conclusion upon the finding of the trial court involved in its order directing a verdict for defendant. We do not understand that the appeal court in that case pretended to lay down the rule as an abstract proposition of law, but only that conditions as shown in that case by the evidence made the question one of law and not of fact; that is, assuming the facts as to the conditions existing at the time of the accident to be true, the defendant could not, as a matter of law, be guilty of negligence.

As seen, the true test, according to all the authorities, upon the question of when negligence becomes a question of law or is one of fact is this: If from the evidence but one conclusion can reasonably be reached, it is a question of law; but where the evidence is such that reasonable minds might differ upon the question whether or not there was negligence, "then the question returns to the domain of fact, and the duty of the court is to allow the jury to solve it as a fact." McKune v. Santa Clara V. M. & L. Co., 110 Cal. 484, 42 Pac. 980; Herbert v. Southern Pac. Co., 121 Cal. 229, 53 Pac. 651; Fernandes v. Sacramento, etc., R. R. Co., 52 Cal. 45; McKeever v. Market St. R. R. Co., 59 Cal. 294; Chidester v. Consolidated, etc., Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 Pac. 308.

3. The court's instructions as to the duty of the defendant to promulgate and enforce rules governing the operation of its cars in

the barn for the protection of the employés are declared by appellant to be prejudicially erroneous. The ground of the objection to these instructions is that there was introduced no evidence of which they could be pertinently and properly predicated. In support of its position on this proposition, appellant refers to and quotes from Labatt on Master and Servant, volume 1, pages 466, 467, and 468. That author, among other things, says: "But in the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them. It is therefore error to leave the case to the jury, where the plaintiff has offered no evidence which indicates that other employers in the same business had promulgated any such rule, or that the suggested rule was necessary or practicable, or that the necessity and propriety of making such a rule was so obvious as to make the question one of common knowledge and experience. * * * If the plaintiff relies upon the theory that some specific rule should have been promulgated under the circumstances, he must show not only that the rule suggested was necessary, but that it was reasonable and proper, and, if observed, would have adequately protected the employés." We have already expressed our views as to the sufficiency of the evidence to show the necessity of a rule requiring proper warning of some kind being given before starting the cars. Not only does the evidence disclose conditions which would seem to imperatively call for such a rule, but there is evidence in the record disclosing it to be a custom among several other street railway corporations—some in the East and others in California—to give warning preliminarily to moving cars in car houses. This testimony as to such custom was, we think, sufficient to "indicate that other employers in the same business had promulgated" such a rule.

The instructions of which complaint is thus made, which are numbered 7, 8, 9, 17, 18, and 21, have been carefully examined with reference to their applicability to the issues tendered by the pleadings and developed by the proofs with the result that it is our conclusion that they, as well as the entire charge of the court, contain a clear and correct statement of the law of the case.

Some other alleged errors are assigned, but in these we perceive nothing that calls for special notice.

The motion for a nonsuit was properly denied, and the verdict appears to be amply supported by the evidence.

The judgment and order are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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SANTA BARBARA COUNTY v. YATES.

(Supreme Court of California. May 12, 1910.)

Appeal from District Court of Appeal, Second District. Action by the County of Santa Barbara against Mary M. Yates to condemn a right of way. From the judgment, Mary M. Yates appealed. The judgment was affirmed in the District Court of Appeal, and she petitioned for an order transferring the cause to the Supreme Court. Petition denied. For opinion in the District Court of Appeal, see 108 Pac. 726.

PER CURIAM. The petition for an order transferring this cause to the Supreme Court for a rehearing is denied. This order is not to be understood as an approval of that part of the opinion of the District Court of Appeal (108 Pac. 726) holding that the alleged defect in the bond accompanying the road petition cannot be questioned collaterally. We consider the bond sufficient, for the reasons stated in the last paragraph of the opinion of the District Court of Appeal. Hence the question whether a material defect therein would make the proceeding void on the fact of the record is not involved, and the part of the opinion relating to collateral attack is unnecessary to the decision.